Report of the

ATTORNEY-GENERAL

under the New Zealand Bill of Rights Act 1990 on the Corrections (School Notification of Sex Offenders) Amendment Bill

Presented to the House of Representatives pursuant to Section 7 of the New Zealand Bill of Rights Act 1990 and Standing Order 262 of the Standing Orders of the House of Representatives

1. I have considered whether the Corrections (School Notification of Sex Offenders) Amendment Bill ('the Bill') is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 ('the Bill of Rights Act'). I have concluded the Bill is inconsistent with the right not to be subjected to disproportionately severe treatment affirmed in s 9 of the Bill of Rights Act.

2. As required by s 7 of the Bill of Rights Act and Standing Order 262, I draw this to the attention of the House of Representatives.

The Bill

3. The Bill aims to enable local schools to make informed decisions about the risk of a sex offender's placement in the community. The Bill amends the Corrections Act 2004 ('the principal Act') to require probation officers to notify school principals when certain offenders are placed in their community. The proposed notification must include the offender's name and residential address, and the sentence or order to which they are subject. It is unclear if principals could or would be provided with information about the offence committed.

4. For the purposes of the Bill, an offender is a person under the supervision of a probation officer and who has been convicted of an offence listed in s 107B(2) of the Parole Act 2002. Section 107B(2) lists sexual offences against the Crimes Act 1961, including sexual offences against children and those not involving children.

5. The proposed notification is to principals of any schools within 5 kilometres of the residence of the offender. If there are no schools within 5 kilometres, the principal of the closest school to where the offender resides must be notified. Probation officers also have a discretion to notify the principal of any other school in the relevant probation area in which an offender resides.

6. Notification must occur:

    6.1 at least 48 hours before the release of the offender from detention; or

    6.2 if the offender is not being released from detention, as soon as possible, but not later than 72 hours, after the probation officer knows of a new residential address of the offender.

Existing opportunities for school notification

7. The Department of Corrections already notifies schools of the placement of some child sex offenders in the community, in the absence of express statutory authorisation. This is intended to enable community members to reinforce safety messages and to take common sense precautions to keep themselves and children safe.

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8. There is a presumption that notification will take place in relation to offenders who are subject to certain types of orders,[1] but an individualised assessment of risk takes place in each case before notification occurs. In deciding whether notification is appropriate, the rights of the offender and their rehabilitation and reintegration are balanced against the duty to inform individuals of an increased risk.

9. When a decision is made that notification should occur, notification is generally made to principals of schools and other early childhood education facilities within a 1.5 kilometre radius of the offender's proposed address. The process of notification does not include providing schools information from which the offender could be identified, such as their name or address.

10. Child sex offenders may also be registered on and required to report personal information to the Child Sex Offender Register, established under the Child Protection (Child Sex Offender Government Agency Registration) Act 2016. The Register is a record of a range of up to date personal information about child sex offenders living in the community. It is intended to help Police and Corrections with the monitoring of people who have offended in the past, with the aim of preventing reoffending and keeping children safe.

11. The Register is not publicly available, but there is a limited ability to disclose personal information to an affected person, including a teacher of a child, in circumstances where it is reasonably believed that the offender poses a threat to the life, welfare or sexual safety of a particular child or children.[2]

Section 9 of the Bill of Rights Act (right not to be subject to disproportionately severe treatment)

12. Section 9 of the Bill of Rights Act affirms that everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment. The purpose of s 9 is to ensure that all persons are treated with respect for their inherent dignity and worth.[3]

13. The respect for inherent dignity and worth protected by s 9 can also be capable of recognising the value of an individual's privacy notwithstanding the absence of a freestanding right to a private life in the Bill of Rights Act.[4]

14. The key questions in assessing whether there is a limit on the right are:

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[1] These are extended supervision orders ('ESOs') with intensive monitoring, ESOs, preventive detention, parole where an ESO application has been made, and returning offender orders.

[2] Section 45 of the Child Protection (Child Sex Offender Government Agency Registration) Act 2016.

[3] A Butler and P Butler, *The New Zealand Bill of Rights Act: A Commentary* (2nd edition, LexisNexis, Wellington, 2015) at [10.4].

[4] *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.

WELLINGTON, NEW ZEALAND

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14.1 is the notification requirement treatment or punishment? and, if so,

14.2 is the notification requirement cruel, degrading, or disproportionately severe?

Is the notification requirement treatment or punishment?

15. The White Paper commentary indicates that the treatment element of s 9 is aimed at "any form of treatment" that is "incompatible with the dignity and worth of the human person".[5] Butler and Butler consider that the term is "sufficiently wide to refer to any measure applied to a particular person or persons, or the manner in which a particular person or persons is dealt with".[6] I am satisfied that the notification requirement amounts to treatment for the purposes of s 9.

16. I do not consider the notification requirement is a punishment. In relation to the Child Sex Offender Register, the then Attorney-General, Hon Christopher Finlayson, concluded that the imposition of registration and reporting requirements on child sex offenders amounted to punishment for the purposes of s 9.[7] The context of the proposed notification requirement in the Bill is similar and the connection with a triggering criminal conviction is similarly strong. I do not, however, consider the proposed notification is a punishment because it has less impact on offenders' liberty and other protected rights than the imposition of registration and reporting, there is no offence provision created by the Bill and the obligations fall to the probation officer rather than the offender.

Is the treatment cruel, degrading, or disproportionately severe?

17. The Supreme Court has held that for s 9 to be engaged, the treatment or punishment must reach the very high threshold of outrageousness.[8]

18. In this instance, the key issue is whether the Bill would result in treatment that is disproportionately severe. The Supreme Court has noted that the standard of disproportionate severity will be engaged only in extreme circumstances, to capture treatment or punishment which is grossly disproportionate to the circumstances.[9] It has further held that the prohibition in s 9:[10]

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[5] *A Bill of Rights for New Zealand: A White Paper* (1985) at [10.162].

[6] A Butler and P Butler, *The New Zealand Bill of Rights Act: A Commentary* (2nd edition, LexisNexis, Wellington, 2015) at [10.9.1].

[7] *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.

[8] *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429 at [92].

[9] *Taunoa v Attorney-General* [2007] NZSC 70 at [92].

[10] *Taunoa v Attorney-General* [2007] NZSC 70 at [175] per Blanchard J, endorsing *R v P* (1993) 10 CRNZ 250 (HC) at 255 per Williams J.

WELLINGTON, NEW ZEALAND

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is extended by the words "disproportionately severe" to encompass punishment which is not in itself cruel or unusual but becomes so because it is disproportionately severe in the particular circumstances.

19. In my view a notification requirement, in and of itself, would not necessarily amount to disproportionately severe treatment. Disproportionate severity would depend on the circumstances of each case, the information disclosed, and the adequacy of any safeguards.

20. The proposed notification requirement, however, is overly broad, insufficiently flexible, and lacks safeguards. I consider that the scheme would result in disproportionately severe treatment in relation to at least some of the offenders to which it applies in the following ways:

    20.1 There is no clear rational connection between the scope of the notification requirement and its intended aim of improving child safety. The notification requirement would apply to offenders whose offending did not involve children and those who were not assessed as posing a risk to children.

    20.2 There is no evidence to demonstrate a need for notification of this kind over and above the current, more targeted opportunities for school notification.

    20.3 The scheme leaves no room for considering the appropriateness or proportionality of the notification requirement in individual cases. Notification will occur regardless of the risk the offender poses to the safety of children or of the potential impact of notification on the offender's privacy, safety, or prospects of successful rehabilitation and reintegration.

    20.4 There is an absence of safeguards, such as an indication of what school principals are expected to do with the information or the limits of appropriate use. It is unclear how the information might assist schools to assess and make decisions about the risk posed by a sex offender's placement, particularly if principals are not provided with information about the offence committed, or what principals ought to do if they consider a placement is not suitable. The absence of safeguards also gives rise to safety concerns for the offender, as probation officers would be required to notify principals of the offender's name and residential address.

21. I note that where s 9 is engaged, there is no scope for justification in terms of s 5 of the Bill of Rights Act.[11] Therefore, there cannot be a "reasonable limit" on the right to be free from disproportionately severe treatment.

[11] *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 at [264].

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Conclusion

22. For the above reasons, I have concluded the Bill appears to limit s 9 of the Bill of Rights Act.

Hon David Parker

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WELLINGTON, NEW ZEALAND

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