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REGISTERING PUBLIC FEAR: AN ANALYSIS OF THE NEW ZEALAND CHILD SEX OFFENDER GOVERNMENT AGENCY REGISTER

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Abstract

Both in New Zealand and internationally, there has been an increase in protection measures for the avowed purpose of keeping children safe. The Child Protection (Child Sex Offender Government Agency Registration) Act 2016 was introduced in New Zealand in attempt to address the perceived risk posed by child sex offenders released back into the community. The Act establishes a Child Sex Offender Register that keeps an extensive range of personal information about offenders who have committed a qualifying offence. This paper critiques the efficacy and suitability of the Register, evaluating both why the Register came about and how it will work in practice. The Register has a number of conceptual and operational problems, making it an ineffective policy to address the problem of child sexual offending in New Zealand.

Keywords

The Child Protection (Child Sex Offender Government Agency Registration) Act 2016 – child sex offender – child sexual offending – register – penal populism

Table of Contents

I Introduction

There is no dispute that sexual offending against children is universally abhorred and considered one of the "most offensive forms of criminal activity possible".[1] Victims of child sexual offences are particularly vulnerable, often lacking emotional, physical and intellectual maturity.[2] Child sexual offending causes serious and long-lasting harm to victims, their families and the community. This can include chronic depression, post-traumatic stress-disorder, anxiety over sex, flashbacks and in extreme cases, personality disorder.[3] The prevalence of sexual offending is also alarming. Up to one in three girls in New Zealand will be subject to an unwanted sexual experience by the age of 16 years old, the majority of those cases being considered serious.[4]

In pursuit of keeping our children safe, there has been an increase, both in New Zealand and internationally, in protection measures such as sex offender registration, notification and vetting systems.[5] The Child Protection (Child Sex Offender Government Agency Registration) Act 2016 (the Act) was introduced in New Zealand in attempt to address the perceived risk posed by child sex offenders released back into the community. The Act establishes a Child Sex Offender Register (the Register) that keeps an extensive range of personal information about offenders who have committed a qualifying offence. The Register is considered a private register, as it is only available to a number of government agencies and third parties in limited circumstances. It was enacted on the premise that monitoring sex offenders when they are released back into communities will enhance public safety in general and the sexual safety of children in particular.[6]

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1 (2 June 2016) 714 NZPD 11657.

2 New Zealand Police and Department of Corrections *Regulatory Impact Statement: Child Protection Offender Register and Risk Management Framework* (6 June 2014) at 5.

3 Angela Browne and David Finkelhor "Impact of child sexual abuse: A review of the research" (1986) 99 Psychological Bulletin 66 at 66.

4 Janet Fanslow and others "Prevalence of child sexual abuse reported by a cross-sectional sample of New Zealand women" (2007) 31 Child Abuse and Neglect 935 at 940.

5 Nessa Lynch "A Statutory Vetting Scheme for the Children's Workforce in New Zealand: Rights, Responsibilities and Parameters" (2013) 44 VUWLR 539 at 539.

6 (15 September 2015) 708 NZPD 6634.

The aim of this paper is to critique the efficacy and suitability of the Register, evaluating both why the Register came about and why it is problematic. Part II of the paper explains how the Register practically works and to whom the Register applies. Part III examines the conceptual foundations of the Register and considers the broader theories that the Register is symptomatic of. Part IV of the paper explores the reasons specific to New Zealand for the creation of the Register. Parts V and VI evaluate the major conceptual and practical problems with the Register and suggest why it will not only be ineffective, but may also be harmful to those it is intended to protect. Alternative options to mitigate child sexual offending in New Zealand - the opportunity cost of the Register - are discussed in Part VII.

II The Register

A Purposes of the Register

The Register is a political response to the perceived public concern about a lack of oversight for sex offenders released back into the community.[7] The purpose of the Register, as stated in the Act, is to reduce both sexual reoffending against child victims and the risk posed by serious child sex offenders.[8] This purpose is measurable and outcome focused; the Register would be deemed successful if reoffending of individuals subject to the Register is reduced.

Although this is a positive goal, in the scheme of all child sexual offences, this is very narrow. Reporting of sexual abuse is very low in New Zealand with an estimated nine per cent of incidents reported to the police.[9] From this, only 13 per cent result in conviction, making the offenders potentially eligible for the Register.[10] In other words, only one per cent of all incidences of child sexual abuse in New Zealand are successfully prosecuted. The Register will cost $146 million to implement over the next 10 years,[11] raising questions about cost-effectiveness; an issue discussed in Part VI. By focusing on those

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7 (15 September 2015) 708 NZPD 6638.

8 Child Protection (Child Sex Offender Government Agency Registration) Act 2016, s 3.

9 Ministry of Women's Affairs *Restoring Soul: Effective Interventions for adult victims/survivors of sexual violence* (October 2009) at 29.

10 (1 June 2016) 714 NZPD 11664.

11 New Zealand Police and Department of Corrections, above n 2, at 4.

who have been convicted, the state is forgoing the opportunity to detect or prevent the many incidents of child sexual abuse that go unreported.

The purpose to reduce reoffending is also based on the presumption that the registration requirements imposed on released child sex offenders will be a deterrent from reoffending. Jono Naylor MP spoke to this effect of the Register, suggesting "when those offenders are perhaps tempted to reoffend, the knowledge that there is somebody who is keeping track of them will also act as a deterrent".[12] But it is questionable whether this is true. The result of a study that analysed the effects of notification laws in the United States (US) concluded that registration laws had no observable influence on the overall rates of offending.[13] The study was of public registration systems, which are more likely to have a deterrent effect than private registration systems. It is therefore very unlikely the New Zealand private Register, in and of itself, will act as a successful deterrent.

B Application of the Register

The Act applies to any "registrable offender". This is a person over 18 who has, in respect of a conviction for a qualifying offence, been sentenced to imprisonment, or sentenced to a non-custodial sentence and made subject to a registration order.[14] There is likely a disjunct between what the public would conventionally think of as sexual offending compared with the range of offences that are included in the Register. Sexual offences, as included in the Act, are not limited to sexual violation or sexual connection,[15] but also include non-contact offences such as communication of indecent material,[16] and sharing of objectionable publications.[17] "Children" includes any person under the age of 16.

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12 (15 September 2015) 708 NZPD 6649 per Jono Naylor MP.

13 Bob Edward Vásquez, Sean Madden and Jeffery Walker "The influence of sex offender registration and notification laws in the United States: a time-series analysis" (2008) 54 Crime and Delinquency 175 at 187.

14 Child Protection (Child Sex Offender Government Agency Registration) Act 2016, s 7(1).

15 Crimes Act 1961, ss 128, 128B, 129, 131, 132, 134 and 138.

16 Crimes Act 1961, s 124A.

17 Films, Videos, and Publications Classification Act 1993, ss 124(1), 127(4) and 131A(1).

Qualifying offences are categorised into Class 1, Class 2 and Class 3 offences,[18] which reflect the seriousness of the offence and correspond to a different length of reporting period on the Register.[19] Class 1 offences include indecent communication with young person under 16,[20] meeting a young person following sexual grooming,[21] and exhibition of objectionable publications dealing with sex to a person under 16.[22] Some examples of Class 2 offences are indecent act with consent induced by threat with a victim under 16,[23] indecent act on a dependent family member,[24] and indecent assault with a victim under 16.[25] Class 3 offences include sexual violation if the victim is under 16,[26] sexual connection with a young person under 16,[27] and assault with the intent to commit sexual violation if the victim is under 16.[28] Class 1 offenders must comply with reporting obligations for eight years, Class 2 offenders for 15 years and Class 3 offenders for the remainder of the offender's life.[29]

The relevant information to be given in the initial report is extensive. It includes basic information of the offender: their name, date of birth, employment and address at which they generally reside (defined as at least two days in any period of 12 months). They also must disclose more personal information such as details of the internet service provider, modem device, telecommunication service, email addresses and online social networking accounts intended to be used by the offender.[30]

Along with the initial report, a registrable offender must make periodic reports at least every 12 months to ensure the information given is correct.[31] They are also required to

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18 Child Protection (Child Sex Offender Government Agency Registration) Act 2016, sch 2.

19 Child Protection (Child Sex Offender Government Agency Registration) Act 2016, s 35.

20 Crimes Act 1961, s 124A.

21 Crimes Act 1961, s 131B(1).

22 Films, Videos, and Publications Classification Act 1993, s 124(1).

23 Crimes Act 1961, s 129A(2).

24 Crimes Act 1961, s 131(3).

25 Crimes Act 1961, s 135.

26 Crimes Act 1961, s 128B(1).

27 Crimes Act 1961, s 134(1).

28 Crimes Act 1961, s 129(2).

29 Child Protection (Child Sex Offender Government Agency Registration) Act 2016, s 35(1).

30 Child Protection (Child Sex Offender Government Agency Registration) Act 2016, s 16.

31 Child Protection (Child Sex Offender Government Agency Registration) Act 2016, s 18.

report any changes to relevant personal information as they occur,[32] including if the registrable offender intends to travel away from their registered residential address within New Zealand or overseas for a period of 48 hours or more.[33] If the registrable offender fails to comply with any of his or her reporting duties without reasonable excuse, they will be convicted of an offence and liable to imprisonment for up to one-year, a $2,000 fine, or both.[34] The consequences are severe and provide another opportunity to punish the offender.

III Conceptual Foundations of the Register

The broader conceptual basis for the Register is evaluated in this section, answering the question: what is the Register symptomatic of in our society? The Register is not entirely outcome-driven, as is apparent in the lack of evidence to support its effectiveness in reducing child sexual offending. Rather, it is responsive to public desires and symbolic of the increase in punitive attitudes to crime.

A Penal Populism

1 The theory

In a number of Western countries, including New Zealand, governments have sought to bring the general public within the framework of penal policy development.[35] Anthony Bottoms, one of the first writers on this idea, coined the phrase "populist punitiveness" to "convey the notion of politicians tapping into, and using for their own purposes, what they believe to be the public's general punitive stance".[36] Now better known as penal populism, the term represents the greater importance that has been placed on the role of the public in the criminal justice system.[37] A new body made up of pressure groups, citizens' rights

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32 Child Protection (Child Sex Offender Government Agency Registration) Act 2016, s 20.

33 Child Protection (Child Sex Offender Government Agency Registration) Act 2016, s 21.

34 Child Protection (Child Sex Offender Government Agency Registration) Act 2016, s 39.

35 John Pratt and Marie Clark "Penal Populism in New Zealand" (2005) 7 Punishment and Society 303 at 303.

36 Anthony Bottoms "The Politics of Sentencing Reform" in Chris Clarkson (ed) *The Philosophy and Politics of Punishment and Sentencing* (Oxford University Press, Oxford, 1995) at 40.

37 John Pratt *Penal Populism* (Routledge, London, 2007) at 12.

advocates, radio hosts and so on, claiming to speak on behalf of ordinary people, have become increasingly influential in policy development.[38]

2 Penal populism in New Zealand

The rise of penal populism in New Zealand arguably began in the 1980s, as radical economic and social reforms left the country with a deep sense of anxiety and insecurity.[39] This ultimately led to a decline in trust for politicians and the political process.[40] The public was left feeling alienated and let down by authorities, therefore turning to extra-parliamentary forces.[41] As discussed later in this paper, the media during this period also played a large role in shaping public views. Crime reporting became more frequent and sensationalised.[42] This gave the impression that crime rates were increasing, when they were in fact stabilising.[43] Public concern focused on serious violent crime and in particular, on sexual offending. In response to public demand for harsher punishments for serious sexual and violent crimes, the Government has had to compensate with more leniency in other areas to avoid further strain on the penal system.[44]

Another accelerant for penal populism in New Zealand was the 1999 Law and Order Referendum. This citizens initiated referendum by Norm Withers asked respondents, "should there be a reform of our justice system placing greater emphasis on the needs of victims, providing restitution, and compensation for them and imposing minimum sentences and hard labour for all serious violent offenders?"[45] The phrasing of the question inevitably meant that respondents could not support victim assistance without simultaneously endorsing a more punitive stance towards offenders.[46] As a result, 92 percent voted in favour of the referendum.[47] Despite the leading nature of this question,

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38 Pratt, above n 37, at 12.

39 Pratt, above n 37, at 63.

40 Pratt, above n 37, at 49.

41 Pratt, above n 37, at 49.

42 Pratt, above n 37, at 49.

43 Pratt and Clark, above n 35, at 312.

44 Pratt and Clark, above n 35, at 317.

45 Electoral Commission "Referenda" (27 November 1999) <www.elections.org.nz>.

46 Julian Roberts "Sentencing Reform in New Zealand: An Analysis of the Sentencing Act 2002" (2003) 36 The Australian and New Zealand Journal of Criminology 249 at 251.

47 Roberts, above n 46, at 251.

politicians have frequently referred to the referendum as a mandate for longer sentences against violent offenders.[48]

New Zealand's political system has also been a contributing factor in the rise of penal populism.[49] The proportional representation system, instead of creating more stable, welfarist versions of criminal justice intervention as has occurred in other jurisdictions,[50] has instead served to accentuate penal severity by exacerbating the electoral influence of single-issue interest groups.[51] The combination of two large parties chasing swing voters, who are responsive to criminal issues, while forming coalitions with small, issue-based parties who have the potential to shape the agenda on criminal justice policy, has made it hard for governments to resist the populist demand for tougher punishment.[52]

For example, the Parole and Victim's Rights Act 2002 was enacted in Helen Clark's Labour Government. This Government was dependent on confidence and supply agreements with two small conservative parties that take hard-line positions on crime: United Future New Zealand and New Zealand First. Similarly, the National Party's coalition with the socially conservative ACT Party, also with a strong law and order mandate, presented the ideal opportunity to progress the "three strikes" regime in the Sentencing and Parole Reform Act 2010. Penal policy is an especially suitable platform for politicians from anywhere on the political spectrum to appeal to undecided voters.[53] This tends to result in what has been called the "prisoners' dilemma", neither party can afford in electoral terms to abandon a tough stance on crime, but both will lose out in terms of the human and economic cost of increasing incarceration.[54]

In the 2017 election, both National and Labour used law and order policies in their electoral campaign, promising to increase the number of police to make communities

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48 Roberts, above n 46, at 251.

49 Nicola Lacey "The Prisoners' Dilemma and Political Systems: The Impact of Proportional Representation on Criminal Justice in New Zealand" (2011) 42 VUWLR 615.

50 Lacey, above n 49, at 624.

51 Lacey, above n 49, at 634.

52 Lacey, above n 49, at 635.

53 Lacey, above n 49, at 625.

54 Lacey, above n 49, at 625.

safer.[55] Controversially, National announced a policy that would put $82 million over four years to crack down on gangs and drug dealers, who Paula Bennett MP commented have "fewer human rights than others".[56] Although Rt Hon Bill English later said her remarks were a mistake,[57] it illustrates the willingness of politicians to put the rights of offenders aside to justify tougher penal policies.[58]

3 Penal populism and the Register

A recurring theme has been the demand for longer and harsher sentences of imprisonment.[59] But penal populism does not only refer to increased rates of imprisonment. It also seeks to curtail or abandon altogether many longstanding fundamental rights that are thought to "favour" criminals.[60] The Register is not imprisonment, but is illustrative of penal populism seeking to punish offenders and reinforce the inferiority of their rights to the rights of their victims and the law-abiding community. This demonstrates the penal populist idea that serving time is no longer sufficient to expiate offenders. Instead, they must carry the shame and humiliation of their offence with them, in some cases for the rest of their lives.[61]

The Register is symptomatic of the rise of penal populism in New Zealand, as it is part of the National Government's response to the "fear and concern in the community" around the lack of oversight for reintegrating sex offenders.[62] There is little concrete evidence that this is a legitimate fear of the public. Extra-parliamentary forces such as the Sensible Sentencing Trust lobby group (SST) and the role of the media have contributed to creating this perception.

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55 Labour Party "More police for safer communities" <www.labour.co.nz>; and National Party "Safer Communities" <www.national.co.nz>.

56 Paula Bennett "New crack down on gangs and drugs" (press release, 3 September 2017).

57 Interview with Bill English, Prime Minister (Susie Ferguson, Morning Report, Radio New Zealand, 4 September 2017).

58 This issue will be discussed further when discussing the conceptual problems with the Register in Part VI.

59 Pratt, above n 37, at 28.

60 Pratt, above n 37, at 29.

61 Pratt, above n 37, at 30.

62 (15 September 2015) 708 NZPD 6639.

Penal populism in and of itself is not undesirable. It is "an essential ingredient of a legitimate democracy, as [it] allows for legislators to respond to the wishes of the electorate".[63] However, issues arise when populist opinions conflict with expert views, indicating that certain populist policies, while well-intentioned and widely supported, are not beneficial to society. As Jacinda Ardern MP noted in the third reading of the Bill:[64]

> It might be good politics, for some members of this House, to play into the idea that simply giving this information [on the Register] will make everybody safe, but we have a responsibility in this House to not play politics with children's safety.

In line with this view, the safety of children vulnerable to sexual abuse is far too serious to be addressed by a mostly symbolic policy that is not proven to be effective.

B Symbolic Policy-Making

Depending on which theoretical lens is used, there are varying arguments as to how penal policies should be enunciated and implemented. Some theories, such as Durkheimian, Marxist or Foucauldian accounts, suggest that penal policies should be understood primarily as symbolic statements about good and bad values and should not be concerned with normative claims about the effectiveness and injustice of policies.[65] In contrast, normative theories are concerned with the substantive operation of the penal system, whether it produces good or bad consequences and how well it apportions punishment to offenders' culpability.[66]

The concern with the former, a system of symbolic penal policy, is that politicians downplay the "complexities and long-term character of effective crime control" in favour of a more expressive alternative.[67] Changes towards symbolic penal policy mean that a well-established system using rationalisation and civilisation is "thrown into reverse" and

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63 Liam Williams "Civil Death and Penal Populism in New Zealand" (2012) Waikato L Rev 111 at 120.

64 (8 September 2016) 716 NZPD 13569.

65 Michael Tonry "Symbol, substance, and severity in western penal policies" (2001) 3 Punishment and Society 517 at 518.

66 Tonry, above n 65, at 518.

67 David Garland *The culture of control: crime and social order in contemporary society* (Oxford University Press, Oxford, 2001) at 134.

could bring an end to the relationship between the policy process and crime control industry experts.[68] Policies are passed off the back of victim's stories, rather than relying on expert evidence.

Penal policy in the US in particular is far more symbolic than substantive.[69] Punitive populist attitudes and the short-term self-interest of politicians' are often prioritised over human rights considerations and even the effectiveness of the programmes.[70] An example of symbolic policy-making was the use of boot camps in Georgia. Although a substantial number of studies established that boot camps had no effect on recidivism rates, they continued to spread to more than two-thirds of US states.[71] Politicians found the symbolic nature of vigorous physical discipline appealing and proponents used the policy to demonstrate their toughness.[72]

Other examples of symbolic policies include American-style sentencing changes such as the three strikes rule and lengthy mandatory sentencing.[73] Although the weight of evidence shows that such initiatives foster circumvention, produce stark disparities in sentences of like offenders and cause injustices in individual cases, these policies have swept through the US, and have been enforced in England, some Australian states and even New Zealand.[74]

Similar to the examples above, a register is very symbolic in nature. Putting those who need to be watched on a list has a simple appeal and "makes us all feel very comfortable in the public".[75] However, concern was repeatedly voiced throughout the debate that there was no evidence from industry experts or from overseas registers to show that the Register would actually work. Carmel Sepuloni MP said that the job of Parliament is "to be rational in our thinking, to use evidence to guide our decision making, because it is so easy to be

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68 Garland, above n 67, at 3.

69 Tonry, above n 65, at 530.

70 Tonry, above n 65, at 530.

71 Tonry, above n 65, at 528.

72 Tonry, above n 65, at 529.

73 Tonry, above n 65, at 529.

74 Tonry, above n 65, at 529.

75 (2 June 2016) 714 NZPD 11666.

guided by emotion".[76] Stuart Nash MP acknowledged the importance of developing legislation that is based on good evidence,[77] and Kelvin Davis MP agreed that implementing legislation "with no research to back it up is just silly".[78]

Despite the recognition by MPs that the Register was not supported by evidence, the Bill was passed with a significant majority. This perhaps reflects the consensus of the wrongfulness of child sexual offending. Although there are varied levels of tolerance for different types of criminal offending, like traffic offences, some drug offences and tax offences, child sexual abuse is not tolerated by anyone.[79] Political parties may have voted in favour of the Register simply to avoid appearing as though they put the rights of sex offenders, some of the most loathed people in society, above the rights of child victims.

The Green Party was the only party to express opposition to the Bill. In response, Darroch Ball MP commented, "the only reason why you would choose to oppose it … is if you were leaning in favour of the offender."[80] This is an unfair statement considering the Green Party opposed the Bill on the basis there was no evidence of its effectiveness and out of concern for victims, not at all because they favoured offenders.[81] Nevertheless, it illustrates how easily political views can be misconstrued and the repercussion of opposing such an emotional and populist policy.

The use of symbolic policy is arguably more tolerable with policies that are not costly and do not infringe on individuals' rights and freedoms. But when you take into account the Register's large cost, effect on individuals' liberty and its misleading promise of keeping communities safer, it is problematic the Register was so easily passed despite little evidence supporting its effectiveness.

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76 (2 June 2016) 714 NZPD 11666.

77 (2 June 2016) 714 NZPD 11665.

78 (8 September 2016) 716 NZPD 13579.

79 (15 September 2015) 708 NZPD 6644.

80 (2 June 2016) 714 NZPD 11660.

81 (2 June 2016) 714 NZPD 11664; and (2 June 2016) 714 NZPD 11658.

C Risk Language in Penal Policy

The use of "risk" language has become more common across society than ever. Calculations of risk permeate environmental and town planning, for example in determining the use of lights and CCTV in public spaces.[82] Risk is used in education, with the development of a Risk Index to replace the decile system for schools.[83] Social security law is in the process of being re-drafted so that those at "risk of long-term welfare dependency" are identified separately.[84] In the area of health and safety, language has moved from identifying "hazards" to now identifying "risks".[85]

In no other area has the fixation with risk been more prevalent than in the criminal justice system. The definition and use of risk has continued to expand, and has now become a fundamental part of penal policy-making.[86] The creation of a risk society has led to a change of the aims of punishment. Continued detention, registration, or monitoring is justified on the basis that community safety overrides the rights of those who pose a risk.[87]

There are a number of points in the criminal justice process where the concept of risk is fundamental to determining how the offender is dealt with. When an offender is first charged with an offence, the risk the offender poses to the public is relevant to the inquiry of whether or not to grant bail.[88] Risk is also relevant during sentencing, as one of the purposes of the Sentencing Act 2002 is to "protect the community from the offender".[89] Once the offender becomes eligible for parole, the primary consideration of the Parole Board is the safety of the community based on risk posed by the offender.[90] At the

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82 Warren Brookbanks and Julia Tolmie *Criminal Justice in New Zealand* (LexisNexis, Wellington, 2007) at 17.

83 Henry Cooke and Laura Dooney "Decile system to be scrapped and replaced with 'Risk Index'" *Stuff* (online ed, August 1 2017).

84 Social Security Legislation Rewrite Bill 2016 (122-2), cl 95(2)(h).

85 Health and Safety at Work Act 2015, s 3.

86 Malcolm Feeley and Jonathan Simon "The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications" (1992) 30 Criminology 449 at 450.

87 John Pratt and Jordan Anderson "'The Beast of Blenheim', risk and the rise of the security sanction" (2016) 49 Australian and New Zealand Journal of Criminology 528 at 530.

88 Bail Act 2000, s 8.

89 Sentencing Act 2002, s 7(1)(g).

90 Parole Act 2002, s 7(1).

conclusion of an offender's sentence, they may be subject to a public protection order (PPO) or extended supervision order (ESO), again on the basis of risk.[91]

The introduction of the Register is another example of a risk-based policy. Child sex offenders who have committed a relevant offence are perceived to pose a future risk to the community, and therefore sanctions are imposed to contain the risk. Despite the growing preoccupation with risk, it is interesting that the requirements for being on the Register are not based on any individual risk assessment, as with other post sentence orders. Instead, being subject to a custodial sentence for a qualifying offence is all that is required. It is only in the case of an offender sentenced to a non-custodial sentence where the risk language is imported, and the Court may use its discretion to make an order for the offender to be put on the Register, if "satisfied that the person poses a risk to the lives or sexual safety of 1 or more children, or of children generally".[92]

The length of the reporting requirement for a registrable offender is also determined by the initial offence rather than risk level posed at the time of release. The select committee submission on the Bill by clinical psychologist Gwenda Willis suggested a real limitation of the Register was the lack of utilisation of risk assessment tools available to take into account individual differences and risks of reoffending.[93] Unintended consequences may result, where a sex offender determined to pose a low-risk (through risk assessment processes) has committed an initial offence requiring longer reporting obligations than a high-risk offender who, due to the nature of the initial offence, may have shorter reporting obligations. The Register could have been much more effective in concentrating resources on those who pose a greater risk of reoffending, as opposed to the reporting duration being dependent on an offender's initial offence.[94]

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91 Parole Act 2002, s 107IAA; and Public Safety (Public Protection Orders) Act 2014, s 13.

92 Child Protection (Child Sex Offender Government Agency Registration) Act 2016, s 9.

93 Gwenda Willis "Submission to the Justice and Electoral Select Committee on the Child Protection (Child Sex Offender Register) Bill 2015" at [7].

94 Willis, above n 93, at [7].

D Increased Prevalence of Security Sanctions

Closely linked with the use of risk, the rise of security sanctions has also been a recent penal phenomenon in many Western societies.[95] Rather than reacting to crime, security sanctions aim to protect public safety by predicting and aiming to prevent future crime.[96] Legislative examples of protection-oriented policy include extended terms of imprisonment (such as preventative detention), post-prison detention (such as PPOs), restrictions of movement in public spaces (as required in ESOs) and registration reporting requirements.[97] The containment of the most severe risks in society is prioritised over upholding cardinal principles of justice, especially when the risk of harm is to the most vulnerable members of society.[98]

In New Zealand, the case of Stewart Murray Wilson is a good example of the use of security sanctions. Wilson is known to most New Zealanders as the "Beast of Blenheim" a name coined by a journalist in 1996 to refer to the number of offences he committed beginning in the 1970s, including rape, attempted rape, indecent assault, ill-treatment of a child and bestiality.[99]

The news of Wilson's parole after he served 18 and a half years in Whanganui Prison was met with public outrage. The Whanganui local council organised a community shunning of Wilson. Residents were encouraged to apply for trespass orders that would prevent him from moving into private space or council-owned property. Wilson was eventually sent back to prison in February 2013 for "non-normative" behaviour. This sparked the creation of the Public Safety (Protection Orders) Bill, which was retrospective in effect in order to allow Wilson and others to be indefinitely detained at the end of their prison sentence.

The way in which Wilson was treated in our penal framework contravenes the fundamental principles and norms associated with penal law and practice in a modern,

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95 Pratt and Anderson, above n 87, at 528.

96 Pratt and Anderson, above n 87, at 528.

97 Jordan Anderson "Throwing Away the Key: An Examination of the Renaissance of Preventative Detention in New Zealand" (MA Dissertation, Victoria University of Wellington, 2016) at 63.

98 Pratt and Anderson, above n 87, at 533.

99 Pratt and Anderson, above n 87, at 528.

democratic society.[100] He was kept apart from the rest of the community, contrary to any meaningful attempts at reintegration; he was detained in prison again, despite not committing an additional offence; and the Public Safety Act was applied retrospectively, contrary to the fundamental principles of the rule of law.[101] This response illustrates the new direction of New Zealand's penal policy, which seeks to impose restrictions on offenders to prevent future wrongdoing instead of directly relating to the crime initially committed.

IV Reasons for the Register in New Zealand

Having considered the broader conceptual basis for the Register, this section examines the conditions specific to New Zealand that have contributed to its creation. The introduction of a sex offender register in New Zealand follows the international trend in community management of sex offenders with the avowed purpose of child protection.[102] In 1994, laws were introduced in several American states in response to high profile cases involving the sexual assault, kidnapping and murder of children.[103] For example, Megan's Law was enacted after Megan Kanka, a seven-year-old girl, was raped and murdered by her neighbour, a convicted sex offender. These cases understandably led to community outrage and the public feeling resentful that they were not informed of the convicted offender living in the area.[104] Megan's Law has provided authority for a number of states in America to collect data on sex offenders who have committed offences against children. Similarly in England and Wales, the Child Sex Offender Disclosure Scheme, known as Sarah's Law, was enacted after Sarah Payne, an eight-year-old girl, was abducted and murdered by a convicted child sex offender.[105]

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[100] Pratt and Anderson, above n 87, at 529.

[101] Pratt and Anderson, above n 87, at 529.

[102] Jenna Bollinger, Katie Seidler and Richard Kemp "Who Thinks What about Child Protection: Community Perceptions and Awareness of Child Protection Strategies and their Effectiveness for Reducing Sexual Reoffending" (2012) 4 Sexual Abuse in Australia and New Zealand 33 at 33.

[103] Bollinger, Seidler and Kemp, above n 102, at 33.

[104] Jonathan Gaines "Law enforcement reactions to sex offender registration and community notification" (2006) 7 Police Practice and Research 249 at 250.

[105] Home Office "Child sex offender disclosure scheme" (29 October 2010) <www.gov.uk>.

The Act is New Zealand's version of this type of initiative. However, unlike the overseas counterparts, there was no one incident that instigated the Register in New Zealand. Instead, a number of variables unique to New Zealand circumstances led to the introduction of the Act.

A Inadequacy with the Management of Child Sex Offenders

The first reason for the Register in New Zealand was the perception that our system for management of child sex offenders was inadequate. The Regulatory Impact Statement (RIS) for the Act acknowledged the existence of a "range of measures in place to reduce the risk of harm caused by convicted child sex offenders, and to aid law enforcement and investigation".[106] However, the RIS concluded that these measures are limited in time and scope, as they focus mostly on very high-risk sex offenders.

There are two parts to the management of child sex offenders in New Zealand. Firstly, a range of restrictive orders are available at the expiration of an offender's sentence to safeguard communities from the highest risk offenders. Secondly, information-sharing arrangements are in place between agencies, prescribed by the Corrections Act 2004, which now co-exists with the Act. This section examines the system of management for child sex offenders, thus determining what the Register adds, and whether there was a need for its enactment.

1 Orders available at the end of a sentence of imprisonment

At the conclusion of a high-risk child sex offender's sentence, an order may be granted extending the detention of the offender. Preventative detention is an indeterminate sentence imposed for a minimum of five years.[107] As the name suggests, the order is not focused on punishing the offender, but to prevent the "significant and ongoing risk" if released.[108] The requirements for preventative detention include the person committing a qualifying sexual or violent offence,[109] and the High Court being satisfied that the person

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[106] New Zealand Police and Department of Corrections, above n 2, 7.

[107] Sentencing Act 2002, ss 87 and 89(1).

[108] Sentencing Act 2002, s 87(1).

[109] Sentencing Act 2002, s 87(5).

is "likely to commit another qualifying sexual or violent offence" at the end of their sentence.[110]

An offender may also be subject to a PPO.[111] Initially established, as noted above, for the extended incarceration of Wilson, individuals subject to a PPO are detained in a secure facility on prison precincts and subject to extensive constraints.[112] Although PPOs are not criminal but "civil detention",[113] the extensive constraints on the detained individual are closely characterised to incarceration. Both preventative detention and PPOs are intended to capture individuals posing the highest risk of harm, with the idea that keeping them locked away from society mitigates this risk.

A child sex offender may also be subject to a period of supervision after they are released. ESOs were introduced under the Parole Act 2002, [114] and were extended in 2014 to include a wider range of offenders and to enable ESOs to be renewed as often as needed.[115] Standard ESO conditions include the offender reporting to the probation officer as required, notifying the probation officer of his or her residential address, taking part in rehabilitative needs assessment if directed and importantly, prohibition from associating with or contacting a victim of the offender, or any person under the age of 16 years.[116] The Parole Board also has the discretion to impose special conditions at any time during the ESO, including submitting the offender to be accompanied and monitored for up to 24 hours a day, long-term full-time placement in care of an appropriate agency for a programme, intensive monitoring conditions and requirements to take prescription medication.[117]

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[110] Sentencing Act 2002, s 82(2).

[111] Public Safety (Public Protection Orders) Act 2014, s 9.

[112] Public Safety (Public Protection Orders) Act 2014, s 45.

[113] Department of Corrections: Chief Executive's Guidelines on the Use of Coercive Powers under the Public Safety (Public Protection Orders) Act (May 2015) <www.corrections.govt.nz>.

[114] Parole Act 2002, s 107I.

[115] The Parole (Extended Supervisions Orders) Amendment Act 2014, s 6.

[116] Parole Act 2002, s 107JA.

[117] Parole Act 2002, s 107K.

A recent study evaluated the difference in recidivism rates between child sex offenders subject to and not subject to an ESO.[118] The report concluded that the reoffending rate for those not subject to an ESO was significantly lower than those in the ESO sample, 3.7 per cent compared to 23.6 per cent.[119] Most of the offences committed by those in the ESO sample were breaches of a condition attached to the ESO (as opposed to a new sexual offence), a reflection of the individual being subject to restrictive conditions. The study suggests ESOs are successfully achieving their function of monitoring and detecting behaviours of high-risk offenders that may be precursors to the offender's pattern of previous sexual offences. Decision-making about which offenders are subject to an ESO also appears to be effective, considering the low recidivism rates for those not subject to an ESO.

If the above orders are not applied, then offenders are only released back into communities when deemed fit for release by the Parole Board at the individual's parole hearing.[120] Public safety is a priority; therefore the release of prisoners is not a decision to be taken lightly or without significant evaluation and advice from health assessors. Those who are released are subject to standard release conditions, including reporting to the probation officer for a required period, not associating with specific persons and notifying officers of any change of residence until the Board discharges the offender from the conditions.[121]

It could be argued that the Register adds to these protective mechanisms. The Register applies more broadly to all eligible child sex offenders, as opposed to only those who pose a high risk, but is less restrictive than preventative detention, PPOs or ESOs. However, considering the thorough parole process, it is arguably unnecessary for those who have served their sentence of imprisonment, had access to rehabilitation, are deemed by the Parole Board to pose little to no risk to the community, to then be the focus of an expensive scheme promising to mitigate child sexual offending.

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[118] Teresa Watson and Jim Vess "Short Term Reoffending by Child Victim Sex Offenders in New Zealand: A Comparison of those with and without Extended Supervision" (2008) 1 Sexual Abuse in Australia 44.

[119] At 47.

[120] Parole Act 2002, s 7(1).

[121] Parole Act 2002, ss 14 and 58.

Evaluating the available orders for child sex offenders, it is clear that there is a trend towards extending detainment and supervision of offenders, even after the sentence has expired. The Register is no exception. It represents another option to punish and supervise child sex offenders beyond their original sentence to mitigate the risk of harm to the community. However, the Register requires low risk offenders to be subject to extensive and long-term reporting requirements. This is an inefficient use of resources. Because of the low risk these offenders pose, the Register is unlikely to significantly reduce child sexual offending as intended.

2 Information sharing between government agencies

The Register was also motivated by the perception that information sharing arrangements between government agencies was inadequate.[122] Before the enactment of the Register, the Corrections Act 2004 was the governing statute for information sharing between agencies.[123] Information sharing under the Corrections Act is not limited, as with the Register, to information about child sex offenders, but includes information relating to all high-risk offenders.[124]

The Corrections Act facilitates information sharing with the same government agencies as the Register, with the addition of the Department of Internal Affairs and New Zealand Customs Service.[125] A specified agency must only disclose information about that child sex offender where disclosure is for, or relates to a listed purpose, including:[126]

> (a) to monitor compliance by the child sex offender with his or her release conditions … :
>
> (b) to manage the risk that the offender may commit further sexual offences against children:
>
> (c) to identify any increased risk that the offender may breach his or her conditions or will commit further sexual offences against children:
>
> (d) to facilitate the reintegration of the offender into the community:

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[122] (15 September 2015) 708 NZPD 6635.

[123] Corrections Act 2004, s 182C.

[124] Corrections Act 2004, s 181A.

[125] Child Protection (Child Sex Offender Government Agency Registration) Act 2016, s 43(2).

[126] Corrections Act 2004, s 182A(3).

These purposes are very similar to the purposes for information sharing for the Register, which also focuses on managing risk of further offences and threat to public safety.[127] A notable difference is the fact the Register does not have a purpose of "reintegration", unlike under the Corrections Act, illustrating the less offender friendly approach of the Register. Of course the Register will contain more detail and personal information on the registrable offender. But this level private information about the offender's life and whereabouts is unnecessary (especially for the lengthy required period) if proper parole procedures have been carried out and the offender is deemed safe to be in society.

The storing of information about released child sex offenders on a single Register, as discussed earlier in the paper, is particularly symbolic. Child sex offenders are isolated from other types of offenders as an identifiable group that are specifically "bad" and in need of monitoring. However, considering the purposes for information sharing under the Register and the Corrections Act are substantially similar, the information will not be shared or utilised any more successfully under the new Act, and even if it were, the difference would be negligible. Therefore, a lack of information sharing is not a particularly convincing reason for the enactment of the Register.

B Influence of the Sensible Sentencing Trust

The most influential extra-parliamentary force advocating for a sex offender register is the SST. The SST is a registered charitable trust that "exists to advocate on behalf of the victims of serious violent and/or sexual crime and homicide in New Zealand".[128] SST is deliberately non-aligned politically in order to lobby politicians on the single issue of tougher sentencing for violent and sex offenders.[129] All donations received by the trust are used to assist volunteers to meet with politicians about SST's "policy wishlist", attend select committee hearings, educate their membership database regarding SST policies and run lobbying campaigns.[130]

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[127] Child Protection (Child Sex Offender Government Agency Registration) Act 2016, s 43(1).

[128] Sensible Sentencing Trust "About us" <sst.org.nz>.

[129] Pratt and Clark, above n 35, at 306.

[130] Sensible Sentencing Trust "About us" <sst.org.nz>.

One of the policies on the SST wish list was a national, government-funded and publicly accessible sex offender database.[131] The creation of the Register has, as expected, been met with support from the SST. However, the SST identified a number of limitations of the Register in their select committee submission on the Bill, arguing that the effectiveness of the Register would not meet its full potential unless the general public were able to check the details of any person whom they believe may pose a risk to children.[132] It was considered that the "eyes and ears of all New Zealanders" were required to ensure the best oversight of child sex offenders.[133] Considering the SST strongly advocates for harsher punishments of offenders, it is unsurprising they do not think the Register goes far enough.

This is not the first time an SST policy has developed into legislation. At the time former ACT Party list MP David Garrett was elected into government, he was also legal advisor to SST, using his position to push the three strikes policy into law.[134] Although there is no specific evidence, it is likely that pressure from the SST in strongly advocating for and publishing an ad hoc version of a sex offender database has played a significant role in the introduction of the Bill. In line with earlier discussion relating to the rise of penal populism, it has become increasingly apparent that the definition of expertise in this area of criminal justice has been usurped from academics and transferred to pressure groups such as the SST.[135]

Despite their influence as a "serious player" in criminal justice politics in New Zealand,[136] there is no clear evidence to show if SST's views are necessarily representative of the New Zealand public. In 2001, the SST initiated a research poll to assess public penal attitudes. Awareness of the SST was moderately high among the general public at 65 per cent, this figure increasing to 90 per cent for participants over 50 years of age. With regards to punitive attitudes, 73 per cent of the participants agreed that prison sentences for violent

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131 Sensible Sentencing Trust "National Offender Database" <sst.org.nz>.

132 Sensible Sentencing Trust (Napier) "Submission to the Social Services Select Committee on the Child Protection (Child Sex Offender Register) Bill 2015" at 5.

133 Sensible Sentencing Trust (Napier) "Submission to the Social Services Select Committee on the Child Protection (Child Sex Offender Register) Bill 2015" at 5.

134 Lacey, above n 49, at 634.

135 Pratt and Clark, above n 35, at 315.

136 Lacey, above n 49, at 632.

crimes were too short.[137] Although not indicative of the public's support for the SST, this does illustrate the public's increasingly punitive stance mirroring that of the SST.

C Role of Media in Influencing Public Opinion

The comprehensive coverage of crime in the media, especially relating to child sex offenders, has contributed to the anxiety and insecurity felt by the public. Broadcasting networks were privatised in the early 1990s, resulting in greater competition for audience viewing between channels, and more sensationalised and tabloid style news reporting to attract viewer attention.[138] The increase in reporting of sexual offences gave the impression there was an unprecedented explosion in sexual crime, when in fact crime rates were stable.[139]

Violent and sex offenders were not just reported by the media, but also turned into "monsters".[140] A good example is Wilson being dubbed the "Beast of Blenheim", a name that continues to identify and follow him.[141] A great deal of media attention has focused on child sex offenders.[142] The term "sexual predator" was used more frequently to label child sex offenders that cannot be controlled and pose an unmanageable threat to the public.[143]

A significant news story published close to the introduction of the Register, and the only case mentioned during the reading of the Bill, was the reoffending of convicted child sex offender, Tony Robertson. Blessie Gotingco was raped and murdered by Robertson, who had been released from prison five months earlier after serving a sentence for indecently assaulting a young girl. The "exposé" style news report following the offence was titled

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[137] Sensible Sentencing Trust "New Zealanders attitudes towards crime and prison sentences" (May, 2011) <sst.org.nz>.

[138] Pratt and Clark, above n 35, at 312.

[139] Adam Sampson *Acts of Abuse: Sex Offenders and the Criminal Justice System* (Routledge, London, 1994) at 42.

[140] Anderson, above n 97, at 114.

[141] Pratt and Anderson, above n 87, at 528; and "'Beast of Blenheim' to be released" *The New Zealand Herald* (online ed, Auckland, 17 April 2012).

[142] Julian Roberts and others *Penal Populism and Public Opinion: Lessons from five countries* (Oxford Press, New York, 2003) at 132.

[143] Roberts and others, above n 142, at 132.

"The making of a killer" referring to Robertson's background and upbringing.[144] Another article was titled "Deliver us from evil", emphasising Robertson as the epitome what society deems as evil.[145]

The community outrage over Gotingco's murder led to an independent government inquiry on the handling of Roberston's release.[146] Robertson was subject to an extensive ESO, including 24-hour GPS tracking, but could still leave his house within a restricted area.[147] The government inquiry came to the conclusion that no aspect of Robertson's management by the Department of Corrections (Corrections) or the police provided an opportunity for the murder of Gotingco.[148] Moreover, Robertson's ESO conditions are far more restrictive than those required by the Register, and it is clear that the existence of the Register would not have prevented Gotingco's murder. The fact the case was mentioned during the reading of the Bill is therefore misleading.

There has also been a general increase of articles in mainstream news relating to the release of sex offenders into the community.[149] As part of their role in the ongoing monitoring of sex offenders, the Police or Corrections may choose to notify neighbours and schools within a community that a sex offender has moved into their area. The decision to notify must balance the public's desire to know who the individual is so they

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144 Sam Boyer "The making of a killer Tony Robertson's story" *The Dominion Post* (Wellington, 29 July 2015).

145 Donna Chisholm "Deliver us from evil" *The Listener* (online ed, Auckland, 30 July 2015).

146 Mel Smith *Government Inquiry into Tony Douglas Robertson's Management Before and After his Release from Prison in 2013* (Department of Corrections, 29 March 2016).

147 Smith, above n 146, at 23.

148 Smith, above n 146, at 83.

149 See generally Anna Laesk "EXCLUSIVE: 'Warning' flyers sent to street about resident sex offender" *New Zealand Herald* (online ed, Auckland, 1 May 2017); Cherie Howie "Hobsonville and Marina View primary schools warned after newly-released child sex offender moves into their West Auckland community" *New Zealand Herald* (online ed, Auckland, 1 February 2017); Timothy Brown "Families warned child sex offender released to City Rise" *Otago Daily Times* (online ed, Dunedin, 21 October 2016); "Community anger rises as sex offender moves near another school" *New Zealand Herald* (online ed, Auckland, 26 June 2016); Neighbours unnerved at prospect of sex offender returning to Te Atatu street" *New Zealand Herald* (online ed, Auckland, 12 May 2016); and Morgan Tait "Exclusive: Auckland community upset over lack of details ahead of sex offender's release" *New Zealand Herald* (online ed, Auckland, 13 August 2015).

can take precautionary steps, the offender's right to privacy and ability to make a fresh start in a community, and the authorities' wish to prevent notification leading to the identification of the individual having negative unintended consequences.[150] Notification will still protect some personal details of the offender, but will offer guidance as to best practice regarding the offender.[151]

The articles relating to the release of prisoners into communities depict rising "community anger" and neighbours being "unnerved" and "upset". Despite nothing illegal occurring since the offender's release, the articles portray the situation as one requiring "warning", disseminating to the public that there is something to fear. However, as discussed in the following section, it is unlikely that communities are aware that the risk of recidivism posed by released individual is very low.[152] Considering the majority of perpetrators of child sexual abuse are not convicted,[153] the risk posed by someone on the Register may be no higher than someone who has not been convicted for sexual offending before. Furthermore, the Register does not stop offenders from being released back into communities. The release of almost all prisoners is inevitable, as indefinite incarceration is practically undesirable.

The media's cultivation and creation of fear felt by the public towards sex offenders has been a substantial factor in the creation of the Register. Those who rely on media depictions in forming their attitudes are likely to see sex offenders as unpredictable, evil and extremely dangerous.[154] The public always thinks of child sexual offending as the worst forms of child abduction and abuse, instead of comparatively minor non-contact offences. This prominence of the child sex offenders in the media has contributed to them being the most feared sub-species of all offenders.[155]

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150 Smith, above n 146, at 66.

151 New Zealand Police "Child Sex Offender (CSO) Register" <www.police.govt.nz>.

152 Arul Nadesu *Reconviction Rates of Sex Offenders – Five year follow-up study: Sex offenders against children vs offenders against adults* (Ministry of Corrections, January 2011) at 4.

153 Ministry of Women's Affairs, above n 9, at 29.

154 Gwenda Willis, Jill Levenson and Tony Ward "Desistance and Attitudes Towards Sex Offenders: Facilitation or Hindrance?" (2010) 25 Journal of Family Violence 545 at 552.

155 Pratt and Anderson, above n 87, at 538.

D Overestimation of Sex Offender Recidivism

The Register was enacted to monitor child sex offenders who have been convicted and released, as opposed to preventing or detecting abuse. This presupposes that there is a high chance of reoffending of child sex offenders, requiring legislative change to reduce the likeliness of harm. It is unsurprising that the public has overestimated recidivism rates, considering the combination of the severity of this type of offending and the media's representation of child sex offenders.[156] As discussed above, sex offenders are often constructed in the media as compulsive recidivists who are virtually certain to reoffend.[157]

The true rate of recidivism for sexual offences is difficult to measure. It will vary depending on whether recidivism is defined as rearrest or reconviction. It is also difficult to find an accurate figure as many incidences of child sexual offending go undetected by the police or unreported by the child.[158] However, despite these difficulties, and factoring them into the analysis, an overwhelming number of studies show that as a group, sex offender recidivism is low.[159]

A recent study by Corrections evaluated patterns of reconviction of 1100 male sex offenders who were released from prison in New Zealand between January 2001 and December 2003.[160] Corrections advises against the use or reliance on recidivism analysis from other countries, as the figures will differ markedly based on how criminal justice data is handled, the relevant legislation, sentencing practices, resource levels of the criminal justice sector agencies and crime rates.[161] Of the study group, 689 individuals were child sex offenders. In the 60-month period following their release, the reconviction

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156 Kelly Richards "Misperceptions about child sex offenders" (2011) 429 Trends and Issues in Crime and Criminal Justice 1 at 2.

157 Richards, above n 156, at 2.

158 David Greenberg and others "Recidivism of Child Molesters: A Study of Victim Relationship with the Perpetrator" (2000) 24 Child Abuse and Neglect 1485 at 1486.

159 See generally Lisa Sample and Timothy Bray "Are Sex Offenders Dangerous?" (2003) 3 Criminology and Public Policy 59; Elizabeth Turner and Stephen Rubin "Once a sex offender…always a sex offender: Myth or Fact?" (2002) 17 Journal of Police and Criminal Psychology 32; and Richard Zevitz "Sex Offender Community Notification: Its Role in Recidivism and Offender Reintegration" (2006) 19 Criminal Justice Studies 193.

160 Nadesu, above n 152, at 4.

161 Nadesu, above n 152, at 4.

rate for a sexual offence against a child or other violent offence was eight per cent. Comparatively, the reconviction rate for adult sex offenders for violent or sexual offences against adult victims was 18 per cent, more than double the child sex offender reconviction rate.[162]

It would be interesting to assess any changes in the public's view if accurately informed about the recidivism rates of sex offenders. Several researchers have advocated for the value of providing accurate information to the public in order to positively influence their attitudes towards sex offenders.[163] However, crime is a particularly emotional subject, intolerant attitudes and negative expectations are unlikely to easily adjust.

V Operational Problems with the Register

A Cost Effectiveness

The Register will cost $146 million over the next 10 years, comprising the capital and operational costs of setting up and running the Register as well as costs associated with managing those on the Register.[164] These costs include staff time.[165] From this amount, $85.1 million will be met through existing funding: $70.6 million from Corrections, $14.1 million from the Police and $380,000 from the Courts.[166]

The main concern with the cost of the Register is the fact it is being taken from agencies such as the police that are already under extreme financial pressure and "stretched to breaking point".[167] It is assumed that Corrections will absorb this cost through "efficiency gains" and the police through achieving more "effective utilisation of existing staff".[168] Considering both the police and corrections are currently responsible for protecting

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[162] Nadesu, above n 152, at 4.

[163] Jill Levenson and others "Public Perceptions About Sex Offenders and Community Protection Policies" (2007) 7 Analyses of Social Issues and Public Policy 1 at 20.

[164] New Zealand Police and Department of Corrections, above n 2, at 4.

[165] New Zealand Police and Department of Corrections, above n 2, at 4.

[166] New Zealand Police and Department of Corrections, above n 2, at 4.

[167] (15 September 2015) 708 NZPD 6647.

[168] New Zealand Police and Department of Corrections, above n 2, at 4.

communities from sex offenders, it is imperative that this role is not compromised by the required maintenance of the Register.

Another concern is the fact that $146 million is being spent on a policy "unproven to reduce harm",[169] raising the question of whether it is a smart way to spend scarce public sector dollars.[170] The RIS considered that there was "insufficient information to undertake a cost-benefit analysis of this proposal".[171] International evidence was also considered insufficient to quantify the anticipated benefits of the Register with any certainty.[172] This is disconcerting, considering the significant cost and critical subject at hand.

The estimated success of the Register was the prevention of between four and 34 child sex offence convictions over 10 years, as well as the "prevention of many undisclosed, or unreported child sex offences".[173] This number is unsatisfactory. Undoubtedly, every sexual offence that can be prevented should be. But the expenditure of $146 million over 10 years resulting in a possible prevention of as little as four sexual offence convictions is a poor allocation of resources. From an economic perspective, between $4.3 and $36.5 million will be spent for every child sex offence that is prevented. Even at the best estimate, more money is being spent per prevented conviction than the value of a statistical life in New Zealand, $4.06 million.[174] With regard to the many other undisclosed child sexual offences, as discussed earlier, there is no evidence to suggest the Register would act as a successful deterrent to those on the Register, let alone those who have not been convicted of an offence.

The $146 million is ultimately coming at a cost to other investments that are proven to work including educating families and their children on how to keep themselves safe, treatment programmes for child sex offenders and investment in successful reintegration.

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169 (1 June 2016) 714 NZPD 11626.

170 (2 June 2016) 714 NZPD 11658.

171 New Zealand Police and Department of Corrections, above n 2, at 3.

172 New Zealand Police and Department of Corrections, above n 2, at 11.

173 New Zealand Police and Department of Corrections, above n 2, at 4.

174 Ministry of Transport *Social Cost of Road Crashes and Injuries 2015 Update* (March 2016) at 3.

These alternatives, which represent the opportunity cost of enacting the Register, will be discussed in Part VII.

B Likelihood of Public Access

The issue of access to the Register and the maintenance of its privacy were frequently discussed during the process of the Bill.[175] With the exception of NZ First,[176] the consensus in Parliament was that a private register was preferable. This was largely in response to research on public registers in other jurisdictions, and the harms they can produce.[177] MPs cited the increase of vigilante behaviour and victimisation of offenders by the public,[178] the increased chance of reoffending,[179] the potential to disincentivise a young person from reporting a member of their family,[180] and undermining the offender's rehabilitation.[181]

Public notification would significantly affect the social acceptance of the sex offender, which has a crucial role in their reintegration.[182] One of the biggest issues for sex offenders was fear of community members' reactions to their release from prison, in particular, the fear of being identified as a sex offender and being threatened with violence from members of the community.[183] "Outing" people publicly could mark them a target of suspicion, fear and often aggression, making it more likely they will reoffend rather than allowing them to "get on with their lives with appropriate, positive support from within

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175 (8 September 2016) 716 NZPD 13561; (8 September 2016) 716 NZPD 13579; (15 September 2015) 708 NZPD 6637; and (2 June 2016) 714 NZPD 11659.

176 (1 June 2016) 714 NZPD 11660.

177 See generally Richard Zevitz and Mary Farkas "Sex Offender Community Notification: Managing High Risk Criminals or Exacting Further Vengeance? (2000) 18 Behavioral Sciences and the Law 375; Richard Tewksbury "Collateral Consequences of Sex Offender Registration" (2005) 21 Journal of Contemporary Criminal Justice 67; and Jill Levenson and Leo Cotter "The Effect of Megan's Law on Sex Offender Reintegration" (2005) 21 Journal of Contemporary Criminal Justice 49.

178 (15 September 2015) 708 NZPD 6648; (15 September 2015) 708 NZPD 6656; and (2 June 2016) 714 NZPD 11659.

179 (8 September 2016) 716 NZPD 13561.

180 (8 September 2016) 716 NZPD 13579.

181 (15 September 2015) 708 NZPD 6637.

182 Willis, Levenson and Ward, above n 154, at 546.

183 Ian Lambie and others "Community Reintegration of Sex Offenders of Children in New Zealand" (2013) 57 International Journal of Offender Therapy and Comparative Criminology 55 at 62.

the community".[184] Furthermore, research literature has found that public registers can actually increase citizens' anxiety due to a lack of education and information about how to protect themselves or their children from sexual assault.[185]

A private register was thought to strike the right balance, between ensuring offenders do not "disappear" back into communities and avoiding the negative impacts of a public registration system.[186] However, the Act does provide for a number of ways the information on the Register can be shared and accessed, the issue then being whether the Register will stay private as intended. Stuart Nash MP said the chance of the information on the Register leaking was a "very real concern".[187] Similarly, David Clendon MP indicated that New Zealand has a poor history of keeping secrets - "once databases and their information are in the domain of the public sector, it is very difficult to guarantee their long-term security".[188] Mr Clendon said it was "inevitable" that individuals' names would be leaked from the Register and that the likelihood was that blocks of the Register would become available at some point.[189]

The first option for sharing of information is between specified agencies. Under s 43, this type of information sharing is allowed in order to monitor the whereabouts of the offender, verify personal information or to manage "any risk or threat to public safety".[190] Specified agencies are defined as the Police, Department of Corrections, Ministry of Social Development, Housing New Zealand Corporation, Department of Internal Affairs and the New Zealand Customs Service.[191] The pool of people that will or could have access to information on the Register is evidently very large, in the tens of thousands.[192]

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184 (2 June 2016) 714 NZPD 11659.

185 Willis, Levenson and Ward, above n 154, at 551.

186 (8 September 2016) 716 NZPD 13567.

187 (2 June 2016) 714 NZPD 11665.

188 (15 September 2015) NZPD 6645.

189 (8 September 16) 716 NZPD 13575.

190 Child Protection (Child Sex Offender Government Agency Registration) Act 2016, s 43(1).

191 Child Protection (Child Sex Offender Government Agency Registration) Act 2016, s 43(1).

192 (2 June 2016) 714 NZPD 11658.

As there a large number of people who may have access to the Register, there may be situations where the individual is tempted to share the information. During the second reading of the Bill, Poto Williams MP gave the example of a Housing New Zealand worker responsible for rehoming a sex offender on the Register to their street or the street of a family member.[193] It is only human nature to want to warn their family members - can we trust that public servants will not act on this temptation? Once someone in the public has access to the information, it is in the public domain and could be used in the SST database or publicised in other ways.

There is also no definition of "public safety" in the Act, meaning the circumstances where s 43 could be used are unclear. A comparison could be made with the term "national security". Despite also being frequently referred to in legislation, and even having legislation with the purpose of protecting New Zealand's "national security", there is also no definition of what this actually means.[194] The wording is intentionally ambiguous to leave the discretionary powers of Government agencies unconstrained.

The author suggests "public safety" could be defined as a likely or foreseeable risk to the lives or sexual safety of one or more children, or children generally in the near future. This aligns with the purpose of the Act: to reduce sexual reoffending and risk posed by child sex offenders. Requiring a standard of "foreseeable risk" is less stringent than, for example, a requirement of "imminent risk", while still ensuring a threshold that dissuades abuse of the information-sharing power.

Another option for the release of information is under s 45. This allows for information to be disclosed to "affected persons", being a parent, guardian, teacher or regular caregiver of the child, where there is a "threat to child safety or welfare".[195] There is no definition of "threat to child safety or welfare" and it is unclear from the legislative language when the section will be used. For example, would living in certain proximity to a school be enough to constitute a threat? If so, at what point or distance does the presumed threat no

[193] (1 June 2016) 714 NZPD 11629.

[194] Intelligence and Security Act 2017, s 3(a)(i).

[195] Child Protection (Child Sex Offender Government Agency Registration) Act 2016, s 45(1)(a).

longer exist, or no longer justify disclosure? Again, it seems the power has been left open as not to limit the State's discretion. Detail in the legislation has evidently been abandoned in favour of ensuring a powerful symbolic policy is maintained.

Hon Anne Tolley MP when introducing the Bill used the example of an "affected person" being a parent of a child or children who can check whether a new partner is a registered child sex offender.[196] There are a few issues with this example. A parent who receives information that their new partner is not on the Register, may think that this conclusively indicates there is no risk of harm. This is not true as only a minority of perpetrators of child sexual abuse end up on the Register. Furthermore, this may lead to a situation where members of the public with children may think it is their right to apply to access the Register when entering into a new relationship. This sort of access, administration and use of the Register is not what Parliament intended with the enactment of the Register.

Perhaps it could be argued that an offender has less of a right to privacy.[197] An analogous situation involving the storage of offender information is the DNA profile databank.[198] A major concern about the use of national DNA databases in general has been the potential to threaten individuals' right to privacy, through the indefinite retention of DNA samples that contain unlimited amounts of genetic information about a known person.[199] A study evaluating public perceptions of DNA use in New Zealand found that 53 per cent of participants were concerned with privacy issues. However, all participants agreed convicted sex offenders should be included in the DNA database.[200] This illustrates the perspective, perhaps similar to the Register, that storing information of charged or convicted criminals is acceptable. But this type of data storage is unacceptable for "ordinary people like themselves", that are considered to have more rights in relation to their DNA information by virtue of not engaging in criminal behaviour.[201]

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196 (15 September 2015) 708 NZPD 6635.

197 (15 September 2015) 708 NZPD 6639.

198 Criminal Investigations (Bodily Samples) Act 1995, s 25.

199 Kristina Staley "The Police national DNA Database: Balancing Crime Detection, Human Rights and Privacy" (January 2005) GeneWatch UK <www.genewatch.org>.

200 Cate Curtis "Public Perceptions and Expectations of the Forensic Use of DNA" (2009) 29 Bulletin of Science, Technology and Society 313 at 320.

201 Curtis, above n 200, at 317.

It should be noted there are safeguards in place to ensure the information on the Register remains confidential.[202] A person who is authorised to have access to the Register (s 43 situation) must not disclose any personal information unless authorised and a person whom personal information about a registered offender is disclosed to (s 45 situation) must not disclose information to any other person.[203] If these sections are breached without reasonable excuse, the person commits an offence and is liable to up to six months imprisonment in the case of an individual, and a fine not exceeding $50,000 for a body corporate. The upper end of the punishment is quite severe to create a strong disincentive. Whether the public will be aware of the ramifications of unauthorised disclosure or whether it will actually work as a deterrent is uncertain.

Considering the two situations allowing information sharing, and the possibility of it being leaked through these mechanisms, it is "murky" as to whether the Register will remain private.[204] It is imperative that the Register is not leaked and its private status is maintained in order to minimise the adverse effects of public registers on offenders and the community.

VI Conceptual Problems with the Register

Not only are there specific operational problems with the Register, there are broader conceptual concerns too. First, the Register infringes on a number of offender's human rights. It is unsurprising that the rights of offenders are not seen as a priority, perhaps reflecting the view that offenders are less-deserving citizens. The Register may also affect the ability of offenders to successfully reintegrate into society, and therefore desist from reoffending. This is a particularly critical problem as it could mean the Register increases the risk of harm.

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[202] Child Protection (Child Sex Offender Government Agency Registration) Act 2016, s 47.

[203] Sections 47(1) and 47(2).

[204] (15 September 2015) 708 NZPD 6641.

A The Register's Inconsistency with the New Zealand Bill of Rights Act 1990

The state of criminal justice is often used as a broad index of how "civilized, progressive or truly democratic" a country is.[205] In particular, how society treats sex offenders is significant, as the conduct of sex offenders' provoke the most visceral reaction.[206] A fundamental principle in protecting human rights is that even those deprived of their liberty "shall be treated with humanity and with respect for the inherent dignity of the person".[207]

The New Zealand Bill of Rights Act 1990 (NZBORA) is designed to protect and promote human rights and fundamental freedoms in New Zealand and to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights.[208] Although NZBORA is not supreme law in New Zealand, and cannot be used to invalidate other enactments, it is still recognised as an important constitutional document.[209] Where a Bill is inconsistent with any of the rights and freedoms contained in NZBORA, s 7 imposes a duty on the Attorney-General (AG) to report to Parliament on the inconsistencies.

Both the principal Bill and a subsequent amendment Bill for the Register had s 7 reports,[210] confirming a number of NZBORA inconsistencies. A number of comments during the Bill's reading recognised the infringement of rights as a serious issue that needed remediation. David Clendon MP said that the Bill's inconsistency was "a very serious matter",[211] and Adrian Rurawhe MP stated that "the rights of [offenders] need to be recognised as well".[212] But these views were not acted upon, and the legislation passed with an overwhelming majority.

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[205] Lacey, above n 49, at 3.

[206] Debra Weiss "The Sex Offender Registration and Community Notification Acts: Does Disclosure Violate an Offender's Right to Privacy?" (1996) 20 Hamline Law Review 557 at 557.

[207] New Zealand Bill of Rights Act 1990, s 23(5).

[208] New Zealand Bill of Rights Act 1990, Long Title.

[209] Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at 11.

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

[211] (15 September 2015) 708 NZPD 6644.

[212] (15 September 2015) 708 NZPD 6651.

1 Disproportionately severe treatment or punishment

Section 9 of NZBORA protects the right not to be subjected to disproportionately severe treatment or punishment.[213] The purpose of s 9 is to ensure that "all persons are treated with respect for their inherent dignity and worth and are not treated as a means to an ends".[214] In *Taunoa v Attorney-General*, Blanchard J suggested that the term "disproportionately severe" was included in NZBORA to catch behaviour that does not inflict suffering that could be described as cruel or degrading, but would nevertheless be regarded as so out of proportion to the particular circumstances to be considered shocking.[215]

In the s 7 report on the Bill, the AG concluded that the registration and reporting obligations constituted a punishment.[216] This is because those who are on the Register are referred to as registrable "offenders", the reporting requirements are in effect a type of sanction imposed upon release and failure to comply constitutes an offence punishable by up to one year imprisonment.[217] Although being subject to reporting obligations is less of a punishment than the deprivation of liberty, it nonetheless imposes restrictions on protected rights such as freedom of movement,[218] and freedom of expression.[219] The real problem however was not compliance with the reporting obligations, but the inability of registrable offenders to have their obligations reviewed on the ground that they no longer pose a risk to the safety of children.[220]

This was the only inconsistency with NZBORA that was addressed. Section 38 of the Act was inserted, giving the Court power to suspend lifetime reporting obligations only where the registrable offender has complied with reporting obligations for 15 years, and the "offender satisfies the court that he or she does not pose a risk". Despite attempting to

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213 New Zealand Bill of Rights Act 1990, s 9.

214 Butler and Butler, above n 209, at 352.

215 *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429 at [172].

216 Finlayson, above n 210, at [11].

217 At [11]. This is similar to the analysis of ESOs as punishment in *Belcher v Chief Executive of the Department of Corrections* (2006) [2006] 1 NZLR 507 (CA).

218 New Zealand Bill of Rights Act 1990, s 18.

219 New Zealand Bill of Rights Act 1990, s 14; and Finlayson, above n 210, at [12].

220 Finlayson, above n 210, at [14].

address this inconsistency, s 38 was described as an "unreasonably high bar",[221] considering the lengthy 15-year period after an individual's release before they can access the right of review. It would also be difficult to show that they no longer pose any "risk", considering the fact that they have lived safely in society for 15 years is not evidence enough.

2 Right to be free from retroactive penalties

The AG also considered the Bill to be inconsistent with the right not to be subject to retroactive penalties and double jeopardy under s 26(2) of NZBORA. This section states that no one who has been convicted of an offence shall be punished again. As noted above, reporting obligations constitute a punishment, additional to the time served by the individual in prison.[222]

The principal Act was intended to be retrospective in application. However, this intention was not articulated due to poor drafting, prompting the Child Protection (Child Sex Offender Government Registration) Amendment Act 2016 (Amendment Act). The Amendment Act amends sch 1 of the principal Act to ensure it applies to all offenders who on 14 October 2016 were subject to sentences of imprisonment, ESOs, PPOs, or were no longer serving the sentence of imprisonment for a registrable offence, but subject to release conditions.[223] The Amendment Act was put through Parliament under urgency, which meant no consultation or select committee process was undertaken. The s 7 report on the Amendment Bill concluded the application was very broad,[224] and could not be justified in a free and democratic society.[225]

The AG emphasised that the presumption against retrospective application plays an important role in safeguarding the rule of law.[226] This requires that, before committing

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[221] (8 September 2016) NZPD 13574 per David Clendon MP.

[222] Finlayson, above n 210, at [29].

[223] Child Protection (Child Sex Offender Government Agency Registration) Amendment Act 2017, s 7.

[224] Christopher Finlayson *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Child Protection (Child Sex Offender Government Agency Registration) Amendment Bill* (7 March 2017) at [35].

[225] Finlayson, above n 224, at [48].

[226] R v KRJ [2008] DC Rotorua CRI-2011-077-1135, 25 February 2013 at [23].

any course of action, citizens should be able to know in advance what the legal consequences are that flow from that action.[227] The principle against retrospective legislation is strongest in relation to legislation that imposes obligations or penalties, or takes away acquired rights, in this case, to prevent "a person from suffering the patent injustice of being punished twice for the same offence".[228]

The Courts are already struggling with the Act's retrospective application. The case *AH v Commissioner of Police* considered the issue of how to treat someone who successfully challenged an order to be on the Register prior to the principal Act being amended, but was placed back on the Register as a consequence of the Amendment Act coming into force.[229] Although s 6 of NZBORA allows the Courts to prefer a rights consistent approach, this was not possible on the wording of the amending statute.[230] Section 2 of the Amendment Act is clear that it would be "taken to come into force on 14 October 2016", plainly meaning the amendments were to have retrospective effect.

However, the Court quashed the applicant's placement on the Register, as the Amendment Act had no provision allowing for the re-registration of the applicant following a successful challenge.[231] The case illustrates both the Court's limits in interpreting rights-inconsistent legislation, as per the basic principle of parliamentary supremacy, yet its willingness to try and find a rights-friendly outcome.[232]

3 Right to benefit from a lesser penalty

Section 25(g) of NZBORA affirms that everyone who is charged with an offence has the right to the benefit of the lesser penalty, if the penalty has been varied between the commission of the offence and sentencing. Essentially, this affirms the principle that statutes should not have retrospective effect to the disadvantage of an offender.[233] Section

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227 *Black-Clawson International Ltd. v Papierwerke Waldhof-Aschaffenburg A.G.* [1975] AC 591 (HL) at [638].

228 *Daniels v Thompson* [1998] 3 NZLR 22 (CA), per Thomas J (dissenting) at [57].

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

230 At [28].

231 At [29].

232 At [24].

233 Finlayson, above n 224, at [44].

25(g) only applies to penalties that are punitive in nature. Again, as the registration and reporting obligations were considered to be a penalty, the Act is clearly inconsistent with the right protected under s 25(g).

4 Implication of inconsistencies with NZBORA

There is no enforceable obligation upon Parliament to legislate or repeal legislation that is inconsistent with NZBORA, but it is assumed that a s 7 report would dissuade Parliament from doing so.[234] Parliament is only expected to proceed with a version that is inconsistent where there are "strong justification for the decision".[235] The justification given by Hon Anne Tolley was that the reporting obligations were not excessive "when balanced against the rights of children".[236] Even though a "clear bias" was recognised against the offender, this was a "comfortable" balance considering the context.[237]

There is no denying that reducing recidivism of child sex offenders constitutes an important objective.[238] However, in both s 7 reports, the AG acknowledged the lack of evidence to support the effectiveness of child sex offender registers and their ability to improve public safety.[239] Disregarding the human rights of offenders by using a system that is not evidenced to achieve the anticipated objective is particularly concerning.

The inconsistencies with NZBORA were not considered reason enough for Parliament to oppose the legislation. This reflects the view of MP's, and maybe also the public, that sex offenders are less human and therefore deserve fewer rights than other individuals.[240] The author does not contend that the legislation should be abandoned on the basis of rights infringement alone. Practically speaking, the role of NZBORA is not to strike down law. However, this is an important problem that should not be ignored, and further highlights the Register's inadequacy.

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234 Paul Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003) at 72 and 195.

235 Butler and Butler, above n 209, at 297.

236 (15 September 2015) 708 NZPD 6635.

237 (15 September 2015) 708 NZPD 6642 per Todd Muller MP.

238 Finlayson, above n 224, at [23].

239 Finlayson, above n 210 at [33]; and Finlayson, above n 224, at [24].

240 See Paula Bennett "New crack down on gangs and drugs" (press release, 3 September 2017).

B Obstructing Reintegration of Child Sex Offenders into the Community

An offender's ability to reintegrate into society is crucial to desistance from criminal behaviour.[241] Desistance can be conceptualised in a number of ways, but is generally used to refer to individuals who having previously engaged in patterns of offending and decrease these patterns over time.[242] Movement away from patterns of criminal behaviour is dependent on both external structural, such as housing, employment and relationships, as well as internal subjective changes in the person's self-identity.[243] Desistance research has obvious implications for policy-makers interested in reducing recidivism to determine how prisoners should be released and reintegrated into communities.[244]

An external process of particular importance to desistance of sex offenders is stable employment.[245] Work is often related to "having a purpose" and presents opportunities for the individual to set clear life goals.[246] Relationships and community acceptance were also considered to be of significant importance. Successful desistance narratives were characterised by themes of strong relationships and social support through difficult times.[247]

With regard to internal changes, desistance from sexual offending requires self-reflexivity,[248] where the offender can imagine a plausible new identity or "replacement self".[249] This essentially requires a fundamental transition in identity from offender to non-offender.[250] Internal changes are ultimately linked to external social processes, as

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241 Willis, Levenson and Ward, above n 154, at 545.

242 Anne-Marie McAlinden, Mark Farmer and Shadd Maruna "Desistance from Sexual Offending: Do the Mainstream Theories apply?" (2017) 17 Criminology and Criminal Justice 266 at 269.

243 McAlinden, Farmer and Maruna, above n 242, at 285.

244 Willis, Levenson and Ward, above n 154, at 545.

245 McAlinden, Farmer and Maruna, above n 242, at 278.

246 McAlinden, Farmer and Maruna, above n 242, at 276.

247 McAlinden, Farmer and Maruna, above n 242, at 282.

248 Barry Vaughan "The internal narrative of desistance" (2007) 47 The British Journal of Criminology 390 at 390.

249 Peggy Giordano, Ryan Schroeder and Stephen Cernkovich "Emotions and Crime over the Life Course: A Neo-Meadian Perspective on Criminal Continuity and Change" (2002) 112 American Journal of Sociology 1603 at 1607.

250 McAlinden, Farmer and Maruna, above n 242, at 287.

relationships and employment affect the self-worth of the individual, adding to their desire to desist from reoffending.

The Register is likely to hinder desistance in two ways. Firstly, it perpetuates the negative public view and stigma that all of those on the Register are dangerous and violent offenders with a high risk of reoffending. Although the Register is not public, there have been a number of instances before the Register was enacted, where information about an offender was leaked and became public knowledge.

For example, in 2011, John Francis Hubbard, who bought a house in Opunake, was driven out of town when the property was vandalised.[251] Hubbard was previously convicted for possessing images that were deemed objectionable under the Films, Videos and Publications Classification Act 1993. The local residents were clearly disturbed by his moving back into their community and smashed the windows of the house in response.[252] Similarly, in July 2017, Darren Albert Jolly was paroled to a suburban area in Whangarei.[253] However, neighbours identified him through the SST online database, and their negative reaction to his return ultimately drove Jolly to a different city.[254]

Hubbard and Jolly's situations are not unique, and exemplify the problematic community response to past offenders. Pushing a former offender out of town could drive them underground, and result in them returning to unhealthy habits in the absence of social support, accountability and contact. The ultimate result of this type of alienation is an increased chance of the individual reoffending, exactly what the Register aims to prevent in the first place.

Secondly, the active reporting requirements mandated by the Register may affect the individual's ability to separate themselves from their former behaviours and go through

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[251] Leighton Keith "Town drives internet sex offender out" *Taranaki Daily News* (online ed, Taranaki, 22 November 2011).

[252] Keith, above n 251.

[253] Linda Laird "Sex offender paroled to, then evicted from Whangarei" *New Zealand Herald* (online ed, 25 July 2017).

[254] Laird, above n 253.

the internal change required for successful desistance. Registration requirements force individuals to carry the "sex offender" label with them for anywhere between eight years to life. The constant updating of the Register reinforces the offender's past and defines them as that type of person.

Labelling theory has had significant impact on criminal justice policy for many years. It has been suggested that individuals with a history of sexual offending should not be unnecessarily labelled with terms such as "sex offender", as they may induce a negative Pygmalion effect in individuals with a history of sexual offending.[255] This means individuals may see themselves as inherently dangerous, immoral strangers who do not deserve a chance at redemption and ought to be separated and ostracised from society.[256] If such individuals do not see themselves as worthy human beings, capable of acceptance and change, it significantly compromises their chances of desistance.[257]

It should be noted that the Register for child sex offenders is the only one of its kind in New Zealand. This means child sex offenders are the sole category of convicted criminals who have to continue to identify with a label. Take for example X, a 19 year old, who has had sexual intercourse with his or her underage partner. X is convicted of an offence. After serving his or her time in prison and undergoing community rehabilitation, X is considered to have a very low risk of re-offending. However, X will be subject to ongoing reporting requirements and have to carry the stigma and label of being a "sex offender" for eight years to life. On the other hand, Y who has been convicted of grievous bodily harm and raping an adult victim, will be free to live his or her life once released from prison, uninhibited by any reporting requirements. Though X does not necessarily pose a greater risk of harm than Y (in fact, X is likely to pose far less of a risk), this is justified based on the stigma around the severity of child sex offending.

Take another example of person Z, who has a number of charges for sexual assault against different underage girls. Z has never been convicted of an offence, and therefore will not

[255] Willis, Levenson and Ward, above n 154, at 554.

[256] Willis, Levenson and Ward, above n 154, at 554.

[257] Willis, Levenson and Ward, above n 154, at 554.

qualify for the Register. Consistent with the longstanding principle of the presumption of innocence, certainly Z should not suffer restrictions or sanctions in relation to alleged offending. But the presence of X on the Register, and Z not on the Register again may not be representative of the risk of harm that each individual poses.[258]

The imposition of the reporting requirement to have an individual identify as an offender for a lengthy period of time after their sentence, as required by the Register, is inconsistent with desistance theory. It is counterproductive to enforce a system that obstructs an offender's reintegration into society and harms their ability to undergo the necessary internal changes, ultimately increasing their likelihood of reoffending.

C Creating a False Sense of Security

The prevalence of child sexual abuse is very difficult to determine, stemming from the fact that sexual offending and child sexual offending in particular is a "hidden" crime. Most instances of child sexual abuse occur in private, with only the victim and offender present. Considering the age and maturity of the victims, they will often not understand the incident was wrong and therefore may not know that they should report the incident or how to do so.

As the object of the Register is to keep children safe and away from those who could harm them, legislators should have really examined the evidence of how children come to be harmed. A common misconception is that child sex offenders target strangers.[259] Popular culture and media have diverted attention to "stranger danger", focusing on ensuring children do not talk to or trust strangers. However, the reality is, the vast majority of sexual offending, and child sexual offending in particular, is perpetrated by a family member or associate. Corrections estimates that 85 per cent of all child sexual abuse is committed by someone known to the child or their family.[260] In cases where the victim knows and trusts the offender, they will be further dissuaded from disclosing the incident to anyone.

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[258] For a similar example with regard to vetting, see Nessa Lynch, above n 5, at 552.

[259] Kelly Richards "Misperceptions about child sex offenders" (2011) 429 Trends and Issues in Crime and Criminal Justice 1 at 2.

[260] Department of Corrections "Release and Management of Sexual Offenders" <www.corrections.govt.nz>.

Considering these statistics, the Register inaccurately represents those who pose the greatest risk to children and creates a false sense of security for the public.[261] The public may be preoccupied with the individuals identified and registered, diverting attention from those who pose a genuine risk of offending in the community.

This is comparable to the process of vetting children's workers mandated under the Vulnerable Children's Act 2014 (VCA).[262] Vetting of potential and current employees is an important part of child protection.[263] The vetting scheme identifies "risky" individuals to limit their ability to work or volunteer with children.[264] A problem with vetting children's workers is that it may give parents and children a false sense of security: if the person has been checked then they are safe to work with children.[265] This is a dangerous assumption to make. Similar to the Register, the existence of a conviction is not necessarily reflective of who poses the highest risk of harm. In fact, considering the recidivism rates for child sex offenders,[266] many on the Register are likely to pose a very low risk of harm.

As well as requiring safety checks of children's workers, the VCA enforces an automatic bar or disqualification for those who have been convicted of a "specified offence" from being a core children's worker. "Specified offences" include all the registrable offences under the Act, with the addition of other serious crimes unrelated to child sex offending.[267] The State's ability to exclude individuals from certain positions of employment is a

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[261] Jenna Bollinger, Katie Seidler, Richard Kemp "Who Thinks What about Child Protection: Community Perceptions and Awareness of Child Protection Strategies and their Effectiveness for Reducing Sexual Reoffending" (2012) 4 Sexual Abuse in Australia and New Zealand 33 at 38; Hazel Kemshall and Beth Weaver "The sex offender public disclosure pilots in England and Scotland: Lessons for 'marketing strategies' and risk communication with public" (2012) 12 Criminology and Criminal Justice 549 at 553; and Naomi Freeman and Jeffrey Sandler "The Adam Walsh Act: A False Sense of Security or an Effective Public Policy Initiative?" (2010) 21 Criminal Justice Policy Review 31 at 43.

[262] Vulnerable Children's Act 2014, ss 21 – 44.

[263] Lynch, above n 5, at 541.

[264] Lynch, above n 5, at 539.

[265] Anne-Marie McAlinden "Vetting sexual offenders: State over-extension, the punishment deficit and the failure to manage risk" (2010) 19 Social and Legal Studies 25.

[266] Nadesu, above n 152, at 4.

[267] Schedule 2.

powerful one.[268] Being a barred individual may have significant implications, including the general assumption that because the person is barred, they are a paedophile.[269] However, the reality may be that the offender has committed a far less stigmatised, non-contact offence. In a similar way to the Register, disqualification from a particular position of employment is a significant restriction on an individual's freedom and may not accurately represent who poses the greatest risk of harm.[270]

A registration system may alleviate common anxieties and make the public feel safer. However, it is counter-productive, and even dangerous, to create a distraction from the true risk. Moreover, it is problematic that legislators have created the Register without having considered that the real but hidden risk of harm is not actually the individuals on the Register.

VII Alternative Options

Policy aimed at protecting children against harm from child sex offenders has, for the most part, been focused on punishment and punitive sanctions, with very little attention given to prevention or rehabilitation.[271] Reducing sex offender recidivism and increasing public safety can be achieved through other means, including the provision of proper support and assistance to the offenders.[272] But injecting money into "helping" offenders is an unpopular notion, does not fit with the notion of penal populism and has no symbolic appeal.

This section considers some of the alternative options for minimising reoffending from convicted individuals. Government has limited public funds and the allocation towards one policy inadvertently comes at the cost of other options. Considering the Register's

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[268] Lynch, above n 5, at 553.

[269] McAlinden, above n 265.

[270] Lynch, above n 5, at 553.

[271] Rekha Wazir and Nico van Oudenhoven (eds) *Child Sexual abuse: What Can Governments Do?* (Kluwer Law International, Massachusetts, 1998) at 110.

[272] New Zealand Council for Civil Liberties Inc. "Submission to the Justice and Electoral Select Committee on the Child Protection (Child Sex Offender Register) Bill 2015" at 2.

cost of $146 million and the uncertainty regarding its effectiveness in reducing child sex offending, it is all the more important that the opportunity cost of the Register is evaluated.

A Reintegration and Community Support

Reintegration focuses on helping an individual successfully re-join society after time in prison. Recent research in New Zealand illustrates how poor reintegration planning is linked to a greater risk of sexual recidivism.[273] Release planning for offenders is not limited to where the individual lives, but also employment options, ensuring the individual has social support and options available for community based treatment.

The international programme Circles of Support and Accountability (COSA) was referred to both during parliamentary debates and in the select committee process as a reintegration programme proven to succeed. COSA is internationally accepted as best practice to reintegrate high-risk child sex offenders who do not otherwise have adequate social support.[274] The offender is the core member of the circle, and is supported by volunteers in the community (the inner circle), who are advised by professionals (the outer circle).[275] If watching offenders after their release from prison is considered a priority, then COSA is the most relevant alternative to the Register.

Based on the twin philosophies of safety and support, the scheme operates as a means of addressing public concerns about the reintegration of sex offenders while also meeting the offender's needs.[276] It provides intensive support, guidance and supervision of the offender, putting an emphasis on reintegration and minimising risk.[277] As both the wider community and state agencies are involved in creating the network of support, the offender is likely to feel accountable for their actions, ensuring a more successful reintegration into society. COSA has been described as unique because it plugs the gaps left by institutions,

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[273] Gwenda Willis and Randolph Grace "Assessment of community reintegration planning for sex offenders: Poor planning recidivism" (2009) 36 Criminal Justice and Behaviour 494.

[274] Jim van Rensburg "Preparing Core members for Circles of Support and Accountability in New Zealand" (2014) 2 Practice: the New Zealand Corrections Journal 35 at 35.

[275] Rensburg, above n 274, at 35.

[276] Anne-Marie McAlinden "Managing risk: From regulation to the reintegration of sexual offenders" (2006) 6 Criminology and Criminal Justice 197 at 208.

[277] McAlinden, above n 276, at 208.

targeting the "dangerous isolation" outside prison that lies in wait for child sex offenders' once released.[278] Studies show that COSA reduces rates of reoffending by up to 70 per cent compared to an offender not in the circle.[279]

COSA was introduced in New Zealand as a pilot project run by Corrections, for the treatment of men who have sexually offended against children.[280] The program was deemed successful in 2013 and was in the process of being introduced in special treatment units (STUs). However, in early 2016, Corrections pulled the plug on COSA, cutting the annual funding of $25,000 to the Bond Trust that facilitated COSA.

The cutting of funds for COSA was due in part to the escape of Phillip Smith, a convicted child sex offender who fled to South America while on temporary release in 2014.[281] Smith was in a COSA group and used volunteers as a decoy for his escape.[282] It is unfortunate this one-off incident has ended the scheme in New Zealand. The Bond Trust responsible with facilitating COSA in New Zealand was reported to have felt "torpedoed" by Corrections.[283] The discontinuation of COSA's funding damages their credibility, as well as undermining the work put in by volunteers.[284] Compared with the $146 million to be spent on the Register, COSA is a low-cost treatment evidenced to work in reducing reoffending.[285]

B Investment in Offender Rehabilitation

Sex offender rehabilitation focuses on the specialised treatment of offenders with the hope to reduce recidivism in the long run. There are two long-running STUs that provide

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278 Phil Pennington "Trust feels 'torpedoed' by Corrections" *Radio New Zealand* (online ed, 7 March 2016).

279 Rensburg, above n 274, at 36.

280 Rensburg, above n 274, at 36.

281 Phil Pennington "Paedophile scheme falls foul of Smith case" *Radio New Zealand* (online ed, 3 March 2016).

282 Pennington, above n 281.

283 Pennington, above n 278.

284 Pennington, above n 278.

285 (1 June 2016) 714 NZPD 11658.

intensive group programmes for medium to high-risk sex offenders: Kia Marama at Rolleston Prison and Te Piriti at Auckland Prison.[286]

Established in 1989, Kia Marama was the first New Zealand treatment programme for those imprisoned for sexual offences against children.[287] By the programme's 25-year anniversary, it had treated more than 1100 child sex offenders, and inspired similar units across the world. Studies have shown the treatment programme reduces reconviction rates from 21 per cent to eight per cent.[288]

Te Piriti was established in 1994, and is also a psychological treatment prison for child sex offenders, but with a specific focus on creating an environment that is culturally supportive of Māori needs. Considering the disproportionate representation of Māori in the criminal justice system, developing a culturally responsive treatment is of particular importance.[289] A 2003 report showed that reconviction rates were even lower than those who had undergone treatment at Kia Marama, at 5.47 per cent.[290] Interestingly, the reconviction rate of those treated at Te Piriti was lower for Māori than non-Māori participants, illustrating the effectiveness of culturally appropriate support.

New Zealand's latest budget has put $763 million towards increasing prison capacity, but only a fraction of this, $30 million over the next four years, is being put towards rehabilitation for offenders. This comprises all forms of rehabilitation, not just that for child sex offenders, including alcohol and drug treatment, education, and treatment for

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[286] Juanita Ryan and Robert Jones "Innovations in reducing re-offending" (2016) 4 Practice: The New Zealand Corrections Journal (online ed.).

[287] Leon Bakker and others "And there was Light: Evaluating he Kia Marama Treatment Programme for New Zealand Child Sex Offenders Against Children" (1998) Department of Corrections at 3.

[288] Bakker and others, above n 287, at 2.

[289] Jillian Larson and others "Te Piriti: a Bicultural Model for Treating Child Molesters in Aotearoa/New Zealand" in William Marshall and others (eds) *Sourcebook of Treatment Programs for Sexual Offenders* (Plenum Press, New York, 1998) 385 at 388.

[290] Lavinia Nathan, Nick Wilson and David Hillman "Te Whakakotahitanga: an evaluation of the Te Piriti Special Treatment Programme for child sex offenders in New Zealand" Department of Corrections <www.corrections.govt.nz>.

violent offenders and reintegration support.[291] Considering the proven effectiveness of the treatment programmes, it is frustrating, though unsurprising, that the Government prioritises locking more people away than make a meaningful attempt to ensure they do not return to prison.

C Public Education and Awareness

Perhaps not a direct alternative for the Register, but a tool that may be useful in managing the problems posed by sex offenders is public education. As considered earlier in this paper, the media often generates myths and misconceptions that shape public attitudes making meaningful discussion of effective policies more difficult.[292] As a result, the public is quick to jump on board with the most punitive policy instead of one that is effective. There is a need to "demythologise" sexual offending and work with the community to create more effective, safer ways of protecting children from reoffending.[293]

A significant gap exists between how the public views sex offenders and reality. Research literature focusing on public attitudes toward sex offenders shows that those who have contact with sex offenders, either in a professional or personal capacity, are associated with less negative views.[294] Those who did not have any contact or experience with sex offenders have greater reliance on stereotypes portrayed in the media, and are associated with more negative attitudes.[295]

The United Kingdom Home Office undertook research to help educate the public on issues of sex offending.[296] The research paper showed that contrary to media portrayals; the abuser is rarely the old man in the raincoat, imagined to be lurking by a local park or primary school.[297] In fact, the overwhelming majority of perpetrators of child sexual abuse

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[291] Hon Louise Upston "$81.8m for Community Corrections and prisoner rehabilitation" (Ministers' Release, 25 May 2017).

[292] McAlinden, above n 276, at 210.

[293] McAlinden, above n 276, at 210.

[294] Willis, Levenson and Ward, above n 154, at 550.

[295] Willis, Levenson and Ward, above n 154, at 548.

[296] Don Grubin *Sex Offending against children: Understanding the risk* (UK Home Office, Police Research Series, 1998).

[297] Grubin, above n 296, at 13.

are men and women who have a relationship with the child. Furthermore, there are different levels of risk posed by sex offenders and most sex offenders will not re-offend when given the appropriate treatment and support.[298]

Communities that have all the relevant information are more likely to be able to handle the problem in a responsible and effective manner, helping statutory and voluntary agencies to successfully place and reintegrate sex offenders into the community. Moreover, it will elucidate who actually poses a risk to society by encouraging parents and guardians to stress the importance of body safety, and being able to communicate when something is wrong. The adoption of such an approach is, at this point, conjectural and is difficult to reconcile with penal populism as discussed earlier. However, if the public is exposed to evidence that shows their involvement will help reduce future offending, it may persuade the public that this is an effective and worthwhile option.[299]

VIII Conclusion

The Register is based on the presumption that releasing child sex offenders into the community is dangerous, and watching over them will keep children safer. On further analysis, it is apparent that the Register is very limited in its application. Only a small percentage of sex offenders are convicted and will actually be on the Register and those offenders are empirically proven to pose a low risk of reoffending. Furthermore, the Register may actually cause more harm than good. Constant reporting requirements will hinder an offender's ability to make internal changes vital to desistance and if the Register is leaked, public backlash may drive the offender to unhealthy recidivist behaviour.

At the time of writing, the Register has only been in existence for 12 months and as such, there is little evidence to illustrate how effective it has been. Already in the first four months of existence, 11 child sex offenders had been caught breaching a registration requirement.[300] This shows the Register is successfully operating as a means of exacting

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[298] Grubin, above n 296, at 32.

[299] McAlinden, above n 276, at 211.

[300] Tommy Livingston "Eleven child sex offenders caught breaching the sex offender registry since its creation" *Stuff* (online ed, 15 May 2017). More recent information on breaches of the Register have not yet been made available.

further punishment, but also illustrates that breaches of minor reporting requirements may be distracting officials from the true problem - protecting children from sexual offending.

It still remains to be seen whether the Register has successfully deterred child sex offenders from further offending or improved information sharing between agencies. A key question that needs answering is: are our children really safer? Further research in this area may consider what kind of scenario would be required in New Zealand for the Register to be disestablished. If the public were aware of the limitations of the Register, perhaps there would be a shift in attitude away from emotive laws towards evidence-based policies. Regardless of whether there is a change in public views, it is irresponsible to distract the public with yet another punitive piece of legislation as opposed to policy that will improve the safety of children in New Zealand.

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