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A PROPOSED SEX OFFENDER REGISTER FOR NEW ZEALAND:

PRIVACY AND FREEDOM OF EXPRESSION IN PERSPECTIVE

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I INTRODUCTION

Megan Kanka was a seven year old girl who had lived her short life in a quiet, suburban township in New Jersey, America. On 29 July 1994, Megan was lured into her neighbour's home, less than 30 metres from where she lived. A short time later, Jesse Timmendequas, a convicted, repeat sex offender who had already served six years in prison for assault and attempted sexual assault on another child, raped and murdered Megan.[1] Megan's parents had been prevented from knowing Jesse's history because the position taken by the State of New Jersey favoured Jesse's right to privacy over their daughter's safety. New Jersey has subsequently changed its laws, allowing for public notification of convicted sex offenders. In contrast, New Zealand continues to prioritise sex offenders' privacy over the public's right to freedom of information and protection, by not allowing for the public release of sex offender information. Instead, strict rules relating to the release of sex offender information are provided for under the police Criminal Profiling Guidelines.[2]

In 2003, ACT MP Deborah Coddington sought to alter this position by introducing the Sex Offenders Registry Bill 2003[3] to Parliament. The Bill proposed to implement a state-run, non-publicly accessible register (non-public register) of sexual offenders in New Zealand. It was advocated that the Bill would assist in the deterrence, investigation and prevention of future sexual offending. However, with the rejection of the Sex Offenders Registry Bill, the New Zealand Parliament has deemed that the consequential negative effects of a register listing sexual offender information would outweigh the benefits proposed by its implementation.[4] In doing so, Parliament has effectively given prominence to an offender's right to privacy over the public's right to freedom of information and protection. This paper considers whether the New Zealand position is justifiable in today's free and democratic society, or whether the public's right to information and protection and the potential benefits of a register necessitate change.

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[1] Megan Nicole Kanka Foundation www.megannicolekankafoundation.org/mission.htm (accessed 21 May 2008).
[2] Ministry of Justice *Guidelines on Criminal Profiling* (Ministry of Justice, Wellington, 1993).
[3] Sex Offenders Registry Bill, no 36-1.
[4] Hon Phill Goff and Nandor Tanczos, (30 July 2003) 610 NZPD 7494.

Part II of this paper outlines the present approach to sex offender registration in New Zealand, and concludes that a state-run register is needed, as the current situation is not adequate. Part III then outlines the conflicting rights to privacy and freedom of expression in New Zealand, and concludes that both rights need to be given an equal weighting when they come into conflict. Part IV examines approaches in foreign jurisdictions in relation to sex offender registers and evaluates how the conflict between the competing rights to privacy and freedom of expression is overcome in the respective jurisdictions. It concludes that a register can be successfully implemented notwithstanding the competing rights to freedom of expression and privacy. Part V then considers the underlying competing policy concerns behind sex offender registration and determines that only the implementation of a non-public register would address the policy rationales behind a sex offender register. A non-public register is therefore recommended for New Zealand. Part VI accordingly proposes a register for New Zealand and, drawing on the experience of overseas jurisdictions, identifies the characteristics such a register should have. Finally, Part VII considers whether the proposed register could survive in New Zealand's legal climate. This paper concludes that a non-public register would survive in New Zealand, and despite Parliament's concerns in 2003, a non-public register could in fact be implemented without the adverse consequences anticipated, and without unjustifiably breaching an offender's right to privacy.

II SEX OFFENDER REGISTRATION IN NEW ZEALAND TODAY

A What are sex offender registers?

For the purposes of this paper, a sex offender register is a database containing information about persons who have been convicted of specific sexual offences. Information contained on a register can range simply from an offender's name and offence, to DNA samples, photographs, addresses, travel plans and an offender's *modus operandi*. The purposes of registration include facilitating the investigation, prevention and deterrence of future sexual offending.

To achieve these purposes, different approaches to administering registers are taken among various jurisdictions. Sex offender registers may be run officially by the

State, or privately by individuals, interest groups or organisations. This paper will focus on state-run registers, although mention is made of privately-managed sex offender registers in the United States, and the sex offender database run by the Sensible Sentencing Trust in New Zealand.

Within the category of state-run registers, one may further divide sex offender registers into three sub-categories. First, registers may be completely open to the public (whether by internet or by provision of information upon request), as is the position in certain jurisdictions in the United States. Secondly, registers may be non-public, but allowing for the dissemination of information to certain members of the public on a controlled basis. Under these semi-public registers, information may be disclosed to certain officials, teachers and members of the public based on an assessment of risk to public safety. This type of register has been implemented in the United Kingdom and certain provinces in Canada. Finally, registers may be entirely non-public, as in Australia. That is, information contained in the register may only be accessed by police, probationary officers and certain other authorised persons. This paper proposes that New Zealand adopt a state-run, non-public register, with the ability of police to disseminate information to certain members of the public based on an assessment of risk.

B Publication of sex offender information by the State

1 Police Criminal Profiling Guidelines

In New Zealand, the police Criminal Profiling Guidelines allow for limited disclosure of information concerning active, persistent criminals who are currently engaged in significant offending.[5] The release of such information is strictly controlled, and must only be permitted if the offender is currently engaged in continuing criminal offending serious enough to justify the release of information. It is also necessary that releasing the information is believed to reduce or bring about a cessation of the offending.[6] As a result, the current release of information is strictly controlled, and information cannot be disclosed solely on the basis that an offender poses a danger to

[5] *Guidelines on Criminal Profiling*, above n 2.
[6] Ibid, guideline 3.

members of society. As will be detailed below, release of sex offender information not in accordance with the Guidelines can result in liability under the tort of breach of privacy.[7]

2 Proposed state-run register

There is currently no official state-run sex offender register (either public or non-public) which collates information on sexual offenders for the purpose of investigation, prevention and deterrence of future sexual offending. One attempt to introduce such a register was made with the introduction of the Sex Offenders Registry Bill (the Bill) to Parliament in 2003. The purpose of the Bill was to establish a non-public, national database of sex offenders (accessible by the police and any person authorised by the Minister of Justice) to assist the police in their investigation of sexual offences.[8] The database aimed to list three groups of offenders: persons convicted of a sexual offence under the Crimes Act 1961;[9] those found not guilty by reason of insanity who still presented a danger to the public; and those cautioned by the police.[10] The register was to include: an offender's name; address; sexual offences committed; and other identifying information, including any photographs, DNA and fingerprints available.[11]

Despite the Attorney-General's affirmation that the Bill was not inconsistent with the rights and freedoms contained in the New Zealand Bill of Rights Act, the Bill was ultimately not passed, largely due to criticisms made by the New Zealand Law Society (and accepted by the Justice and Electoral Select Committee) that the Bill was too wide in scope and potentially allowed too many people access to information on the register.[12] Consequently, the Justice and Electoral Select Committee concluded that the Bill would not achieve its intended purpose in its proposed form, and recommend that the Bill not be passed.[13] As a result, there remains no formal state-run scheme for the collation of sex

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[7] See Part VII, para A, p 47 for an application of the tort of privacy to the release of information under the Police Criminal Profiling Guidelines in the case of *Brown v Attorney-General* [2006] DCR 630.

[8] Sex Offenders Registry Bill, above n 3, cl 3.

[9] Ibid, cl 4.

[10] Ibid, cl 5.

[11] Ibid, cl 8.

[12] Justice and Electoral Select Committee *Sex Offenders Registry Bill – Report of the Justice and Electoral Committee* (36-1, Wellington, 2003). Anyone proclaiming the desire to reduce sexual offending could have access to the register.

[13] Ibid.

offender information in New Zealand for the purposes of investigation, prevention and deterrence of future sexual offending.

C Publication of sex offender information by individuals

As an alternative to a non-public, state-run register in New Zealand, the Sensible Sentencing Trust administers an informal, public website of paedophiles and sexual offenders.[14] The website lists the details of known sex offenders, including their name, age, photograph, offences, victims, affiliations and current location. The website is not known for its neutrality and it specifically acknowledges that it may contain mistakes or errors.[15] One must ask, if Parliament deems that it is not appropriate to have a non-public, state-managed register, is this public, unregulated alternative justifiable? This paper will demonstrate that such public registers are not in fact justifiable, and will conclude that New Zealand should implement a state-run, non-public register as a justifiable alternative.

III NEW ZEALAND – THE LAW

A Freedom of expression

1 Theories underlying the right to freedom of expression

Underlying the right to freedom of expression are four generally accepted theories as to the importance of free speech. First, freedom of expression is said to allow citizens to attain a sense of self-fulfilment and autonomy, as individuals seek fulfilment through expression.[16] Secondly, free speech helps social stability in that it provides an outlet for hostility. In this regard, freedom of speech may promote social tolerance.[17] Thirdly, free speech and free trade in ideas allows society to discover the truth from a 'marketplace of ideas', as it is believed that the truth will emerge from a contest of ideas.[18] Fourthly, it is advocated that protection of free speech promotes the advancement and maintenance of democratic self-government, as it is through free expression that citizens may influence

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[14] Sensible Sentencing Trust www.safe-nz.org.nz (accessed 21 May 2008).
[15] Ibid.
[16] Thomas I Emerson *The system of freedom of expression,* (Random house, New York, 1970) 6.
[17] Ibid, 7.
[18] See, for example, *Abrams v United States* (1919) 250 US 616, 630, in which Holmes J stated in dissent that "the ultimate good desired is better reached by free trade in ideas- that the best test of truth is the power of the thought to get itself accepted in the competition of the market". Justice Holmes' marketplace of ideas theory draws inspiration from the views of John Milton and John Stewart Mill.

governmental policy and hold representatives accountable.[19] Indeed, such is the importance of freedom of expression to a democratic government that it has been protected by courts even in the absence of a legislative right.[20]

These theories underlying the right to freedom of expression may be used to promote the implementation of a sex offender register. First, the maintenance of a sex offender register may promote citizens' autonomy, as they can carry out their lives without the unnecessary apprehension that they are at risk of unknown sex offenders within their community. By releasing sex offender information, citizens may be able to better protect themselves, the absence of publicity presenting an offender with an opportunity to re-offend if they remain anonymous to the public.[21] Furthermore, by focusing greater public attention on sexual offending, a register may in fact promote social tolerance, as citizens can discuss the issues in relation to sexual offending and vent any hostility that they may have. Finally, those claiming a community entitlement to information claim that the absence of publicity may cause suspicion to fall upon others and believe that the public should be made aware of the identities of the sex offenders in their community. This argument highlights the importance of striving for truth.

2 *Legislative protection of the right to freedom of expression*

The right to freedom of expression, manifested in section 14 of the New Zealand Bill of Rights Act (NZBORA), gives citizens the freedom to "seek, receive and impart information."[22] Proponents of a register identify their right to "seek" information about sex offenders and "receive" that information from the State. Although the right to freedom of expression is recognised as of "central importance in a democratic state",[23]

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[19] See, for example, *New York Times v Sullivan* (1964) 376 US 254.

[20] Despite no constitutional protection of a right to expression, the High Court of Australia has held that a 'freedom of communication' in regard to political matters can be inferred from the concept of democratic government mentioned in the Australian Constitution.

[21] JB Robertson (ed) *Adams on Criminal Law* (Brooker and Friend, Wellington, 1992) 3-43.

[22] New Zealand Bill of Rights Act 1990, s 14. This freedom is also encapsulated in the International Covenant on Civil and Political Rights (19 December 1966) 999 UNTS 171, Art 19.2, which states: "everyone shall have the right to freedom of expression; this right shall include the freedom to seek, receive and impart information".

[23] Geoffrey Palmer (Minister of Justice) *A Bill of Rights for New Zealand, A White Paper* (PD Hasselberg Government Printer, Wellington, 1985) 79.

this freedom is not absolute. Section 5 of the NZBORA states that freedom of expression may be subject to limitations which are demonstrably justified in a free and democratic society.[24] The public's right to seek and receive sex offender information may therefore be restricted in so far as is reasonable to protect a countervailing right or interest. In this context, the countervailing right or interest is an offender's right to privacy.

In the case of *Hosking v Runting*, the Court of Appeal considered whether recognising a tort of privacy would be consistent with the right to freedom of expression affirmed in the NZBORA.[25] The Court held that freedom of expression must accommodate other values which society sees as important and found that the existence of the tort of privacy was indeed such a value.[26] Therefore, a restriction on the right to freedom of expression based on the protection afforded to individuals under the tort of breach of privacy is consistent with the guarantees contained in the NZBORA.

B Tort of breach of privacy

1 The nature of privacy protection

Some commentators have dismissed privacy as an indefinable and unintelligible concept that is incapable of legal protection.[27] The most renowned definition of privacy is "the right to be left alone",[28] however, the inherent vagueness of such a definition has led to an abundance of different formulations attempting to encapsulate the legal right to privacy.[29] Of the many different formulations of privacy, the relevant concept in relation to the release of sex offender information involves informational privacy (as opposed to physical privacy). That is, an individual's ability to control the circulation, dissemination and access of information relating to themselves.[30]

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[24] New Zealand Bill of Rights Act 1990, s 5.
[25] *Hosking v Runting* [2005] 1 NZLR 1 (CA).
[26] Ibid, 56, Tipping J.
[27] Geoffrey Palmer "Privacy and the Law" [1975] NZLJ 747, 748.
[28] Samuel Warren and Louis Brandeis "The Right to Privacy" (1890) 4 Harv L Rev 193.
[29] "Privacy and the Law", above n 27.
[30] Law Commission "Privacy concepts and issues: review of the law of privacy stage 1" (January 2008, Wellington) 57.

2 *Legislative protection of privacy*

Although there is no general right to privacy in New Zealand legislation, various statutes do afford specific protections which relate to aspects of privacy.[31] Most notably, the Privacy Act 1993 provides guidelines relating to the disclosure of private information by the State and its agencies. However, sex offenders will be unable to challenge the legitimacy of a register under the Privacy Act, primarily because section 7 provides that "nothing in … principle 11 [the disclosure principle] derogates from any provision that is contained in any enactment and that authorises or requires personal information to be made available."[32] Thus, as a sex offender register would be established by legislation, the disclosure principle contained in the Privacy Act would not provide any protection to offenders.

The right to privacy is also protected by Article 17 of the International Covenant on Civil and Political Rights 1966 (ICCPR), which stipulates:[33]

> (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.

However, the protection offered by Article 17 only extends to arbitrary, unlawful and false attacks on an individual's honour and reputation.[34] As any information contained in a register would be verified and legally obtained, the protection afforded under Article 17 of the ICCPR would not extend to the disclosure of such information on the grounds of false or unlawful attacks. Furthermore, disclosure of information from a register could not be considered arbitrary, as information would only be disclosed in accordance with

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[31] See generally: New Zealand Bill of Rights Act 1990, s 21; Privacy Act 1993; Broadcasting Act 1989, s 4. See also Stephen Todd (ed) *The Law of Torts in New Zealand* (3ed, Brookers, Wellington, 2001) 911.

[32] Privacy Act 1993, s 7.

[33] International Covenant on Civil and Political Rights (19 December 1966) 999 UNTS 171, art 17. See also, Universal Declaration of Human Rights, UNGA Resolution 217A (III) (10 December 1948), art 12, which protects privacy to a similar degree.

[34] Jae Lemin *The Privacy Law Implications of the 1996 Paedophile and Sex Offender Index* (LLB Research Paper, Victoria University of Wellington, 1997) 4.

set rules and procedures. Thus, disclosure would not be the result of random choices or personal whim based on wide discretion, but would be strictly regulated.

Although the NZBORA does not explicitly guarantee a right to privacy, it does not follow that a right to privacy does not exist in New Zealand law. This is evidenced by section 28 of the NZBORA, which provides that an existing right or freedom is not abrogated or restricted because it is not included or fully included in the NZBORA. It is understood that privacy was not included in the NZBORA because it was not an established right in New Zealand at the time NZBORA was introduced. This is recognised in the White Paper Commentary of NZBORA, which identified privacy as "a right that is not by any means fully recognised ... which is in the course of development, and whose boundaries would be uncertain and contentious."[35] For that reason, the next section will consider the protection afforded to privacy under the tort of breach of privacy, which has developed in common law to become a recognised cause of action in New Zealand.

3 Common law protection of privacy

While the common law has traditionally protected privacy interests through, for example, the torts of trespass and equitable breach of confidence,[36] *Tucker v News Media Ownership* was the first case to acknowledge that an independent legal right to privacy did in fact exist in New Zealand,[37] although in that case McGechan J made it clear that this acknowledgment was given with "caution and hesitation."[38] Seven years later, Gallen J in *Bradley v Wingnut Films* accepted that "such a cause of action forms part of the law of this country".[39] While there is a collection of early case law that contributed to the formation of the New Zealand tort of breach of privacy,[40] it was the case of *Hosking v Runting*[41] that established the current common law approach used by courts.

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[35] *A Bill of Rights for New Zealand, A White Paper*, above n 23, 104.
[36] Todd, above n 31, 911. Privacy interests were also protected through the torts of nuisance, defamation and intentional infliction of emotional distress.
[37] *Tucker v News Media Ownership Ltd* [1986] 2 NZLR 716.
[38] Ibid, 732-3 McGechan J.
[39] *Bradley v Wingnut Films* [1993] 1 NZLR 415, 423 Gallen J.
[40] See generally: *Bradley v Wingnut Films* [1993] 1 NZLR 415; *P v D* [2000] 2 NZLR; and *L v G* [2002] 2 NZLR 591.
[41] *Hosking v Runting*, above n 25.

According to the *Hosking* majority, in order to establish liability under the tort of breach of privacy, the plaintiff must prove:[42]

> (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.

However, publication will not constitute a breach if the defendant can prove that there is a legitimate public concern in the information.[43] The *Hosking* formulation of the tort of breach of privacy has since been applied and successfully relied upon in a situation where information concerning a sexual offender has been released to the public.[44] Consequently, the tort of breach of privacy is an obstacle that will need to be overcome before a sex offender register can be implemented in New Zealand.

C *Which interest to prevail?*

There are at least two possible views about the balancing of the right to freedom of information and the right to protection against a breach of privacy. One view is that, because freedom of information is expressly guaranteed in the NZBORA, it is a primary value in relation to interests that are excluded, such as privacy. The other view is that, although not expressly included in the NZBORA, privacy is nevertheless an existing right of equal standing. This is in accordance with section 28 of the NZBORA, which provides that an existing right or freedom is not abrogated or restricted simply because it is not included or fully included in the Act. Each of these views is advocated in the cases of *Brooker v Police* and *Hosking v Runting*.

A recent development concerning the respective importance of these rights was explored in the case of *Brooker v Police*.[45] While the majority treated freedom of expression as a right of fundamental importance, they considered privacy to be a mere value. Rights were considered to have a dominant status, the 'non-right' having to be

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[42] Ibid, para 117 Gault and Blanchard JJ.
[43] Ibid, para 129 Gault and Blanchard JJ.
[44] *Brown v Attorney-General*, above n 7.
[45] *Brooker v Police* [2007] 3 NZLR 91.

justified as a reasonable limit on the right.[46] Accordingly, those endorsing public registers argue that restricting the right to receive information to the extent that the public may not receive information on a sexual offender living in their community (due to the offender's right to privacy) is an unreasonable limitation on the right to freedom of expression. This was the view of the minority in *Hosking*, which did not accept that privacy could be a justified limitation on free speech under section 5 of the NZBORA.[47]

In contrast, Thomas J for the minority in *Brooker* asserted that both freedom of expression and privacy should be recognised as fundamental values and accorded neither presumptive nor paramount status.[48] This reasoning is in accordance with the case of *Hosking*, in which Tipping J in the majority did not consider that "omission from the Bill of Rights Act can be taken as a legislative rejection of privacy as [a] ... fundamental value."[49] Indeed, Tipping J even considered that privacy could outweigh the right to freedom of expression in certain circumstances.[50] A recent Law Commission study also lends support to this position, as it suggests that a proper weighting of freedom of expression and privacy should be given in the particular circumstances in which they arise, rather than a general rule classifying the relative importance of each value.[51] It is submitted that this view is correct, and for that reason, in cases where the rights to freedom of expression and privacy conflict, neither should have paramount status, each right being weighed in light of the particular circumstances of the case.

IV THE OVERSEAS EXPERIENCE

Before determining whether it would be justifiable to implement a sex offender register in New Zealand in the face of the competing rights to privacy and freedom of expression, it is helpful to examine registers implemented in other jurisdictions, and evaluate how these other jurisdictions overcome the conflict between the competing rights. This section will provide an overview of sex offender legislation implemented in

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[46] Ibid, para 40 Elias CJ.
[47] *Hosking v Runting*, above n 25, para 222 Keith J.
[48] *Brooker v Police*, above n 45, para 164 Thomas J.
[49] *Hosking v Runting*, above n 25, para 92 Gault P and Blanchard J.
[50] Ibid, para 237 Tipping J.
[51] "Privacy concepts and issues: review of the law of privacy stage 1", above n 30, 68.

the United States, the United Kingdom, Australia and Canada. It will then examine the protection afforded to the rights to privacy and freedom of expression in each country, before determining how the different jurisdictions resolve conflicts between the competing rights. This analysis will provide a useful background for determining how a sex offender register could survive in the face of the competing rights to privacy and freedom of expression in New Zealand.

A United States

1 Public registers

The United States first obligated all States to implement public sex offender registers in 1994, under the Jacob Wetterling Act[52] (a federal statute). Subsequently, all States in America have legislated to require sex offenders to register with police. In 2007, the Adam Walsh Child Protection and Safety Act[53] established a national sex offender register. Information from the register is released to the public based on the level of risk the offender poses to society. Information on level 1 (low-risk) offenders may be released to other enforcement agencies, while information on level 2 (moderate-risk) offenders may be made available to schools, neighbours and community groups. Finally, information on level 3 (high-risk) offenders may be disclosed to the public through press releases and fliers. Controversially, as well as the controlled release of information through State registers, there has been a proliferation of privately managed internet sites allowing any individual in the United States to search for sex offenders living in his or her area, and obtain access to information such as an offender's name, age, address, photograph and conviction details.

Information kept on state registers varies amongst the United States jurisdictions, with most registers containing an offender's name, age, address, photograph, fingerprints and conviction details. Some state registers additionally require an offender's residence history, vehicle registration, blood samples, DNA, social security number and *modus*

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[52] Jacob Wetterling Act 136 VI USC § 14071.
[53] Adam Walsh Child Protection and Safety Act (Pub L 109-248).

operandi. Information is kept on registers for varying periods of time, with all States requiring at least 10 years, and some requiring lifetime registration.

In 1996, the United States Supreme Court reviewed the constitutionality of sex offender registers in the case of *Kansas v Hendricks*. The majority upheld the constitutionality of the Kansas sex offender register, although in a close 5-4 decision.[54] The Court ruled that as the register was civil in nature and did not establish 'criminal' proceedings, involuntary confinement pursuant to the statute was not punitive, and as a result, its implementation did not constitute punishment (thus precluding any finding of double jeopardy or ex post facto violation). The legality of the public registers was also affirmed by the United States Supreme Court in 2002 in *Connecticut Dept. of Public Safety v Doe*, in which a sex offender register was challenged on the grounds that it violated the Fourteenth Amendment's due process clause, because registrants were not afforded a pre-deprivation hearing to determine whether they were likely to be "currently dangerous". The Court held that due process did not entitle an offender to a hearing to prove a fact (that is, whether the offender was dangerous or not) which was not material under the relevant statute.[55]

2 Protection afforded to privacy interests

Although the United States Constitution does not expressly mention any right to privacy, support for such a right has been derived from the First, Fourth, Ninth and Fourteenth Amendments.[56] The United States is now regarded as having a well developed privacy law, with the right to privacy being recognised in virtually all jurisdictions of the country.[57] William Prosser, in his seminal article "Privacy",[58] surveyed common law protections of privacy in the United States and found not just one tort protecting privacy

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[54] *Kansas v Hendricks* 521 US 346, 357, 117 SCt 2072 (1997).

[55] *Connecticut Dept. of Public Safety v Doe* (2003) 271 F3d 38 SC. To the author's knowledge, sex offender registers have never been challenged on the grounds of a breach of the tort of privacy in the United States.

[56] *Roe v Wade* (1973) 410 US 113. The concept of privacy in the United States has been invoked to strike down abortion laws, prohibitions on the sale of contraceptives to married couples (*Griswold v Connecitut* (1965) 381 US 479) and anti-sodomy laws (*Lawrence v Texas* (2003) 539 US 558).

[57] See, for example, *Carr v Watkins* [1962] 227 Md 578, 177 A2d 841; and *Truxes v Kenco Enterprises Inc* [1963] 80 SD 104, 119 NW 2d 914.

[58] William Prosser "Privacy" (1960) 48 Cal LR 383.

interests, but four different privacy interests afforded to individuals: intrusion upon the seclusion or solitude of another; public disclosure of private facts; publicity that places another in a false light; and appropriation of another's name or likeness for one's own advantage.[59] However, these torts protecting breaches of privacy have proved to be of limited effect, due to the constitutionally entrenched right to freedom of expression, as explored below.

3 *Freedom of expression*

The right to freedom of expression is given express legislative recognition in the First Amendment of the United States Constitution, which guarantees: "Congress shall make no law … abridging the freedom of speech". This right is absolute, and contains no provision subjecting it to any justifiable limitations. The United States Supreme Court balances free speech and other rights on the basis of principles it has developed over the last century. If these principles are found 'compelling', or in some circumstances 'substantial', they may justify restrictions on the exercise of speech rights.[60] However, all principles are designed to give free speech more protection than it would enjoy if courts were to afford freedom of speech and competing interests equal importance in the balancing process. Thus, there is a strong presumption in favour of free speech.

4 *Conflicts and resolution*

American courts have tended to take an abstract approach to the balancing of privacy and free speech interests. Such an approach proceeds by deciding which of the two interests is of greater importance in society generally. The more important value (usually taken to be freedom of speech) is then given pre-eminence in all cases, except in a specific case where the competing value has some extraordinary or overwhelming weight.[61] As a consequence, the effect of privacy laws has been significantly reduced because of the pre-eminence given to freedom of speech in the First Amendment.[62]

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[59] William Prosser *Restatement of the Law of Torts 1977* (United States, 1977) §§ 652B-652E.
[60] Eric Barendt *Freedom of Speech* (Oxford University Press, Oxford, 2005) 51.
[61] E Paton-Simpson "Human Interests: Privacy and Free Speech in the Balance" 16 NZLR 225, 226.
[62] See, W P Keeton (ed) *Prosser and Keeton on the Law of Torts* (5ed, West Publishing Co, St Pauls, 1984) 860-862. See also Harry Kalvern Jr "Privacy in tort Law – Were Warren and Brandeis Wrong?" (1966) 31 Law & Contemp Probs 327, 336.

In fact, due to the First Amendment protection of free speech in the United States, private litigation brought as a result of publication of private facts is so limited by free speech concerns that it is almost always unsuccessful.[63] As one academic has noted, when expectations of freedom of speech collide with expectations of privacy, "privacy almost always loses."[64] This is illustrated in the case of *Florida Star v BJF*, where the Supreme Court held that the imposition of damages against a newspaper for publishing a rape victim's name was in violation of the First Amendment, despite the fact that it was a crime and a violation of the newspaper's internal policy to do so.[65] The Court held that the sensitivity and significance of the interests presented in clashes between First Amendment and privacy rights counsels the court to rely on "limited principles that sweep no more broadly than the appropriate context of the instant case."[66] In this case, the Court held that to impose liability for a breach of privacy interests would not be an appropriate limitation upon the First Amendment.[67]

B United Kingdom

1 Non-public register

In the United Kingdom, the Sex Offenders Act 1997 and Sexual Offences Act 2003 established a non-public register, known as ViSOR (the Violent and Sex Offender Register). While ViSOR can only be accessed by police and probation service personnel, there is selective 'controlled disclosure' of information to certain officials, professionals and members of the public. Offenders are required to register if they are convicted of an applicable crime,[68] found not guilty by reason of insanity but still pose public danger, or if an offender is cautioned by a police officer and admits the offence at the time. Controversially, ViSOR also contains information on persons who have not been convicted but are thought to be at risk of offending.

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[63] Diane Zimmerman "Requiem for a Heavyweight: A Farewell to Warren and Brandeis' Privacy Tort" (1983) 68 Cornell L Rev 291.

[64] Anderson, "The failure of American privacy law" in Markesinis (ed) *Protecting Privacy* (Oxford University Press, New York, 1999) 139, 140.

[65] *Florida Star v BJF* (1989) 491 US 524, 109 SCt 2603. Further examples of this liberal mindset are: *Cox Broadcasting Corp v Cohn* 420 US 469; *Metter v Los Angeles Examiner* (1939) 95 P 2d 491 (2nd Cir).

[66] *Florida Star v BJF* (1989) 491 US 524, 109 SCt, 2603.

[67] Ibid, 2604.

[68] The Sexual Offences Act 2003 (UK) extends to a wide range of crimes, including incest and possession of indecent photographs of children.

In addition to the requirement that sex offenders supply their name, age and address, the register also holds an offender's photograph, risk assessment, *modus operandi* and audit trail.[69] An offender remains on the register for a period of time varying from five years (if the offender is cautioned or imprisoned for less than six months) to indefinite (if the offence carries a penalty of imprisonment for life). Offenders are also required to notify the authorities each time they change address and are also required to notify police if they are to leave the country for more than eight days.[70]

2 Protection afforded to privacy rights

Traditionally in England it was thought that there was no common law protection of privacy. This was made clear in the case of *Kaye v Robertson*[71] and reiterated by the House of Lords in 1996 in *R v Brown*,[72] when Lord Hoffman definitively stated that: "English common law does not know a general right to privacy."[73] However, in *A-G v Guardian Newspapers (No 2)* the boundaries of the equitable breach of confidence action were extended to allow protection for privacy interests in circumstances where no confidential relationship existed.[74] The most recent English privacy cases all demonstrate a trend towards developing the action of breach of confidence to protect privacy interests.[75] For example, in *A v B*, Lord Woolf pronounced, "if there is an intrusion in a situation where a person can reasonably expect his privacy to be respected, then that intrusion will be capable of giving rise to liability for breach of confidence."[76] Similarly, Sedley LJ asserted in *Douglas v Hello!* that "[the plaintiffs] have a right to privacy, which English law will today recognise and protect." [77] Thus, it can now be said with confidence that privacy interests are protected in the English common law (albeit through the guise of the action of breach of confidence).

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[69] Ibid, ss 83-84.
[70] Sex Offenders (Notice Requirement) (Foreign Travel) Regulations 2001 (UK).
[71] *Kaye v Robertson* [1991] FSR 62.
[72] *R v Brown* [1996] AC 543.
[73] Ibid ,557 Lord Hoffman.
[74] *A-G v Guardian Newspapers (No 2)* [1990] 1 AC 109.
[75] See generally: *Hellewell v Chief Constable of Derbyshire* [1995] 1 WLR 804; *Douglas v Hello! Ltd* [2005] EWCA Civ 595; *A v B plc* [2002] 2 All ER 545; *Campbell v MGM Ltd* [2003] 1 All ER 224; and *Green Corns Ltd v CLA Verley Group Ltd* [2005] EWHC 958 (QB).
[76] *A v B plc* [2002] 2 All ER 545, 554, Lord Woolf.
[77] *Douglas v Hello! Ltd*, above n 75, 1001, Lord Justice Sedley.

Additionally, the right to privacy has been given legislative recognition by the incorporation of the European Convention of Human Rights (ECHR) into English domestic law through the Human Rights Act 1998.[78] Article 8 of the ECHR contains a right to private and family life, home and correspondence. The ECHR has acted as a catalyst for judges to give more overt recognition of breach of privacy rights and further expanded the breach of confidence action.

The expanding protection of privacy interests through actions in breach of confidence has lead some commentators to assert that breach of confidence and the tort of privacy may realistically be distinguished in name only: "[i]t is evident that the real concern of English courts is to protect the privacy of the individual."[79] Indeed, Justice Laws in *Hellewell* commented that "the law [will] protect what might reasonably be called a right of privacy, although the name accorded to the action would be breach of confidence."[80] There are, however, a number of academics who dispute the existence of only cosmetic differences between the claims. According to Bridget Murphy, the redefinition of breach of confidence sits uneasily with the traditional concepts of the doctrine, which is founded upon the integrity of confidential relationships as a matter of equity, in contrast to actions for invasion of privacy, which are founded upon individual autonomy.[81] Murphy argues that as a consequence, breach of confidence can therefore only accommodate one aspect of the developing tort of privacy – the public disclosure of private facts.[82]

3 *Freedom of expression*

English law historically took little notice of concepts such as freedom of speech, but English courts increasingly relied on common law principles of freedom of speech to limit the scope of other common law rules (for example, in libel, breach of confidence

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[78] Human Rights Act 1998 (UK), s1(1), sch 1.
[79] Burrows (ed) *Todd on Torts* (8ed, 2001, Brokers, Wellington) 917.
[80] *Hellewell v Chief Constable of Derbyshire*, above n 75, 807 Laws J.
[81] Bridget K Murphy "Developments in the Law of Invasion of Privacy in New Zealand and England: *L v G, A v B*" (2002) 9 AULR 1031, 1040.
[82] Ibid.

and contempt of court).[83] Judges were also influenced in the 1980s and 1990s by Article 10 the ECHR, which guarantees the right to "receive and impart information", although its provisions were not binding on them at that time.[84] Hence, both in common law cases and in the context of statutory interpretation, courts became increasingly willing to apply a freedom of speech principle. Accordingly, the English right to freedom of expression was developed and established in common law before being statutorily recognised in 1998 with the incorporation of the ECHR through the Human Rights Act 1998 (HRA). As a result, freedom of speech is now an accepted part of English law. Indeed, it has been said that "there is a constitutional right to freedom of expression".[85]

It should be noted that there is no right to *access* information under Article 10 of the ECHR; the freedom of expression protected being a negative liberty, protecting against State interference. This was confirmed in the case of *Leander v Sweden*, in which the European Court on Human Rights held that Article 10, in providing a right to "receive information" signifies a right that is limited to receiving information "that others wish or may be willing to impart."[86] The Court held that Article 10 did not confer on the individual a right of access to a state register, nor did it embody an obligation on the government to impart such information.[87]

4 Conflicts and resolution

In determining the relationship between the right to privacy expressed in Article 8 of the ECHR, and the protection of freedom of expression guaranteed in Article 10, the English courts have determined that neither has a presumptive right. Instead, the rights are to be balanced against each other, as illustrated in the case of *Campbell v MGN*, in which Lord Hoffman stated: "there is a need to ensure that the essence of the particular situation is examined, with due weight given to conflicting interests under the HRA."[88] This is despite section 12 of the HRA, which stipulates that the courts must have regard

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[83] Eric Barendt, above n 60, 40.
[84] See, for example, *A-G v BBC* [1981] AC 303 (HL).
[85] *Reynolds v Times Newspapers* [2001] 2 AC 127, 207 Lord Steyn.
[86] *Leander v Sweden* Series A, no 116, 29, para 74 (1978).
[87] Ibid.
[88] *Campbell v MGN Ltd*, above n 75, para 55, Lord Hoffman; paras 104-106 Lord Hope.

to the importance of the convention right to freedom of expression. While section 12 could have been used to elevate the right to freedom of expression over privacy, courts have rejected such an interpretation, as illustrated in the case of *In re S (a child) (Identification: restrictions on publication)*, in which the House of Lords said:[89]

> First, neither article has as such precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each.

C Australia

1 Non-public register

All State governments in Australia are responsible for monitoring individual offenders within their jurisdiction and the maintenance of their own registers.[90] State registers contain an offender's name, address, employment, car registration, fingerprints, offences and travel arrangements (including inter-state). Offences requiring registration include offences of a public nature (such as rape, indecent conduct and grooming of minors) but extend to offences such as possession of child pornography. Information about the offender is kept on state registers for periods ranging from eight years to life, depending on the number and type of offences. Offences are classified as either class one (murder, sexual intercourse or persistent sexual abuse of a child), or class two (acts of indecency punishable by 12 months imprisonment or more).

At national level, the National Sex Offender System encompasses the sharing of offender information across state borders using the Australian National Child Offender Register (ANCOR). The national system is centred on the CrimTrac agency, which controls the national fingerprint and DNA databases, and also includes information on

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[89] See, for example, *In re S (a child) (Identification: restrictions on publication)* [2005] 1 AC 593 (HL).

[90] Most State registers are based primarily on the New South Wales register, which was established through the Child Protection (Offender Registration) Act 2000 (NSW). Other State registers were established through the following Acts: Sex Offenders Registration Act 2004 (Vic); Child Protection (Offender Reporting and Registration) Act 2004 (NT); Child Protection (Offender Reporting) Act 2004 (QLD); and Community Protection (Offender Reporting) Act 2004 (WA).

children who live with the offender, membership of clubs and time spent in correctional facilities. Australian registers are non-public, as public community registers were considered to "fail to achieve their goals and lead to significant unintended consequences."[91]

2 Protection afforded to privacy interests

With no Bill of Rights and no mention of a right to privacy in the Australian Constitution,[92] it was left to common law to develop a right to privacy in Australia. There were some early indications that a privacy tort might be introduced, when in *Church of Scientology Inc v Woodward*, Murphy J identified the "unjustified invasion of privacy" as a developing tort.[93] However, later courts have declined to recognise a stand-alone right to privacy in Australia.[94] The development of a tort of privacy at common law has long been regarded as restricted by the decision in *Victoria Park Racing and Recreation Grounds v Taylor*.[95] In that case, Latham CJ rejected the submission that the law of nuisance included protection of a right to privacy. However, recently the case of *ABC v Lenah Game Meats Pty Ltd*[96] has cast doubt on that position. In *Lenah* it was suggested that the High Court of Australia would give effect to a right of privacy similar to that protected by the New Zealand tort prior to *Hosking*, through an extension of the breach of confidence action.

Essentially, therefore, the High Court of Australia has not ruled out the possibility of a common law tort of privacy, nor has it embraced it with open arms. As a result, the High Court of Australia has left it open as to whether the tort exists, and lower courts have subsequently arrived at inconsistent decisions.[97] Along with the conflicting developments of the right to privacy in common law, there have been conflicting

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[91] Caslon Analytics offender registries http://www.caslon.com.au (accessed 17 July 2008).
[92] Commonwealth of Australia Act 1900 (Cth).
[93] *Church of Scientology Inc v Woodward* (1982) 154 CLR 25.
[94] See, *Cruise and Kidman v Southdown Press Pty Ltd* (1993) 26 IPR 125; and *Australian Consolidated Press Ltd v Ettingshausen* (Court of Appeal, New South Wales, CA 40079 of 1993, 13 October 1993).
[95] *Victoria Park Racing and Recreation Grounds v Taylor* (1937) 58 CLR 479.
[96] *ABC v Lenah Game Meats Pty Ltd* (2001) 185 ALR 1.
[97] To date, two lower courts have held that such a cause of action is part of the common law of Australia: *Grosse v Purvis* (2003) Aust Torts Reports 81-706; *Doe v Australian Broadcasting Corporation* [2007] VCC 281.

legislative developments concerning privacy in Australia. Despite the fact that privacy rights are increasingly being afforded protection through statutory law in Australia, no common, statutory protection against the invasion of privacy has yet been established.

While historically the Australian Law Reform Commission declined to recommend the creation of a general tort of privacy,[98] it has since proposed that, to ensure consistent privacy protection, a cause of action for serious invasion of privacy should be recognised by the legislature in Australia.[99] At federal level, the enactment of the Privacy Act 1988 (Cth)[100] conferred a degree of enforcement power upon the Federal Court and the Federal Magistrates Court to protect privacy (although a much watered down protection than the proposed introduction of an action for breach of privacy). The Australian Government also ratified the ICCPR in 1980, which contains a right to privacy in Article 17. Additionally, at state level, a right to privacy has been expressly mentioned in the Charter of Human Rights and Responsibilities Act 2006 (Vic) and the Human Rights Act 2004 (ACT).

3 Freedom of expression

In addition to the absence of a right to privacy in the Australian Constitution, there is no explicit guarantee of freedom of speech. While Australia is a signatory to the Universal Declaration of Human Rights, which affirms the right of free speech in Article 19,[101] no government has implemented the free speech provisions, and as a result, they are not enforceable in Australian Courts. There have been several attempts to introduce a right to freedom of speech and expression into the Australian Constitution, or through a Bill of Rights, but so far all such attempts have failed.[102] One example is the case of *Miller v TCN Channel Nine*, in which Murphy J attempted to read in a right to freedom of expression into the Australian Constitution by referring to "guarantees of freedom of speech" found in section 92 of the Constitution (which refers to free trade within the

[98] Australian Law Reform Commission, *Privacy*, ALRC 22 (1983), para 1081.
[99] Australian Law Reform Commission, *Review of Australian Privacy Law*, DP 72 (2007), Proposals 5 1-7.
[100] Amended by the Privacy Amendment (Private Sector) Act 2000 (Cth).
[101] Universal Declaration of Human Rights, UNGA Resolution 217A (III) (10 December 1948), art 19.
[102] See generally: 1942 Constitutional Convention held in Canberra; Constitution Alteration (Post-War Reconstruction and Democratic Rights) Bill 1944 (Cth); Human Rights Bill 1973 (Cth); Australian Human Rights Bill 1985 (Cth).

Commonwealth).[103] However, this judgment brought stinging rebuke from other judges, including Justice Sir Anthony Mason, who retorted "I cannot find any basis for implying a new section 92A into the Constitution."[104]

Freedom of expression, therefore, like almost all civil liberties in Australia, is afforded protection through common law. As Australian common law shares its essential features with English common law, Australian courts are influenced by English precedent and give legal recognition to the right of freedom of expression. As a result, freedom of expression is a recognised and established right under Australian common law, and regarded as a 'civil right' and fundamental freedom.[105]

4 Conflicts and resolution

Because an established right to protection against a breach of privacy is not evident in Australian law, either through legislation or common law, it is unlikely that sex offender registers would be challenged on the ground of breach of privacy. Furthermore, with respect to existing registers, neither at state nor federal level is sex offender information disclosed to the public, so an unjustified breach of one's right to privacy (should it exist) would not occur.

D Canada

1 Non-public register

The Canadian federal structure has resulted in a mix of federal and provincial registers. Ontario's Sex Offender Registration Act 2001 formed the basis for most provincial legislation until recently, when the National Sex Offender Registry came into force in 2004.[106] While some provinces have adopted 'limited disclosure' registers, the national register is private.[107] The national register is applicable to anyone convicted, or found not guilty by reason of insanity, of an offence under section 490.011 of the

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[103] *Miller v TCN Channel Nine* (1988) 161 CLR 556.
[104] Ibid, 568 Murphy J.
[105] Carol Foley *The Australian Flag: Colonial Relic or Contemporary Item?* (Federation Press, Victoria, 1996) 156.
[106] The National Sex Offender Registry came into force with the passage of the Sex Offender Information Registration Act RS C 1985 c A-1.
[107] Ibid, s 16.

Criminal Code (which includes wide ranging offences such as incest, bestiality, possession of child pornography and indecent exposure). Offenders are registered for the maximum penalty they could have received for their offence if sentenced (that is: 10 years; 20 years; or life). A second conviction results in registration for life.

Under the national scheme, convicted offenders may be ordered by a court to register their name, age, address, phone number and physical description with the registration centre in their area.[108] The registration centre will then put that information, along with their offences, victims and court orders on the register.[109] Offenders must update this information when necessary and are required to notify the authorities if they are to be absent from their address for 15 consecutive days.

2 Protection afforded to privacy interests

Like the NZBORA, the Canadian Charter of Rights and Freedoms does not specifically guarantee a right to privacy. However, in interpreting section 8 of the Charter (the right to be secure against unreasonable search and seizure), Canadian courts have recognised an individual's right to a reasonable expectation of privacy. In *City of Longueuil v Godbout*, the Supreme Court held that the purpose of the protection accorded to privacy under section 8 is to guarantee a sphere of individual autonomy for all decisions relating to "choices that are of a fundamentally private or inherently personal nature".[110] Furthermore, in *R v Duarte*, the Supreme Court of Canada held that the police could not arbitrarily record and transmit private communications in the course of surveillance, confirming that section 8 protected the right of individuals to control the release of personal information.[111]

Certain provincial Charters have gone further than the implied protection of privacy afforded in the Canadian Charter by expressly protecting privacy interests. An example is section 5 of the Quebec Charter of Human Rights and Freedoms, which

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[108] Ibid, s 4(1).
[109] Ibid, s 8.
[110] *City of Longueuil v Godbout* [1997] 3 SCR 844, 913.
[111] *R v Duarte* [1990] 1 SCR 30.

guarantees every person "a right to respect for his private life". The Supreme Court of Canada has subsequently awarded damages for a breach of the right to privacy guaranteed by section 5 of the Quebec Charter. In *Les Editions Vice-Versa v Aubry and Canadian Broadcasting Corporation*,[112] the Supreme Court upheld section 5 of the Quebec Charter when the respondent's photograph, taken in a public place, was published in an arts magazine. The Court considered that the purpose of section 5 was to protect a sphere of individual autonomy,[113] and held that the right to respect for private life was infringed as soon as one's image is published without consent, provided the individual concerned is identifiable in the image.[114]

While recent authorities evidence a growing recognition of the right to protection of privacy interests, Canadian courts have not yet reached a clear consensus. In *Hung v Gardiner*,[115] the Supreme Court of British Columbia declined to follow *Aubry*, refusing to accept that there was a common law tort of invasion of privacy in the province of British Columbia in addition to the protection afforded by the British Columbia Privacy Act. The Court held that as *Aubry* was an action for breach of privacy under section 5 of the Quebec Charter, it was only applicable as authority within the Quebec province.[116]

There are other indications, however, that privacy concerns are increasingly receiving legal protection in Canada. Certain Canadian provinces have enacted privacy legislation, with British Colombia, Manitobia and several other provinces enacting Privacy Acts.[117] The wording of the statutes is very general, with the legislation providing civil sanctions for violating the privacy of another. In the District Court in *MacKay v Buelow*, it was held that a tort of invasion of privacy does exist in Canadian common law.[118] In that case it was implicitly accepted that damages could be awarded for

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[112] *Les Editions Vice-Versa v Aubry and Canadian Broadcasting Corporation* [1998] 1 SCR 591.
[113] Ibid, 594.
[114] Ibid.
[115] *Hung v Gardiner* [2002] BCSC 1234.
[116] Ibid, para 110 Joyce J.
[117] Privacy Act 1996 RSBC c 737 (British Colombia); Privacy Act CCSM s P125 (Manitobia); see also Privacy Act 1978 RSS c P-24 (Saskatchewan); Privacy Act 1990 RSNL c P-22 (Newfoundland and Labrador).
[118] *MacKay v Buelow* (1995) 11 RFL (4th) 403 Binks J.

a breach of privacy, and general damages of $25,000 were awarded with little discussion of the nature of the tort. From these authorities, one can deduce that the right to protection against a breach of privacy is certainly gaining greater recognition in Canadian law, although the position is still far from settled.

3 *Freedom of expression*

Until the enactment of the Canadian Charter of Rights and Freedoms, Canadian free speech law had largely followed the common law approach in England. In 1982 the Charter transformed the legal position, guaranteeing the right to freedom of expression. Specifically, section 2 provides to "everyone" the "fundamental freedom" of "thought, belief, opinion and expression, including freedom of the press and other media of communication."[119]

From its first decision on freedom of expression,[120] the Canadian Supreme Court has taken a broad view of the scope of the right to freedom of expression; it encompasses all modes of expression that attempt to convey meaning.[121] The underlying rationale for the protection of expression is the realisation of self-fulfilment.[122] Yet, this right is not absolute, for section 1 states: "The Canadian Charter ... guarantees the rights set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[123] Therefore, the right to freedom of expression may be limited by a right to protection from a breach of privacy (if recognised), if the limitation is deemed justifiable in a free and democratic society. If a limitation on a Charter right is deemed unjustified, Canadian courts have a right to strike down the legislation (unlike New Zealand).

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[119] Constitution Act 1982, Part I, s 2.
[120] *RWDSU v Dolphin Delivery Ltd* [1986] 2 SCR 573.
[121] *R v Sharpe* [2001] 1 SCR 45, 968.
[122] See generally *R v Keegstra* [1990] 3 SCR 697.
[123] Canadian Charter of Fundamental Rights and Freedoms, above n 119, s 1.

4 *Conflicts and resolution*

The Canadian Charter does not give prominence to one right over another. Instead, Canadian courts are prepared to balance competing rights in light of the particular circumstances, and courts are not restricted by the use of formulated principles.[124] When rights are purported to be limited, courts engage in a proportionality test to determine whether such a restriction on a right can be "demonstrably justified in a free and democratic society".[125] In examining this question, courts apply a test derived from the Canadian Supreme Court decision of *R v Oakes*,[126] which can be broken down into four constituent elements: whether the restriction fulfils a pressing and substantive objective; whether the means adopted have a rational connection to this objective; whether there exists proportionality between the limitation and the objective; and whether there is minimal impairment upon the right. Therefore, when determining whether a restriction on a right may be justified, the Canadian Supreme Court fully considers the context of the particular case and the value of the expression at issue.

E Conclusion

From this overview, one can observe that sex offender registers (both public and non-public) can survive in the face of the competing rights to freedom of expression and privacy. The question still to be answered, however, is whether such a register could survive in New Zealand's legal climate. In determining this, one can have regard to the criteria identified in the *Oakes* test (which has subsequently been applied and adopted into the New Zealand legal system),[127] which looks to factors such as proportionality and pressing and substantive objectives in evaluating whether something is justifiable in a free and democratic society. The following examination of the policy rationales behind sex offender registers will therefore question whether such registers do in fact have pressing and substantive objectives, and whether they can adequately fulfil those objectives without disproportionately encroaching upon an offender's right to privacy.

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[124] Eric Barendt, above n 60, 57.
[125] Canadian Charter of Fundamental Rights and Freedoms, above n 119, s 1.
[126] *R v Oakes* [1986] 1 SCR 103.
[127] See, for example, *Hansen v R* [2007] NZSC 7 and *Moonen v Film & Literature Board of Review* [2002] 2 NZLR 9.

V ARGUMENTS FOR AND AGAINST SEX OFFENDER REGISTRIES

While legislation for the registration of sex offenders is no doubt well-intentioned, there has been much criticism of the effectiveness of sex offender registers. Before implementing such legislation in New Zealand, one must question whether sex offender registers are an effective mechanism in the prevention, deterrence and investigation of sexual offending. This section will determine whether, and to what extent, laws mandating the registration and publication of sexual offender information do in fact address the underlying policy rationales driving them, or whether the consequential negative effects of a register would in fact outweigh the ostensible goals such laws set out to achieve. This section will conclude that, while the implementation of a *public* register would not be justifiable due to its potential negative consequences, the implementation of a *non-public* register would adequately address the policy rationales underlying a sex offender register.

A Arguments for sex offender registers

1 The public's right to freedom of expression

The right to freedom of expression, manifested in section 14 of the New Zealand Bill of Rights Act (NZBORA), gives citizens the freedom to "seek, receive and impart information."[128] However, this freedom is not absolute, as section 5 of the NZBORA stipulates that freedom of expression may be subject to limitations that are demonstrably justified in a free and democratic society.[129] Proponents of a public register rely on the recent Supreme Court decision of *Brooker v Police*, in which the majority considered that as freedom of expression is expressly affirmed in the NZBORA it is a right of fundamental importance, in contrast to privacy, which they considered to be a mere value.[130] Rights were considered to have a dominant status, the 'non-right' having to be justified as a reasonable limit on the right.[131] Those endorsing public registers argue that the right to receive information has a dominant status in relation to privacy interests, and restricting their right to receive information to the extent that they may not receive

[128] New Zealand Bill of Rights Act 1990, s 14.
[129] New Zealand Bill of Rights Act 1990, s 5.
[130] *Brooker v Police*, above n 45, para 40, Elias CJ.
[131] Ibid.

information on a sexual offender living in their community (due to the offender's right to privacy) is an unreasonable limitation on their right to freedom of expression.

2 Investigation and prevention of future offending

One of the primary rationales in establishing a sex offender register is to assist the police in the prevention and investigation of sexual offences.[132] While it is admitted that there are methodological barriers to demonstrating a correlation between sex offender legislation and reduced recidivism rates, it is believed that by having an easily accessible register, police will be able to monitor sex offenders in the community, preventing and reducing future offending. In support of this, a 2005 Washington study suggested community notification laws to be partly responsible for the reduction of new sexual offences from 7 per cent to 2 per cent.[133]

3 Deterrence

Deterrence is another important objective behind the concept of a public register.[134] It has been suggested that publicity is "one of the chief deterrents to evil-doing; and one of the severest punishments that evil-doers have to face."[135] However, studies have questioned the effectiveness of publicity as a deterrent. In one survey conducted by the United States Department of Justice concerning the effectiveness of public registers on re-offending, the following response from offenders was typical:[136]

> If you're going to re-offend, it doesn't matter if you're on TV, in the newspaper, whatever, you're going to re-offend. And there's nothing to stop you. It's a choice you make … The only person that can stop it is the sex offender himself.

While deterrence is thought to be an important factor in relation to sexual offending, as there is a common perception that sexual offenders have high rates of

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[132] Sex Offenders Registry Bill 2003, above n 3, Explanatory note.
[133] Kate Fitch "Megan's Law: Does it protect children (2)?" (2000) NSPCC 36.
[134] Claire Baylis, "Justice Done and Justice Seen to be Done – The Public Administration of Justice" (2001) 21 VUWLR 177, 178.
[135] R Munday, "Name Suppression: an adjunct to the presumption of innocence and to the mitigation of sentence – 1" [1991] CrimLR 680, 755.
[136] US Department of Justice "Managing Sex Offenders in the Community: A National Overview" (Oregon, September 30, 2001) 21.

recidivism,[137] studies in the United States report paedophile recidivism rates of 10.9 per cent[138] and 12.7 per cent.[139] These rates are much lower than the recidivism rates of drug offenders and violent offenders.[140] A number of recent reports also show that specialised prison and community based treatment programmes in New Zealand are reducing the rates of paedophile recidivism to as low as 5.2 per cent.[141] However, while recidivism rates may not be as high as common perception, if registers do have the proposed deterrent effect, this is certainly a substantial factor in favour of registration.

4 Open justice

In the context of court proceedings, there is a prima facie presumption in favour of openness when a judge is considering whether to grant a suppression order. The Court of Appeal has made it clear that sexual offenders cannot normally expect their names to be suppressed.[142] In particular, the Court of Appeal in *R v Liddell*[143] highlighted the importance of the principles of freedom of speech and open justice. Cooke P acknowledged the importance of the competing right to privacy, but noted that it would rarely be enough to displace the weighty presumption in favour of openness.[144] Subsequent authorities have mandated that "compelling reasons" or "very special circumstances" must be present to justify departure from the principle of open justice.[145]

The principle of open justice is today associated with the wider right to freedom of expression, which affords the public a right to receive information.[146] In accordance

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[137] Mike Smith "Sex Offender Registry OK'd" (20 February 1996) *The Journal Gazette,* Fort Wayne.
[138] M Alexander "Sex Offender Treatment: A response to Furcy, et al 1989" (Presentation at Conference of the American Association for the Treatment of Sexual Abusers, Beaverton, 11 November 1994).
[139] Lita Furby, Mark Weinrott and Lyn Blackshaw "Sex Offender Recidivism: A review" (1989) 105 Psychology Bulletin 3.
[140] 2004/2005 Department of Corrections Annual Report http://www.corrections.govt.nz (accessed 16 July 2008).
[141] Department of Corrections "Community Solutions for the Community's Problem: An Outcome Evaluation of Three New Zealand Community Paedophile treatment Programmes" (Auckland, 2003), 24. The sexual offenders who completed the Kia Marama programme at Rolleston prison in Christchurch had a recidivism rate of 8 per cent, while the offenders from the Te Piriti programme at Auckland prison had a recidivism rate of 5.47 per cent.
[142] *Prockter v R* [1997] 1 NZLR 295,300 (CA) Thomas J for the Court.
[143] *R v Liddell* [1995] 1 NZLR 538.
[144] Ibid, 547 (CA) Cooke P for the Court.
[145] See *Re Victim X* [2003] 3 NZLR 220, para 18 (HC) Hammond J.
[146] *Police v O'Connor* [1992] 1 NZLR 87, 97 (HC) Thomas J.

with the underlying notions of both principles, one could assert that there should be a presumption in favour of releasing a convicted offender's information to the community. Support for this proposition can be drawn from the decision of *Police v O'Connor*, in which Thomas J stated that the public's right to receive information under the umbrella of freedom of expression extends to court proceedings.[147] Thus, proponents of a register would state that, in accordance with the principle of open justice, the public has a right to information about the conviction of sexual offenders.

5 *Public protection*

A powerful rationale underlying the implementation of a register is the potential protection it will afford the public. The theory that a social contract exists between the State and its citizens asserts that citizens are obliged to pay taxes to the State which, in return, must provide its citizens with protection.[148] Under this theory, it can be argued that the State has a duty to provide the public with protection through the release of details of sexual offenders to the community. The release of information about sex offenders is thought to increase public safety as the public will be able to recognise sex offenders in their community and to take the necessary steps to keep themselves and their children safe from such offenders, who could otherwise go unnoticed.[149]

6 *Conclusion*

While these justifications provide a sound basis for the implementation of a sex offender register in New Zealand, it is necessary to examine whether a register would in fact address these underlying concerns, thereby fulfilling pressing and substantial objectives. Furthermore, it is necessary to identify whether there would be any adverse negative effects associated with registration which would consequently result in a disproportionate breach of offenders' rights in promoting public protection and the right to freedom of expression. For these reasons, it is necessary to explore the arguments advanced against sex offender registers.

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[147] Ibid, 97 (HC) Thomas J.
[148] See generally, Jean-Jacques Rousseau *The Social Contract* (Penguin Classics, Harmondsworth, 1968).
[149] Caslon Analytics offender registries, above n 91.

B Arguments against sex offender registers

1 An offender's right to privacy

Although there is no general right to privacy in New Zealand legislation, an independent legal right to privacy is afforded to individuals under the common law action of the tort of breach of privacy. Those arguing against the implementation of a sex offender register would claim that although a right to privacy is not expressly included in the NZBORA, privacy is nevertheless an existing right of equal standing. This is in accordance with the case of *Hosking*, in which Tipping J in the majority did not consider that "omission from the Bill of Rights Act can be taken as a legislative rejection of privacy as [a] ... fundamental value."[150] A recent Law Commission study also lends support to this position, as it suggests that a proper weighting of freedom of expression and privacy should be given in the particular circumstances in which they arise, rather than a general rule classifying the relative importance of each value.[151] Those against the implementation of a public sex offender register would then argue that when the public's right to freedom of expression is upheld by disseminating information from a sex offender register, this creates an unjustifiable breach upon an offender's right to privacy.

2 Emotionally charged legislation

> Sensationalized sex offence cases have understandably shocked and angered our society. Many legislative actions regarding sex offenders resulted from emotional public response to violent crime rather than from research showing that these laws would make any positive difference in correcting the problem and reducing crime.[152]

There are concerns that, although the idea behind public registers is worthy in principle, the practical effectiveness of such arrangements has not been given enough rational thought. The United States Department of Justice commented in 2003 that, unlike issues such as insurance regulation or seat-belt laws, "sexual abuse is intertwined with a strong emotionalism that exacts an almost visceral response in nearly everyone."[153] As a result,

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[150] *Hosking v Runting*, above n 25, para 92 Gault P and Blanchard J.
[151] "Privacy concepts and issues: review of the law of privacy stage 1", above n 30, 68.
[152] "Managing Sex Offenders in the Community: A National Overview", above n 136, 14.
[153] Ibid.

the Department of Justice alleges that lawmakers' abilities to create an effective legislative regime are clouded by this emotional response to sexual abuse, resulting in laws that are certainly well-intentioned but are nonetheless ineffective.

3 *Dangers of vigilantism*

There have been incidents where the release of information about sex offenders has led to vigilantes using the information to harass, threaten and even murder listed offenders. In one such incident, a vigilante, using publicly available information on the internet, tracked down 24 year old William Elliott to his residential address and shot him dead. Elliot had been convicted of statutory rape over consensual activity with his younger girlfriend, who was days away from turning 16.[154] Another example is the 2000 'Sarah's Law' campaign in England, in which details of 100,000 paedophiles were published in the *News of the World* tabloid. The campaign resulted in demonstrations and attacks on sex offenders in which homes and property were destroyed, five families unconnected with sex offenders were forced to flee, and even a female paediatrician was forced from town when vigilantes confused her title with that of a paedophile.[155]

Although all foreign legislation establishing sex offender registers contains provisions against the improper use of sex offender information, this does not stop the abuse of information contained in sex offender registers. For example, while United States' legislation imposes a $500-$1000 fine for the improper use of register information,[156] a survey carried out in 2005 found that one-third of convicted male sex offenders listed on a public register claimed to have experienced "dire events" such as harassment and vandalism by vigilantes.[157] It is submitted that New Zealand could limit the dangers of vigilantism by the implementation of a non-public register, of which only the police force and other individuals authorised by the Minister of Justice would have access for law enforcement and other authorised purposes.

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[154] Murder Puts Focus on Sex-Offender Registry Policies http://www.npr.org (accessed 21 May 2008).
[155] Doctor Driven out of Home by Vigilantes http://www.guardian.co.uk (accessed 31 May 2008).
[156] Jacob Wetterling Act, above n 52.
[157] Kate Fitch, above n 133, 40.

4 *Adverse effect on rehabilitation*

> One of the major objectives of society, and of the administration of our penal system, is the rehabilitation of the fallen and the reformation of the criminal. It is our object to lift up and sustain the unfortunate rather than tear him down. Where a person has by his own efforts rehabilitated himself, we ... should permit him to continue in the path of rectitude rather than throw him back into a life of shame or crime. Even the thief on the cross was permitted to repent during the hours of his final agony.[158]

Overseas experience teaches us that the public release of sex offender information may have a disintegrative effect on sex offenders' rehabilitation.[159] A Washington survey revealed that offenders subject to community notification frequently leave communities after notification because they feel compelled to go 'underground' to avoid the ostracism, victimisation and vigilantism that results from disclosure.[160] Similarly, as a result of the publication of sex offender details in the *News of the World* campaign, it was reported that "sex offenders have been breaking off contact with probation officers, moving from addresses that were monitored by police ... failing to attend treatment programmes and adopting habits that signalled a return to offending."[161] This inevitably hinders the surveillance and treatment of offenders and makes it extremely difficult for offenders to develop new social-supportive contacts.[162] As a result, mental health professionals claim that public registration may increase, rather than decrease, sex offenders' likelihood of re-offending.

5 *Double punishment*

Double punishment is prohibited in New Zealand by virtue of section 26(2) of the NZBORA, which states "no one who has been finally ... convicted of ... an offence shall be ... punished for it again."[163] Publicity is seen as an extra punishment, and has indeed

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[158] *Melvin v Reid* (1931) 112 P 285, 297 (4th Cir).
[159] Eric Lotke "Politics and Irrelevance: Community Notification Statutes" (1997) 10 Fed Sent R 64, 66.
[160] Lyn Hinds and Kathleen Daly, "The War on Sex Offenders: community notification in perspective" Australian and New Zealand Journal of Criminology (2000) 20.
[161] Pressure to halt 'name and shame' campaign http://www.telegraph.co.uk/news (accessed 16 June 2008).
[162] "Managing Sex Offenders in the Community: A National Overview", above n 136, 21.
[163] New Zealand Bill of Rights Act 1990, s 26(2).

been recognised by New Zealand courts as serving a punitive function.[164] Those opposing a register claim that once offenders have served their sentence, they have paid their debt to society, and any further 'naming and shaming' is a double punishment.[165] It is also asserted that requiring sex offenders to update their address every time they move is an additional punishment to imprisonment, and monitoring schemes provided for under sex offender legislation are a tacit form of permanent imprisonment.[166]

On the other hand, it is arguable that name publication is an expected cost in committing a criminal offence, and is not an additional punishment. This was the view expressed by Tipping J in the case of *Sanders v Police*: "[p]eople must realise that publication of their names is part of the penalty for the commission of crimes."[167] While information disseminated from a sex offender register would involve more than just an offender's name, a non-public register would not make this information publicly available, only selectively disclosing information when deemed necessary. Furthermore, in accordance with *Kansas v Hendricks*, it can be argued that the aim of sex offender registers is not to punish, but to enhance public safety. Thus, because of the register's civil aims, disclosure under such a regime cannot be considered a 'criminal sanction' and does not therefore constitute double punishment.[168]

6 Limited utility of registers

(a) Misguided focus

Community notification laws focus on a relatively rare form of sexual assault: that of random abuse or attack by a stranger. While these crimes are gaining increasing prominence in today's society, evidence suggests that most child sexual abusers offend against children whom they know and with whom they have an established

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[164] See, *Police v O'Connor* [1992] 1 NZLR 87, and also recently *T v Police* (22 April 2005) HC DUN 412/12 Chrisholm J.
[165] Caslon Analytics Offender Registries, above n 91.
[166] Ibid.
[167] *Sanders v Police* Unreported, 20 September 1991, High Court, Christchurch Registry, Tipping J.
[168] *Kansas v Hendricks* 521 US 346, 357, 117 SCt 2072 (1997).

relationship.[169] Ninety per cent of child victims know their offender, with almost half of offenders being a family member.[170] As a result, public registers as they stand are of limited use and public warnings are seemingly ineffective to prevent the majority of sexual abuse cases.

Another criticism of the effectiveness of registers concerns the misguided presupposition that an offender will re-offend in the area in which they live.[171] As noted previously, a potential consequence of community notification is the possibility that offenders will go 'underground' and move to other communities where they are not monitored or recognised. Public notification can only hope to increase safety within a limited area.[172]

(b) Reduction of reporting

There is growing evidence that community notification laws may be affecting the reporting of intra-familial sexual abuse. Recent reports from New Jersey (where notification laws were first enacted) suggest a decrease in the reporting of both incest offences and juvenile sexual offences by victims and by family members.[173] Victims may be deterred from reporting a family member as they may not want to put that family member at risk of retribution, or expose the rest of their family to ostracism and potential vigilantism.[174] As a result, commentators have concluded that "to date, there is little, if any, published evidence that [the United States sex offender registration legislation] is having any impact on reducing child sexual abuse."[175]

(c) Resources required

While the notion of a sex offender register may be compelling, unless the register is sufficiently funded, it may not be able to address the goals sex offender registers aim to

[169] Pressure to halt 'name and shame' campaign, above n 161.
[170] Megan's Law Information http://www.ci.garden-grove.ca.us/ (accessed 17 May 2008).
[171] Kate Fitch, above n 133, 42.
[172] Ibid.
[173] "Managing Sex Offenders in the Community: A National Overview", above n 136, 16.
[174] Kate Fitch, above n 133, 36.
[175] "Managing Sex Offenders in the Community: A National Overview", above n 136, 17.

achieve. As well as sizeable start-up costs,[176] public registration requires continuous monitoring by the State to ensure offender compliance with registration: "millions of dollars are required to operate the systems in a manner likely to achieve any success."[177] Unless a register receives the monetary support that it needs in order for it to remain up-to-date and work efficiently, its objectives will not be achieved. This will mandate a significant financial commitment from the government of the day.[178]

C Conclusion

In balancing the respective policy concerns explored above, one can determine whether the implementation of a sex offender resister would in fact remedy the concerns it set out to address, thereby achieving pressing and substantial objectives, or whether the adverse consequences would outweigh any benefits proposed by implementation. Having considered the competing policy concerns, it is submitted that while the implementation of a *public* register would not be justifiable due the disproportionate breach of an offender's right to privacy and the potential adverse consequences associated with the public release of information, a *non-public* register would effectively address the underlying policy rationales behind sex offender registers.

By not releasing offender information to the general public, a non-public register would overcome obstacles of breaches of privacy, vigilantism and double punishment associated with the public disclosure of information. Additionally, a non-public register would not hinder offenders' surveillance and treatment, as they would not be forced 'underground' to escape public 'naming and shaming', and instead they could be monitored and rehabilitated back into society. A well thought out and empirically-based Act implementing a non-public register would not suffer the consequences of poor, emotionally-driven drafting and could be a useful tool in public protection. It is accordingly submitted that New Zealand should implement a *non-public* register, which could have a positive effect on the prevention, investigation and deterrence of future sexual offending.

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[176] In the UK, the cost of establishing a sex offender registry has already cost around 100 million.
[177] Kate Fitch, above n 133, 43.
[178] In California, annual operation costs are $950,000.

V NEW ZEALAND – THE FUTURE

A A non-public register

Having determined that New Zealand should implement a non-public sex offender register, the next question one must ask is: what form should such a register take? Important questions include, what information should the register contain? For how long should the information be maintained? What offenders will be required to register? When and to whom should information be disclosed? In answering these questions, New Zealand should draw on the experiences of Australia, Canada, and the United Kingdom, which have implemented non-public registers, as well as United States jurisdictions, which have implemented public registers, adapting the experiences of these other jurisdictions to the New Zealand legal environment. The following section outlines the characteristics proposed for a New Zealand non-public sex offender register.

B The characteristics of the proposed non-public register

1 Offences requiring registration

One of the main policy arguments explored above for the implementation of a sex offender register is the potential protection that a sex offender register could afford the public. The controlled release of information concerning sex offenders to individuals that are deemed to be at risk would allow those individuals to take the necessary steps to keep themselves safe from potential harm. Based on this reasoning, a logical response is that a sex offender register should only be applicable to offences which involve a public element, and which expose public citizens to some form of risk. Yet it is noted that many jurisdictions require registration for a wide range of offences extending to those that do not place other members of the public at a risk of harm, such as incest and bestiality.[179] For that reason, it is submitted that the proposed sex offender register should exclude the registration of offenders guilty of sexual offences not involving a public element.

Accordingly, it is proposed that a sex offender register in New Zealand should only be applicable to anyone convicted, or found not guilty by reason of insanity, of

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[179] See, for example, the Sexual Offences Act 2003 (UK), the Sex Offender Information Registration Act RS C 1985 c A-1.

offences under sections 128–138 (excluding section 130) of the Crimes Act.[180] In contrast to the Sex Offender Registry Bill 2003, the proposed register would not follow the Sexual Offences Act 2003 (UK) by applying to suspected sexual offenders warned by police of an offence that the suspected offender admits at the time. This is because, unlike the United Kingdom, New Zealand does not have a formal system of warning offenders, and including offenders warned by police would extend the scope of the register too far. Finally, the register would not be retrospective, and would only apply to offences committed after the implementation of the legislation and to offenders still serving an active portion of their sentence.

2 Information contained in the register

In order to be effective, it is necessary that the register contain sufficient information, not only for the investigation of future offences, but also to assist in the prevention of future offending. However, while it is important that the information contained in the register is sufficient to meet its objectives, it is also important that the information contained is not excessive. As recognised in United States' studies,[181] it is important to limit the information incorporated in a register, as excessive information would consequently require a huge amount of expenditure of time and money by the government to keep the register up to date. The maintenance of an up-to-date register is a key issue in the efficacy of the register,[182] however if more money is spent on updating paperwork rather than actively investigating and preventing future crimes, the very purpose of a register could be undermined. Accordingly, information pertaining to membership in clubs, children living with the offender, travel plans and employment (as required by English and Canadian registers) should be excluded from a New Zealand register. The inclusion of this information would impose too much of a burden on a small country and police force such as New Zealand.

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[180] See Appendix 1 for a list of these offences. This list includes all serious sexual offending, such as sexual violation, sexual grooming and indecent assault, but excludes incest and bestiality.

[181] Kate Fitch, above n 133, 43.

[182] Bill Hebenton and Terry Thomas, "Keeping Track? Observations on Sex offender registries in the US" (1997) Crime Detection and Prevention Series, Paper 83, 33.

It is proposed that New Zealand's register should contain the following information: an offender's name; alias(es); date of birth; address; photograph; fingerprints; DNA sample; previous sexual offences; drivers licence; and assessed level of risk (revised on a yearly basis). While this information is comprehensive for the purposes of the register, it is not excessive and would not be overly time-consuming to maintain. The onus would be on offenders to inform the authorities if any of their details change, with consequences for non-compliance.[183] Police would have the responsibility of confirming an offender's details and re-assessing the offender's level of risk at least once a year.

3 Length of time information retained on the register

Rather than imposing mandatory blanket periods for information to be kept on the register (such as the United States, which requires a minimum of 10 years, with some States requiring lifetime registration for all offenders), information should be held on the register for the maximum imprisonment period an offender could have received for the offence if sentenced.[184] This approach is more justifiable, as it would reflect the seriousness of the offence, rather than imposing a mandatory period, regardless of the gravity of the offending. For this reason, it would also be unjust to require lifetime registration for all second convictions.[185] It is therefore submitted that any secondary offences be cumulative on the total time an offender remains on the register.

Upon the expiration of the applicable registration period, and before an offender's information is withdrawn, the offender should be subject to a review by police to determine whether the offender still poses any risk to the public. If the offender is deemed to continue to pose a risk to society, discretion should be available to maintain the offender's information on the register for an extended period that is deemed reasonable and necessary.

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[183] Consequences for non-compliance would be discretionary and in monetary form.
[184] This is in accordance with the Canadian National Sex Offender Registry.
[185] Lifetime registration for second offences is required in certain jurisdictions of the United States and Canada.

4 Criteria for disclosure

Access to information on the register would be limited to the police and any other person authorised by the Minister of Justice. However, it is proposed that the police should be given discretion to disclose information from the register to certain members of the public if an offender is deemed to pose a high risk of harm to those individuals. This approach is similar to the position taken in various jurisdictions in the United States, where the dissemination of information is based on whether an offender is classified as having a low, medium or high-level of risk.[186] It is suggested for New Zealand that information relating to offenders classified as posing a 'low-level' or 'medium-level' of risk should be available only to the police and other authorised persons. Information concerning offenders classified as 'high-risk', however, should be released to school authorities and similar organisations, as well as close neighbours considered to be at risk of harm.

It is suggested that the disclosure of information to certain individuals based on an assessment of risk would be a more effective and justifiable method than that under the police Criminal Profiling Guidelines today. First, under the current Guidelines, information cannot be disclosed solely on the basis that an offender poses a danger to members of society. Instead, the Guidelines require that an offender is involved in active, persistent offending. Under the proposed register, information could be disclosed if an offender was deemed to pose a 'high-risk' to society. This is a more effective method of protecting the public. Secondly, when information is disclosed, it would only be to certain individuals deemed to be at risk of harm from the 'high-risk' offender, rather than to the wider community, minimising the publicity given to that information, and ensuring that an offender's right to privacy is not unjustifiably breached. This would provide for a more justifiable method of disclosing the information.

VII PROPOSED NON-PUBLIC REGISTER AND THE RIGHT TO PRIVACY

In order to determine whether the proposed register would survive a challenge that it was in breach of the tort of privacy in New Zealand, it is necessary to undergo an

[186] "Keeping Track? Observations on Sex offender registries in the US", above n 182, 28-9.

analysis of the tort of privacy in relation to the disclosure of sex offender information under the proposed register. The next section provides an example of the tort of breach of privacy applied to the disclosure of sex offender information under the current police Criminal Profiling Guidelines, followed by an analysis of the tort of breach of privacy applied to disclosure of information under the proposed register.

A The tort of breach of privacy applied to the Criminal Profiling Guidelines

The tort of breach of privacy was recently applied in relation to the publication of information relating to a sex offender in the case of *Brown v Attorney-General*.[187] Brown, a convicted paedophile, was on parole living in a suburban community. The police, believing Brown was likely to re-offend, circulated a flier around his neighbourhood identifying Brown as a convicted paedophile, containing his photograph, name and address. As a result, Brown was harassed and assaulted. He brought a claim against the police under the tort of breach of privacy.

The District Court held that Brown had a reasonable expectation of privacy in the information released, and that the publicity given to that information would have been highly offensive to a reasonable person.[188] Relevant factors contributing to this decision included the fact that the photograph of Brown was taken without his consent for the purposes in which it was used and that he did not anticipate this information being disclosed, the sensationalised manner and wide audience to which the flier was released, and the breach of the Criminal Profiling Guidelines by the police, as the information was "obtained as a result of otherwise legitimate police work".[189] The Court accordingly held that there had been an unreasonable breach of Brown's right to privacy and awarded Brown $25,000 in damages.[190]

Although *Brown* stands as authority for the proposition that the dissemination of an offender's personal information in the pursuit of public protection may constitute an

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[187] *Brown v Attorney-General*, above n 7.
[188] Ibid, paras 74, 75 and 97 Judge Spear.
[189] Ibid, para 75 Judge Spear.
[190] Ibid, para 106 Judge Spear.

unjustifiable breach of privacy, it should be noted that the decision to award damages in *Brown* was largely due to the circumstances in which the information was obtained and disseminated. It is submitted that the circumstances in *Brown* can be differentiated from a situation where information is lawfully obtained and only disclosed to certain members of the public through a non-public register. One must also note that *Brown* is a decision of the District Court and therefore does not constitute binding precedent for future decisions of higher courts.

B The tort of breach of privacy applied to the proposed register

In order to determine whether disclosure of an offender's information under the proposed non-public register would amount to a breach of the tort of privacy, an evaluation of each element of the tort will be undertaken. As previously mentioned, according to the *Hosking* majority, the elements that must be established in order to satisfy a breach of the tort of privacy are:[191]

> (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.

Even if these two elements are established, publication will not constitute a breach if the defendant can prove that there is a legitimate public concern in the information.[192]

1 Reasonable expectation of privacy in the information?

While some matters are inherently private (such as personal and family affairs), and some matters are inherently public (such as the ownership of land),[193] the distinction is not always simple to draw. As Gleeson CJ stated in *ABC v Lenah Game Meats Pty Ltd*, "there is no bright line which can be drawn between what is private and what is not."[194] His Honour proposed that in order to determine the privacy interest in facts that are not inherently obvious, one must apply "contemporary standards of morals and

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[191] *Hosking v Runting*, above n 25, para 117 Gault and Blanchard JJ.
[192] Ibid, para 129 Gault and Blanchard JJ.
[193] E Paton-Simpson, "Invasion of privacy by the publication of private facts" (1998) MLR 318.
[194] *ABC v Lenah Game Meats Pty Ltd*, above n 96.

behaviours".[195] Thus, for each piece of information that would be disclosed under the proposed register, an analysis will be undertaken of whether there is a reasonable expectation of privacy in the information according to contemporary standards of morals and behaviours.

(a) Is an address considered a private fact?

As evidenced by the case of *Regina v Holman*, information that is considered merely 'factual and descriptive in nature' traditionally does not attract a high degree of expectation of privacy.[196] In that case, the Court declined to uphold the applicant's claim that requiring a person to complete a census form was a breach of their rights. Similarly, American courts have declared that no privacy interest exists in respect of an individual's residential address[197] because this information is readily available in public records such as telephone books and electoral registers.[198]

While in *Brown*, Judge Spear noted that Brown "unquestionably" had a reasonable expectation of privacy in his residential information,[199] this statement was based on the finding that the information was "obtained as a result of otherwise legitimate police work" and the fact that Brown did not anticipate this information being disclosed to the public.[200] Arguably then, the reasoning in *Brown* would not be applicable to situations in which offenders were required to surrender their information for the purposes of a register pursuant to an Act of Parliament, knowing that the information may be disclosed to certain members of the public if the offender is considered to be at risk. The information would therefore be obtained through legitimate means and offenders would anticipate that their information would be disclosed. If information was obtained in this manner, it is likely that courts would follow the American precedent and find that offenders would not be able to claim a reasonable expectation of privacy in their residential information.

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[195] Ibid.
[196] *Regina v Holman* (1982) 28 CR (3d) 378.
[197] *Russell v Gregoire*, (1997) 124 F.3d 1079, 1094 (9th Cir).
[198] *Doe v Poritz*, (1995) 142 N.J. 1, 662 A. 2d 367, 409.
[199] *Brown v Attorney-General*, above n 7, para 75 Judge Spear.
[200] Ibid.

(b) Are criminal convictions a private fact?

Judge Spear in *Brown* determined that there was not a reasonable expectation of privacy in relation to the conviction in that case, as it was considered to be public information, given that sentencing had occurred only three and a half years earlier.[201] This result accords with the prominence given to open justice in New Zealand, which means that recent convictions will most likely be public information. This indicates that an offender should not be able to claim a reasonable expectation of privacy in such information. Indeed, it has been argued that there is no reasonable expectation in respect of convictions at all, given that such information is a matter of public record.[202] Yet, although such information may be publicly accessible in theory, court records in New Zealand will only be available from the register where the hearing took place and access will not be granted without a "genuine and proper reason".[203] This suggests that the principle of open justice should not automatically negate an offender's reasonable expectation of privacy in their convictions.

Furthermore, it is arguable that even if convictions were once public facts, an expectation of privacy can attach to the information regarding conviction after a period of time.[204] In *Tucker v News Media Ownership*, McGechan J held that the plaintiff did have a reasonable expectation of privacy over past convictions, including his most recent conviction, which had occurred four years prior to publication.[205] The notion that public information can become private over time is also explicitly recognised by principle (ii) of the Broadcasting Standards Authority Privacy Principles[206] and affirmed by the decision in *TV3 Network Services v BSA*.[207] In accordance with these authorities, whether an offender has a reasonable expectation of privacy in their criminal convictions may depend on how long ago the offending occurred.

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[201] Ibid, paras 68, 71 and 75 Judge Spear.
[202] *Cox Broadcasting Co v Cohn*, above n 65, 487. See also: *Restatement of the Law of Torts 1977*, above n 59, 384; "The Right to Privacy", above n 28, 216.
[203] Lemin, above n 34, 9.
[204] *Briscoe v Readers Digest Association* (1971) 483 P 2d 34, 41.
[205] *Tucker v News Media Ownership Ltd*, above n 37, 737 McGechan J.
[206] Broadcasting Standards Authority http://www.bsa.govt.nz (accessed 30 June 2008).
[207] *TV3 Network Services v BSA* [1995] 2 NZLR 720, 726-728 Eichelbaum CJ.

(c) Does compilation of information give rise to a greater expectation of privacy?

It has been argued that an expectation of privacy can be raised by a compilation of publicly available information into a single source.[208] The proposed register would compile information such as: an offender's name; alias; date of birth; address; photograph; previous convictions; drivers licence number; fingerprints; and DNA. It is therefore necessary to determine whether an offender would have a reasonable expectation of privacy in the compilation of the above information on a register. However, one must note that while the register does compile all of the above information, only an offender's name, photograph, address and previous convictions would potentially be released to the public. The question, then, is whether a privacy interest is created by the compilation and dissemination of an offender's name, photograph, residential address and previous convictions in one document.

While an expectation of privacy in the compilation of information has been claimed on numerous occasions, such a right has never been recognised by American courts. This is evidenced by the case of *Doe v Portiz*, in which it was held that a compilation of public information would not be afforded the same protection as private information, merely on the basis that it is compiled into a single source.[209] In that case, a convicted sex offender brought a claim against the State of New Jersey, claiming that, among other things, the registration and dissemination of his information under a register breached his right to privacy. The Court refused to uphold the offender's privacy rights, stating that the information was not deserving of a particularly high degree of protection, and public policy interests in the disclosure of the information outweighed any rights to privacy.[210] This is a sensible outcome and it is therefore submitted that it is unlikely that any additional protection would be offered to a compilation of information by the New Zealand courts.

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[208] *Doe v Poritz*, above n 198, 410.
[209] Ibid, 410.
[210] Ibid, 412. The public policy interests in the disclosure of the information included the danger of recidivism of sexual offenders and the State interest in protecting the safety of the members of the public.

(d) Conclusion – reasonable expectation of privacy in the information?

From the discussion above, it is unlikely that offenders could claim a reasonable expectation of privacy in their name, address or photograph if there was legislation in force requiring that such information be surrendered upon conviction, for the purposes of a sex offender register. This is because the information would be lawfully obtained, and offenders would recognise that the information may be released to certain members of the public if they were deemed to be a risk to society. While details of an offender's previous criminal convictions may entail a reasonable expectation of privacy, this obstacle could be overcome by simply not releasing the details of an offender's specific criminal convictions. The same goals would still be achieved by merely stating that the offender poses a risk to the public.

As a consequence of the above discussion, the initial element of the tort of privacy would not be breached by the dissemination of information from the proposed non-public register to certain members of society, as offenders would not have a reasonable expectation of privacy in the information. In reality this ends the inquiry, as both elements of the tort must be fulfilled. However, the remaining elements of the tort of breach of privacy will be analysed in the interests of completeness.

2 *Would disclosure be highly offensive to the reasonable person?*

In *P v D*, the Court established that whether disclosure is 'highly offensive' is to be determined from the perspective of an objective reasonable person in the shoes of the claimant.[211] What is required is a public disclosure that is truly harmful, distressing or humiliating.[212] Thus, it is necessary to consider whether a reasonable person in the claimant's shoes would find it highly offensive to have information pertaining to his or her conviction and other personal details such as his or her name, photograph and address distributed publicly. Clearly any individual, no matter what his or her history, would find it harmful, distressing and humiliating to have such information released. Arguably, the

[211] *P v D*, above n 40, para 34 Nicholson J.
[212] Ibid.

distress would be particularly acute for offenders who have completed their punishment and are attempting to reintegrate themselves back into the community.

A counter argument is that offenders have less of an expectation of privacy than other members of the public, consequently rendering disclosure of their information less offensive than others. American courts have attributed different privacy expectations to offenders, with some courts labelling offenders' privacy rights as "significant" or "important" and others labelling their rights as "relatively modest" or "minimal".[213] New Zealand courts, on the other hand, accept that whether disclosure is considered offensive is coloured by the degree of an individual's expectation of privacy.[214] In accordance with this principle, it could be argued that once offenders have been warned of the fact that their personal information could be disclosed under the proposed register, they have less of an expectation of privacy and should consequently find the dissemination of such information less offensive.

Furthermore, in determining whether publication of information is highly offensive, it is not the nature of the *information* that is in question, but whether the *publicity* given to that information is highly offensive.[215] Thus, the extent of the publication is relevant in determining whether disclosure of the information is considered highly offensive. This is illustrated in the case of *Hosking*, where it was held that privacy would only be protected if there was widespread publicity of the information.[216]

According to these considerations, it is unlikely that information disclosed under the proposed non-public register would be given sufficient publicity to be considered highly offensive. Information would be selectively disclosed to certain members of the public considered at risk, based on an assessment of the risk of harm the offender posed to society. Judge Spear in *Brown* stated that the flier's "overall effect" was the subject of determination.[217] In that case, considerations such as the large audience and

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[213] *Doe v Poritz*, above n 198, 57.
[214] *Hosking v Runting*, above n 25, para 256 Tipping J.
[215] *Hosking v Runting*, above n 25, para 117 Gault P and Blanchard J..
[216] *P v D*, above no 40, 601 Nicholson J.
[217] See *Brown v Attorney-General*, above n 7, para 59 Judge Spear.

sensationalised manner in which the flier was distributed contributed to the finding that the disclosure would be considered highly offensive to a reasonable person. However, if information is disseminated in a controlled fashion, in a non-sensationalised manner and only when deemed necessary, it is unlikely that such dissemination would breach the *Brown* threshold.

3 Public interest in disclosure

Even if the elements of the tort of privacy are satisfied, liability will not result if the defendant proves, on the balance of probabilities, that the information disclosed is a matter of legitimate public interest.[218] As recognised in *Hosking*, the extent of any right to freedom of expression in a publication is directly linked to the extent of any demonstrable legitimate public concern in the information publicised.[219] The public interest element therefore ensures that the right to privacy is not excessively intrusive on the public's right to freedom of expression, by requiring a balancing exercise between the two competing rights.

When balancing freedom of expression and privacy interests, a proportional approach must be taken. That is, the extent of the publication must be proportional to the identified public interest.[220] The greater the invasion of privacy, the greater the level of legitimate public concern must be for the defence to be successful.[221] The case of *Brown* is an example of a court applying the proportionality approach. In *Brown* it was held that there was *some* public interest in the information, but that the *extent* of publication went beyond any legitimate public interest.[222]

In accordance with the above authorities, to rely on a legitimate public interest defence, the disclosure of sex offender information must be proportionate to any legitimate public concern in the information. Consequently, the dissemination must be to a limited, concerned audience, with only the appropriate information being disclosed, and

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[218] *Hosking v Runting,* above n 25, para 129 Gault P and Blanchard JJ.
[219] Ibid, para 132 Gault P and Blanchard J.
[220] Ibid, para 132 Gault P and Blanchard J.
[221] Ibid, para 132 Gault and Blanchard JJ.
[222] *Brown v Attorney-General,* above n 7, para 93 Judge Spear.

not in a sensationalised manner. In this way, the public's right to freedom of expression and safety is promoted, as the members of the public deemed to be at risk are being informed of information of concern to them, whilst an offender's right to privacy is only being limited in so far as it is necessary to protect the public and ensure their right to freedom of information. If disclosure under the proposed register is in accordance with these criteria, it is likely that, should such disclosure breach an offender's right to privacy, liability would not result as the disclosure would be consistent with legitimate public concern.

Finally, one must note that while public interest provides a defence for disclosure, mere public curiosity will not be sufficient.[223] As the Court recognised in *Hosking*, there is a difference between 'public interest' and mere 'public curiosity'.[224] Thus, in justifying disclosure of information from the proposed register, it must be shown that the recipients of the information have a legitimate interest in this information, rather than merely a curiosity. Hence, while sexual offending will undoubtedly be a matter of public curiosity, this is not a sufficient concern to satisfy the public interest defence. Despite these concerns, it is unlikely that this distinction will prove fatal in relation to disclosure under the proposed register, as sexual offending and protection of the public from such offences is unquestionably a legitimate public matter, rather than a matter of mere public curiosity.

VIII CONCLUSION

When a child sexually abused, undoubtedly, one's initial reaction is that something must be done to prevent such a tragedy from occurring again. Arguably, by valuing a sexual offender's right to privacy over freedom of expression and public protection, the government is currently not doing enough to further the investigation, prevention and deterrence of future offending. However, one must ask whether the implementation of a sex offender register is the best way of achieving these goals. This paper has set out to demonstrate that, although the implementation of a *public* register may result in more harm than good, a *non-public* register could indeed be an effective

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[223] *Hosking v Runting,* above n 25, paras 133-134 Gault and Blanchard JJ.
[224] Ibid.

solution in the investigation, prevention and deterrence of future offending. Although this option was rejected by Parliament in 2003, it is submitted that this was due to deficiencies in the Sex Offenders Registry Bill itself, and that a register with similar characteristics as that proposed in this paper would remedy the deficiencies of the 2003 Bill.

Despite initial concerns surrounding the competing rights to freedom of expression and privacy, an examination of other jurisdictions has shown that a sex offender register can survive in the face of the competing rights, and indeed this paper has shown that a balance between both rights can be advanced by the selective disclosure of information to members of the public considered at risk in New Zealand. By only allowing for minimal selective disclosure, an offender's right to privacy would not be unjustifiably breached, and individuals at risk would be afforded their right to information and protection.

The impact of sexual offending is both substantial and oppressive,[225] and since 1985, offences of rape have been increasing by approximately 11 per cent per annum.[226] Solutions are required to address such a serious threat to society sooner rather than later. While disclosure is already provided for by the police Criminal Profiling Guidelines, the register proposed in this paper would provide for more effective and justifiable disclosure in statutory form, as it would allow for disclosure based on an assessment of risk, rather than persistent offending, and promote a consistent approach that fairly balances the rights to freedom of expression and privacy. The compilation of information under the proposed register would also be of substantial benefit to the police for the investigation and detection of future offences, as all relevant information about sexual offenders would be in one source. Introducing legislation to implement a sex offender register would also give Parliament a chance to debate the subject and bring the matter to public attention. With these comments in mind, perhaps a well-drafted, empirically-based piece of legislation introduced to Parliament could next time be met with a different response.

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[225] "Keeping Track? Observations on Sex offender registries in the US", above n 182, 2.
[226] Ibid, 1.

IX APPENDIX 1 – STATUTORY SECTIONS OF THE CRIMES ACT 1961

128 Sexual violation defined

(1) Sexual violation is the act of a person who—

(a) rapes another person; or

(b) has unlawful sexual connection with another person.

128A Allowing sexual activity does not amount to consent in some circumstances

(1) A person does not consent to sexual activity just because he or she does not protest or offer physical resistance to the activity.

128B Sexual violation

(1) Every one who commits sexual violation is liable to imprisonment for a term not exceeding 20 years.

129 Attempted sexual violation and assault with intent to commit sexual violation

(1) Every one who attempts to commit sexual violation is liable to imprisonment for a term not exceeding 10 years.

129 A Sexual conduct with consent induced by certain threats

(1) Every one who has sexual connection with another person knowing that the other person has been induced to consent to the connection by threat is liable to imprisonment for a term not exceeding 14 years.

131 Sexual conduct with dependent family member

(1) Every one is liable to imprisonment for a term not exceeding 7 years who has sexual connection with a dependent family member under the age of 18 years.

(2) Every one is liable to imprisonment for a term not exceeding 7 years who attempts to have sexual connection with a dependent family member under the age of 18 years.

(3) Every one is liable to imprisonment for a term not exceeding 3 years who does an indecent act on a dependent family member under the age of 18 years.

131B Meeting young person under 16 following sexual grooming, etc

(1) Every person is liable to imprisonment for a term not exceeding 7 years if,—

(a) having met or communicated with a person under the age of 16 years (the young person) on an earlier occasion, he or she takes one of the following actions:

(i) intentionally meets the young person:

(ii) travels with the intention of meeting the young person:

(iii) arranges for or persuades the YP to travel with the intention of meeting him;

132 Sexual conduct with child under 12

(1) Every one who has sexual connection with a child is liable to imprisonment for a term not exceeding 14 years.

(2) Every one who attempts to have sexual connection with a child is liable to imprisonment for a term not exceeding 10 years.

(3) Every one who does an indecent act on a child is liable to imprisonment for a term not exceeding 10 years.

134 Sexual conduct with young person under 16

(1) Every one who has sexual connection with a young person is liable to imprisonment for a term not exceeding 10 years.

(2) Every one who attempts to have sexual connection with a young person is liable to imprisonment for a term not exceeding 10 years.

(3) Every one who does an indecent act on a young person is liable to imprisonment for a term not exceeding 7 years.

135 Indecent assault

Every one is liable to imprisonment for a term not exceeding 7 years who indecently assaults another person.

138 Sexual exploitation of person with significant impairment

(1) Every one is liable to imprisonment for a term not exceeding 10 years who has exploitative sexual connection with a person with a significant impairment.

X BIBLIOGRAPHY

I PRIMARY SOURCES

A Cases

A v B plc [2002] 2 All ER 545.

A-G v BBC [1981] 1 AC 303.

A-G v Guardian Newspapers (No 2) [1990] 1 AC 109.

Abrams v United States (1919) 250 US 616.

Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd (2001) 185 ALR 1.

Australian Consolidated Press Ltd v Ettingshausen (Court of Appeal, New South Wales, CA 40079 of 1993, 13 October 1993).

Bradley v Wingnut Films [1993] 1 NZLR 415.

Briscoe v Readers Digest Association (1971) 483 P 2d 34.

Brooker v Police [2007] 3 NZLR 91.

Brown v Attorney General [2006] DCR 630.

Campbell v MGN Ltd [2003] 1 All ER 224.

Carr v Watkins [1962] 227 Md 578, 177 A2d 841.

Church of Scientology Inc v Woodward (1982) 154 CLR 25.

City of Longueuil v Godbout [1997] 3 SCR 844.

Connecticut Dept. of Public Safety v Doe (2003) 271 F.3d 38 SC.

Cox Broadcasting Co v Cohn (1975) 420 US 469.

Cruise and Kidman v Southdown Press Pty Ltd (1993) 26 IPR 125.

Daniels v Thompson [1998] 3 NZLR 22.

Doe v Australian Broadcasting Corporation [2007] VCC 281.

Doe v Poritz (1995) 142 N.J. 1, 662 A. 2d 367.

Douglas v Hello! Ltd [2005] EWCA Civ 595.

Duff v Communicado Ltd [1996] 2 NZLR 89.

Florida Star v B.J.F. (1989) 491 US 524.

Green Corns Ltd v *CLA Verley Group Ltd* [2005] EWHC 958.

Griswold v Connecitut (1965) 381 US 479.

Grosse v Purvis (2003) Aust Torts Reports 81-706.

Hansen v R [2007] NZSC 7.

Hellewell v Chief Constable of Derbyshire [1995] 1 WLR 804.

Hosking v Runting [2005] 1 NZLR 1 (CA).

Hung v Gardiner [2002] BCSC 1234.

In re S (a child) (Identification: restrictions on publication) [2005] 1 AC 593.

Kansas v Hendricks (1997) 521 US 346, 117 SCt 2072.

Kaye v Robertson [1991] FSR 62.

L v G [2002] DCR 234.

Lawrence v Texas (2003) 539 US 558.

Leander v Sweden Series A, no 116, 29 (1978).

Les Editions Vice-Versa v Aubry and Canadian Broadcasting Corporation [1998] 1 SCR 591.

MacKay v Buelow (1995) 11 RFL (4th) 403.

Melvin v Reid (1931) 112 P 285.

Metter v Los Angeles Examiner (1939) 95 P 2d 491 (2nd Cir).

Miller v TCN Channel Nine (1988) 161 CLR 556.

Moonen v Film and Literature Board of Review [2002] 2 NZLR 9.

New York Times v Sullivan (1964) 376 US 254.

News Media Ownership Ltd v Tucker (23 October 1986) CA 172/86.

P v D [2000] 2 NZLR 591.

Police v O'Connor [1992] 1 NZLR 87.

Prockter v R [1997] 1 NZLR 295.

Pullman v Walter Hill & Co Ltd [1891] 1 QB 524.

R v Brown [1996] AC 543.

R v Chief Constable of North Wales Police, ex parte Thorpe [1999] QB 396.

R v Duarte [1990] 1 SCR 30.

R v Keegstra [1990] 3 SCR 697.

R v Liddell [1995] 1 NZLR 538.

R v Oakes [1986] 1 SCR 103.

R v Secretary of State for the Home Dept, ex p Simms, [1999] 3 All ER 400.

R v Sharpe [2001] 1 SCR 45.

Re Victim X [2003] 3 NZLR 220 (HC) Hammond J.

Regina v Holman (1982) 28 CR (3d) 378.

Reynolds v Times Newspapers [2001] 2 AC 127.

Roe v Wade (1973) 410 US 113.

Rogers v TVNZ [2007] NZSC 91.

Russell v Gregoire, (1997) 124 F.3d 1079, 1094 (9th Cir).

RWDSU v Dolphin Delivery Ltd [1986] 2 SCR 573.

Sanders v Police Unreported, 20 September 1991, High Court, Christchurch Registry, Tipping J.

Sunday Times v UK (1979) 2 EHRR 245.

T v Police (22 April 2005) HC DUN 412/12 Chrisholm J.

Television New Zealand Ltd v BA (High Court, Wellington CIV 2004-485-1299, 13 December 2004, Miller J).

Television New Zealand v Rogers (7 August 2006) CA12/06.

Truxes v Kenco Enterprises Inc [1963] 80 SD 104, 119 NW 2d 914.

Tucker v News Media Ownership Ltd [1986] 2 NZLR 716.

TV3 Network Services v BSA [1995] 2 NZLR 720.

Venables and Another v News Group Newspapers Ltd and others [2001] 1 All ER 908.

Victoria Park Racing and Recreation Grounds v Taylor (1937) 58 CLR 479.

X v Attorney General [1994] NZFLR 433.

B Legislation

1 Acts

Adam Walsh Child Protection and Safety Act (Pub L 109-248).

Broadcasting Act 1989.

Child Protection (Offender Registration) Act 2000 (NSW).

Child Protection (Offender Reporting) Act 2004 (QLD).

Child Protection (Offender Reporting and Registration) Act 2004 (NT).

Commonwealth of Australia Act 1900 (Cth).

Community Protection (Offender Reporting) Act 2004 (WA).

Crimes Act 1961.

Human Rights Act 1998 (UK).

Jacob Wetterling Act 136 VI USC § 14071.

Megan's Law Californian Penal Code Section 290.

New Zealand Bill of Rights Act 1990.

Privacy Act 1993.

Privacy Amendment (Private Sector) Act 2000 (Cth).

Sex Offender Information Registration Act RS C 1985 c A-1.

Sex Offender Registration Act 2004 (Ontario).

Sex Offenders Registration Act 2004 (Vic).

Sex Offenders (Notice Requirement) (Foreign Travel) Regulations 2001 (UK).

Sex Offenders Act 1997 (UK).

Sexual Offences Act 2003 (UK).

2 Bills

Australian Human Rights Bill 1985 (Cth).

Constitution Alteration (Post-War Reconstruction and Democratic Rights) Bill 1944 (Cth).

Human Rights Bill 1973 (Cth).

Sex Offenders Registry Bill 2003, no 36-1.

C International Conventions

International Covenant on Civil and Political Rights (19 December 1966) 999 UNTS 171.

Universal Declaration of Human Rights, UNGA Resolution 217A (III) (10 December 1948).

D Texts

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

Burrows (ed) *Todd on Torts* (8ed, 2001, Brokers, Wellington).

Emerson, Thomas *The system of freedom of expression,* (Random house, New York, 1970).

Foley, Carol *The Australian Flag: Colonial Relic or Contemporary Item?* (Federation Press, Victoria, 1996).

Keeton, W P (ed) *Prosser and Keeton on the Law of Torts* (5ed, West Publishing Co, St Pauls, 1984).

Markesinis (ed) *Protecting Privacy* (Oxford University Press, New York, 1999).

Prosser, William (ed) *Restatement of the Law: Torts* (2ed, American Law Institute Publishers, Washington DC, 1977).

Robertson, JB (ed) *Adams on Criminal Law* (Brooker and Friend, Wellington, 1992).

Rousseau, Jean-Jacques *The Social Contract* (Penguin Classics, Harmondsworth, 1968).

Todd, Stephen (ed) *The Law of Torts in New Zealand* (3ed, Brookers, Wellington, 2001).

Todd, Stephen (ed) *The Law of Torts in New Zealand* (4ed, Brookers, Wellington, 2005).

E Government Publications

(30 July 2003) 610 NZPD 7494.

Attorney-General *Sex Offenders Registry Bill: Consistency with the New Zealand Bill of Rights Act 1990* (Wellington, 2003).

Australian Law Reform Commission, *Privacy*, ALRC 22 (1983).

Australian Law Reform Commission, *Review of Australian Privacy Law*, DP 72 (2007).

Department of Corrections "And there was light: Evaluating the Kia Marama Treatment Programme for New Zealand Sex Offenders against Children" (Wellington, 1998).

Department of Corrections "Community Solutions for the Community's Problem: An Outcome Evaluation of Three New Zealand Community Paedophile Treatment Programmes" (Auckland, 2003).

Department of Corrections "Te Whakakotahitanga - An Evaluation of the Te Piriti Special Treatment Programme" (Wellington, 2003).

Justice and Electoral Select Committee *Sex Offenders Registry Bill – Report of the Justice and Electoral Committee* (36-1, Wellington, 2003).

Law Commission "Privacy concepts and issues: review of the law of privacy stage 1 (January 2008, Wellington).

Law Commission "Public Registers: review of the law of privacy stage 2 (January 2008, Wellington).

Ministry of Justice *Guidelines on Criminal Profiling* (Ministry of Justice, Wellington, 1993).

New Zealand Law Society *Submissions on the Sex Offender Registry Bill* (submission to Justice and Electoral Select Committee, 2003).

Palmer, Geoffrey (Minister of Justice) *A Bill of Rights for New Zealand, A White Paper* (PD Hasselberg Government Printer, Wellington, 1985).

US Department of Justice "Managing Sex Offenders in the Community: A National Overview" (Oregon, September 30, 2001).

II SECONDARY MATERIALS

A Articles

Baylis, Calire "Justice Done and Justice Seen to be Done – The Public Administration of Justice" (2001) 21 VUWLR 177.

Berliner, L "Community Notification: Neither a Panacea nor a Calamity" (1996) 8 Sexual Abuse: A Journal of Research and Treatment 101.

Bloustein, Edward J "Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser" (1964) 39 NYU L Rev 962, 980-982.

Bottoms, A E "The Philosophy and Politics of Punishment and Sentencing" in C Clarkson and R Morgan (eds) *The Politics of Sentencing Reform* (Oxford University Press, Oxford, 1995).

Edwards, W and C Hensley "Contextualising sex offender management legislation and policy: Evaluating the problem of latent consequences in community notification laws" (2001) 45 Intl J Offender Therapy & Comparative Criminology 83.

Elbogen, E B, M Patry and M Scalora "The Impact of Community Notification Laws on Sex Offender Treatment Attitudes" (2003) 26 Intl J Law & Psychiatry 207.

Farkas, M and Stitchman, A "Sex Offender Laws: Can Treatment, Punishment, Incapacitation, and Public Safety be Reconciled?" (2002) Crim J Law Rev, 27-2.

Fitch, Kate "Megan's Law: Does it protect children (2)?" (2000) NSPCC 36.

Furby, Lita, Mark Weinrott and Lyn Blackshaw "Sex Offender Recidivism: A review" (1989) 105 Psychology Bulletin 3.

Gavison, Ruth "Privacy" (1980) 89 Yale LJ 421.

Hinds, Lyn and Kathleen Daly "The War on Sex Offenders: community notification in perspective" Australian and New Zealand Journal of Criminology (2000).

Kalvern Jr, Harry "Privacy in tort Law – were Warren and Brandeis wrong?" (1966) 31 Law & Contemp Probs 327.

Lemin, Jae "To Know or Not to Know?" (1998) 28 VUWLR 415.

Levenson, Jill S and Leo P Coter "The Effect of Megan's Law on Sex Offender Reintegration" (2005) 21 Journal of Contemporary Criminal Justice 49.

Levine, J "Can the Right of Publicity Afford Free Speech? A New Right of Publicity Test for First Amendment Cases" (2004) 27 Hastings Comm & Ent LJ 171.

Lotke, Eric "Politics and Irrelevance: Community Notification Statutes" (1997) 10 Fed Sent R 64.

McAlinden, Anne Marie "The Use of 'Shame' with Sex Offenders" [2005] 45 Brit J Criminology 373.

Moreham, Nicole A "Privacy in the Common Law (2005) 121 LQR 628.

Munday, R "Name Suppression: an adjunct to the presumption of innocence and to the mitigation of sentence – 1" [1991] CrimLR 680.

Murphy, Bridget K "Developments in the Law of Invasion of Privacy in New Zealand and England: *L v G, A v B*" (2002) 9 AULR 1031.

Orechio, M and Theresa A Tebbett "Sex offender registration: community Safety or Invasion of Privacy?" (1998) 13 St John's J Legal Comment 675.

Palmer, Geoffrey "Privacy and the Law" [1975] NZLJ 747.

Paton-Simpson, Elizabeth "Human Interests: Privacy and Free Speech in the Balance" 16 NZLR 225.

Paton-Simpson, Elizabeth "Invasion of privacy by the publication of private facts" (1998) MLR 318.

Prosser, William L "Privacy" (1960) 48 Cal L Rev 383.

Roach, Kent "Four Models of the Criminal Process" (1999) 29 J Crim L & Criminology 699.

Schram, D and C D Milloy "Community Notification: A study of offender characteristics and recidivism" (Washington State Institute for Public Policy, October 1995).

Snider, Laureen "Feminism, Punishment and the Potential of Empowerment" (1994) 9 Can J L & Soc'y 75.

Talarico, Susette "What do we Expect of Criminal Justice? Critical Questions of Sanction Policy, Sentencing Policy and the Politics of Reform" (1979) 4 Crim Just Rev 55.

Wacks, Raymond "The Poverty of 'Privacy'" (1980) 96 LQR 73.

Warren, Samuel and Louis Brandeis "The Right to Privacy" (1890) 4 Harv L Rev 193.

Zimmerman, Diane "Requiem for a Heavyweight: A Farewell to Warren and Brandeis' Privacy Tort" (1983) 68 Cornell L Rev 291.

B Electronic Materials

2004/2005 Department of Corrections Annual Report http://www.corrections.govt.nz (accessed 8 July 2008).

Broadcasting Standards Authority http://www.bsa.govt.nz (accessed 30 June 2008).

Caslon Analytics offender registries http://www.caslon.com.au (accessed 17 July 2008).

Doctor Driven out of Home by Vigilantes http://www.guardian.co.uk (accessed 31 May 2008).

KLAAS Kids www.klaaskids.org (accessed 20 May 2008).

Megan Nicole Kanka Foundation www.megannicolekankafoundation.org/mission.htm (accessed 21 May 2008).

Megan's Law Information http://www.ci.garden-grove.ca.us/ (accessed 17 May 2008).

Murder Puts Focus on Sex-Offender Registry Policies http://www.npr.org (accessed 21 May 2008).

Pressure to halt 'name and shame' campaign http://www.telegraph.co.uk/news/ (accessed 16 June 2008).

Sensible Sentencing Trust www.safe-nz.org.nz (accessed 21 May 2008).

The myth of social contract http://www.no-treason.com (accessed 17 July 2008).

Miscellaneous

Alexander, Margaret "Sex Offender Treatment: A response to Furcy, et al 1989" (Presented at Conference of the American Association for the Treatment of Sexual Abusers, Beaverton, 11 November 1994).

Burrows, John "Invasion of privacy – *Hosking* and beyond" (Legal Research Foundation Media Law Conference, Auckland, 15 June 2006.

Hebenton, Bill and Terry Thomas "Keeping Track? Observations on Sex offender registries in the US" (1997) Crime Detection and Prevention Series, Paper 83.

Smith, Mike "Sex Offender Registry OK'd" (20 February 1996) *The Journal Gazette,* Fort Wayne.