IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 31/2019
[2021] NZSC 2

BETWEEN	D (SC 31/2019) Appellant
AND	NEW ZEALAND POLICE Respondent

Hearing:	30 October 2019
Further Submissions:	14 and 26 November 2019 and 26 June 2020
Court:	Winkelmann CJ, William Young, Glazebrook, O'Regan and Ellen France JJ
Counsel:	J D Munro and J N Olsen for Appellant A M Powell and M R G van Alphen Fyfe for Respondent
Judgment:	9 February 2021

JUDGMENT OF THE COURT

A The application to adduce further evidence is granted.

B The appeal is allowed.

C The registration order made by the District Court under s 9(1) of the Child Protection (Child Sex Offender Government Agency Registration) Act 2016 is quashed.

SUMMARY OF RESULT

[1] The Court has, by majority, allowed the appeal and quashed the order made under s 9(1) of the Child Protection (Child Sex Offender Government Agency Registration) Act 2016 (the Registration Act) placing the appellant on the Child Sex Offender Register.

[2] The appeal raised two primary issues. The first was whether the Registration Act applied to the appellant, given he committed the qualifying (registrable) offence before the Act came into force. The second was the relevance of the New Zealand Bill of Rights Act 1990 when the court is deciding whether to make a registration order under s 9 of the Registration Act.

[3] Winkelmann CJ, O'Regan and Ellen France JJ have held that s 9 of the Registration Act does not apply to offenders such as the appellant who committed a qualifying offence before the Act came into force but were convicted and sentenced after that date. They consider that the Registration Act is not sufficiently clear to displace the presumption against retrospective penalties in s 6 of the Sentencing Act 2002. The appellant is therefore not eligible to be placed on the register.[1]

[4] William Young and Glazebrook JJ have concluded that the appellant is eligible to be placed on the register. They consider that s 9 of the Registration Act applies to all offenders convicted of a qualifying offence and sentenced to a non-custodial sentence after the Act came into force, irrespective of when the offence was committed (as well as all those convicted before and sentenced after). Their view is that this is the only available interpretation of s 9.[2]

[5] In terms of the correct approach to s 9 of the Registration Act, Winkelmann CJ, Glazebrook and O'Regan JJ have held that the exercise undertaken by the court when considering making a registration order is a two-stage process.[3] First, the court must be satisfied that the offender poses a real or genuine risk to the lives or sexual safety of a child or children generally.[4] Second, the court must be satisfied this risk is of sufficient gravity to justify the making of a registration order with the consequent impacts on the rights of the offender.[5]

[6] William Young and Ellen France JJ consider that where an offender is sentenced to home detention and poses a real or genuine risk to child safety, there will

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1 At [77] and [82] per Winkelmann CJ and O'Regan J and [159] per Ellen France J.
2 At [266](a) per William Young J and [252] and [257] per Glazebrook J.
3 At [104] per Winkelmann CJ and O'Regan J and [260] per Glazebrook J.
4 At [104]–[105].
5 At [101] and [106]–[108].

not be a great deal of scope for the court to exercise its discretion against making a registration order.[6] They do not read into s 9 a requirement that an order cannot be made unless the sentencing judge regards the incidents of a registration order as proportionate to the particular risks posed by the offender.

[7] In assessing the risk posed by the appellant, Winkelmann CJ, O'Regan and Ellen France JJ consider it legitimate to take into account the updating reports of the clinical psychologist who treated the appellant since his original sentencing. Counsel for the respondent accepted that the Court consider these reports as updating evidence of risk.[7] William Young and Glazebrook JJ query the legitimacy of considering updating evidence that shows how the risk posed by the offender has changed since the time of sentencing. They are of the view that the risk posed by an offender should be assessed at the time of the original sentencing.[8]

[8] Applying their approach to s 9 to the appellant's case, Winkelmann CJ and O'Regan J were satisfied that the appellant poses a real risk to the sexual safety of children. However, in their view, this risk is not of sufficient gravity to justify the making of a registration order. They would have accordingly allowed the appeal even if they had found that the Registration Act did apply to the appellant.[9] Glazebrook J agrees with their approach, but takes a different view of its application to the facts of the present case. She would have dismissed the appeal.[10]

[9] William Young J considers that at the time the appellant was sentenced, he posed a real or genuine risk to the lives or sexual safety of one or more children or children generally. The making of a registration order was therefore appropriate. He would have dismissed the appeal.[11]

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6 At [296]–[299] per William Young J and [150] and [158] per Ellen France J.
7 At [41] per Winkelmann CJ and O'Regan J and [159] per Ellen France J.
8 At [305]–[309] per William Young J and [262] per Glazebrook J.
9 At [128] and [135].
10 At [260]–[264].
11 At [310].

[10] Given her view that the Registration Act does not apply to the appellant, Ellen France J does not consider it necessary to express a view as to whether a registration order should have been made under s 9 if the Act did apply.[12]

[11] As is apparent from the intituling, the Court has also decided that it is appropriate for the judgment (and leave judgment) to be anonymised.[13]

REASONS

WINKELMANN CJ AND O'REGAN J
(Given by O'Regan J)

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12 At [159].

13 At [147] per Winkelmann CJ and O'Regan J, [267] and [314] per William Young J, [265] per Glazebrook J and [159] per Ellen France J.

Introduction

[12] The appellant pleaded guilty to two offences under the Films, Videos, and Publications Classification Act 1993 (the FVPC Act). The first of these was an offence of making an objectionable publication, knowing or having reasonable cause to believe that the publication was objectionable, an offence under s 124(1) of the FVPC Act. The second was an offence of having in his possession an objectionable publication, knowing or having reasonable cause to believe that the publication was objectionable, an offence under s 131A(1) of the FVPC Act.

[13] The appellant was sentenced to nine months' home detention in the District Court.[14] The Judge also made an order that the appellant be placed on the Child Sex Offender Register established under the Child Protection (Child Sex Offender Government Agency Registration) Act 2016 (the Registration Act).[15] Under s 9(1) of the Registration Act, such an order may be made when a court imposes a non-custodial sentence in respect of a conviction for a "qualifying offence". The offence under s 131A(1) was a qualifying offence as the publication involved subjects under 16 and dealt with sex.[16]

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14 *New Zealand Police v [D]* [2018] NZDC 665 (Judge David Sharp) [DC judgment] at [11].
15 At [15]–[17].
16 Child Protection (Child Sex Offender Government Agency Registration) Act 2016 [Registration Act], sch 2 cl 1(b)(iii).

[14] The appellant appealed to the High Court against the making of the registration order (but did not appeal against his sentence of home detention).[17] That appeal was dismissed.[18] The appellant then sought leave to appeal to the Court of Appeal against the High Court judgment. Leave was granted.[19] However, the appeal itself was dismissed.[20]

Issues on appeal

[15] The argument at the hearing of the appeal focused on whether, and, if so, how the New Zealand Bill of Rights Act 1990 (the Bill of Rights) is to be taken into account in decisions under s 9 of the Registration Act. That was the approved question on which leave to appeal was given.[21]

[16] Closely related to this issue was the scope and effect of the retrospectivity provisions in the Registration Act. As will become apparent, the retrospectivity issue became determinative of the appeal. Counsel made additional submissions after the hearing on that issue. We also amended the grant of leave by adding an additional approved question:

> … whether the Child Protection (Child Sex Offender Government Agency Registration) Act 2016 applies retrospectively to offenders who committed a qualifying offence before the date on which the Act came into force and were convicted and sentenced after that date.

[17] An additional issue which arose for consideration was whether this judgment (and this Court's leave judgment) should be anonymised.

The legislation

[18] The Registration Act came into effect on 14 October 2016, but was intended to apply retrospectively. During the parliamentary process, the Attorney-General issued a report under s 7 of the Bill of Rights in which he concluded that the Bill was

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17 Section 9(4) of the Registration Act provides that a registration order is a sentence for the purposes of Part 6 of the Criminal Procedure Act 2011 (appeals).

18 *[D] v New Zealand Police* [2018] NZHC 563 (Lang J) [HC judgment].

19 *[D] v New Zealand Police* [2018] NZCA 337 (Miller, Mallon and Gendall JJ).

20 *[D] v New Zealand Police* [2019] NZCA 30, [2019] 2 NZLR 778 (Kós P, French and Gilbert JJ) [CA judgment].

21 *D (SC 31/2019) v New Zealand Police* [2019] NZSC 58.

inconsistent with ss 9 and 26(2) of the Bill of Rights[22] and could not be justified under s 5.[23]

[19] The purpose of the Registration Act is set out in s 3, which provides:

> **3 Purpose**
>
> The purpose of this Act is to establish a Child Sex Offender Register that will reduce sexual reoffending against child victims, and the risk posed by serious child sex offenders, by—
>
> (a) providing government agencies with the information needed to monitor child sex offenders in the community, including after the completion of the sentence; and
>
> (b) providing up-to-date information that assists the Police to more rapidly resolve cases of child sexual offending.

[20] A person who is sentenced to a term of imprisonment for a qualifying offence is automatically placed on the register.[24] Where a person is sentenced to a non-custodial sentence in respect of a conviction for a qualifying offence, the court may make a registration order, but is not obliged to do so. This power is contained in s 9 which relevantly provides:[25]

> **9 Court may make registration order**
>
> (1) If a court imposes on a person a non-custodial sentence in respect of a conviction for a qualifying offence, the court may order that the person must be placed on the register and must comply with the reporting obligations of this Act.
>
> (1A) For the purposes of subsection (1), the date on which the person was charged with the offence is irrelevant.
>
> (2) A court may make an order under this section (a ***registration order***) only if the court is satisfied that the person poses a risk to the lives or sexual safety of 1 or more children, or of children generally.
>
> (3) For the purpose of assessing the risk posed by the person, the court must consider the following matters:

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22 Section 9 deals with the right not to be subjected to disproportionately severe treatment or punishment; s 26(2) deals with the right not to be subject to double jeopardy.

23 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) at [41].

24 See ss 7(1)(a) and 12.

25 Subsection (3) was added at the select committee stage "to give extra guidance to judges when assessing the risk posed by the offender": see Child Protection (Child Sex Offender Register) Bill 2016 (16-2) (select committee report) at 2.

(a) the seriousness of the qualifying offence:

(b) the period of time that has elapsed since the offence was committed:

(c) the age of the person:

(d) the age of the person at the time of the offence:

(e) the age of any victim of the offence at the time of the offence:

(f) the difference in age between the victim and the person at the time of the offence:

(g) any written assessment of the risk posed by the person:

(h) any submission or evidence from any victim of the offence:

(i) any other submission or evidence relating to the risk posed by the person:

(j) any other matter that the court considers relevant.

…

[21] Qualifying offences are divided into three classes, depending on the level of seriousness.[26] The qualifying offence committed by the appellant is in class 1, the least serious category.

[22] The length of the reporting period for a registrable offender is eight years for a class 1 offence, 15 years for a class 2 offence and life for a class 3 offence.[27] The eight-year period also applies to an offender who has been sentenced to a non-custodial sentence for a qualifying offence and is subject to a registration order.[28] So, for the appellant, eight years is the relevant period.

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26 Schedule 2.
27 Section 35(1).
28 Section 35(1)(d).

[23] Once a registration order has been made, the registrable offender is required to report "relevant personal information" to the police. The relevant provision is s 16(1), which provides:

> **16 Relevant personal information to be reported**
>
> (1) For the purposes of this Act, the ***relevant personal information*** to be reported by a registrable offender consists of the following information:
>
> (a) his or her name, together with any other name by which he or she is, or has previously been, known:
>
> (b) in respect of each name other than his or her current name, the period during which he or she was known by that other name:
>
> (c) his or her date of birth:
>
> (d) the address of each of the premises at which he or she generally resides or, if he or she does not generally reside at any particular premises, the name of each of the localities in which he or she can generally be found:
>
> (e) the name, sex, and date of birth of each child who generally resides in the same household as that in which the offender generally resides:
>
> (f) in respect of each child who generally resides in the same household as that in which the offender generally resides, the name of the principal caregiver:
>
> (g) his or her postal address for service of notices and documents under this Act:
>
> (h) if he or she is working,—
>
> (i) the nature of the work; and
>
> (ii) the name of his or her employer (if any); and
>
> (iii) the address of each of the premises at which the offender generally works or, if he or she does not generally work at any particular premises, the name of each of the localities at which he or she generally works:
>
> (i) details of his or her affiliation with any club or organisation that has a child membership or child participation in its activities, including any online club or organisation:
>
> (j) the make, model, colour, and registration number of any motor vehicle owned by, or generally driven by, the offender:

(k) details of any tattoos, scars, or permanent distinguishing marks that he or she has (including details of any tattoo or mark that has been removed):

(l) if, at the time of making an initial report, he or she has 1 or more valid passports, the passport number, place of issue, and date of expiry of each passport:

(m) details of any telecommunications service used, or intended to be used, by the offender, including—

(i) the name of any landline or mobile telephone service provider used, or intended to be used, by the offender; and

(ii) any phone numbers used, or intended to be used, by the offender:

(n) the name of any Internet service provider, and the details of any routing or modem device, used, or intended to be used, by the offender:

(o) details of any username for any online social networks, online gaming accounts, or online storage accounts used, or intended to be used, by the offender:

(p) details of any website domain owned or website administered, or intended to be owned or administered, by the offender:

(q) details of any email addresses used, or intended to be used, by the offender.

[24] Offenders must make an initial report,[29] make annual update reports,[30] and report any changes to certain aspects of the reported information.[31] They must also report any travel plans,[32] and their ability to change their name is restricted.[33]

[25] The reporting requirements in s 16 apply to all offenders, regardless of the offence for which they have been convicted and the seriousness of that offence. The periods of registration are also fixed. So a decision under s 9 to place someone on the register is a binary decision. A judge does not have a discretion to place an offender on the register for a period less than the eight years provided for in s 35 and also has

29 Section 17.
30 Sections 18 and 19.
31 Section 20.
32 Sections 21–23.
33 Part 2 subpt 4.

no discretion to excuse the offender from some of the reporting requirements if they are not relevant to the offence for which the offender was convicted.

[26] Failure to comply with the reporting obligations without reasonable excuse is a criminal offence.[34] Knowingly providing false or misleading information is also an offence.[35]

[27] The register is not a public register. Access to the information contained in the register is restricted to those authorised by the Commissioner of Police (the Commissioner) in accordance with guidelines to be issued by the Commissioner.[36] Provision is made for specified government agencies to share the information contained on the register for the purpose of monitoring the whereabouts of registered offenders, verifying their personal information, managing the risk that they may commit further sexual offences against children and managing any risk or threat to public safety.[37] The appellant queries how much monitoring is really happening, however. We will revert to this later.

The offending

[28] The summary of facts to which the appellant pleaded guilty describes the offending that led to his conviction under s 131A. The offending was discovered after a search warrant was executed on the appellant's home. 1,260 video files and 1,890 photographs of child pornography were found stored on his computer. These photographs were classified in the summary of facts according to the SAP scale, which ranks images of child pornography from level 1 (nudity or erotic posing with no sexual activity) up to level 5 (images of sadism or bestiality).[38] The images found on the appellant's computer included images in each of the five categories on the SAP scale.

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34 Section 39.
35 Section 40.
36 Section 41.
37 Section 43(1).
38 The SAP scale was adopted by the Court of Appeal of England and Wales in *R v Oliver* [2002] EWCA Crim 2766, [2003] 1 Cr App R 28. See also *R v Zhu* [2007] NZCA 470 at [12]–[15].

[29] A precise description of the nature of the photographs stored on the appellant's computer appears in the judgments of the Courts below and it is not necessary for us to repeat it here.[39]

[30] The charge on which the appellant was convicted under s 124(1) of the FVPC Act involved a video in which the appellant himself appeared with another adult male. It did not, however, involve subjects under the age of 16 and was therefore not a qualifying offence for the purposes of the Registration Act.[40] There appears to have been some confusion about whether the offence under s 124(1) was a qualifying offence in the appellant's case. We will revert to this aspect later.[41]

The Courts below

District Court

[31] The sentencing report provided to the District Court by the Department of Corrections recorded that the appellant's risk of reoffending was assessed as medium and the risk of harm to potential victims was high. The sentencing Judge also had before him a report from a clinical psychologist, Dr Rogers, who had treated the appellant over 31 one-hour sessions. She advised that prior to this treatment, the appellant's overall risk of sexual reoffending was considered to be moderate. This took into account an actuarial assessment under the Static-99R model, which assessed the appellant as falling within the low-moderate risk category relative to other adult male sex offenders. She reported that the appellant had, in the course of his treatment, developed increased insight into his offending and strategies to manage his risk. This led her to opine that his overall risk of sexual reoffending following treatment was low-moderate and that any future sexual offending was likely to be limited to behaviour exhibited in the index offence (viewing child pornography). She recommended continuing treatment.

[32] Judge David Sharp noted the seriousness of the offending, the vulnerability of the children depicted in the photographs and videos and the risk assessment that there

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39 HC judgment, above n 18, at [25]–[29]; and CA judgment, above n 20, at [24]–[25].
40 Schedule 2 cl 1(b)(i).
41 See below at [116]–[118].

was a low to moderate risk of reoffending.[42] He said that when considering the protection of children, the presence of a low to moderate risk was a factor of significance, and determined that an order should be made.[43]

High Court

[33] Lang J recorded that there had been two different approaches to cases under s 9 of the Registration Act in the High Court.[44] We will revert to these approaches later.[45] He considered that the matters set out in s 9(3) that are to be taken into account for the purpose of assessing the risk posed by the offender also informed the discretion as to whether a registration order should be made in the event that the court determined that the threshold test set out in s 9(2) was made out.[46]

[34] Having considered those factors, as well as an updating report from Dr Rogers, the Judge determined that the threshold in s 9(2) was met.[47] He then concluded, applying the same factors, that a registration order should be made. He saw this as the only realistic way in which the appellant's use of the internet could be monitored in the future.[48] He dismissed the appeal.

Court of Appeal

[35] The Court of Appeal had before it a third report by Dr Rogers updating the reports presented to the District Court and High Court. The Court accepted this as updating evidence.[49] Dr Rogers reported that the appellant had engaged in 11 maintenance sessions with her and had commenced a SAFE treatment programme. She expressed the view that the appellant's dynamic risk factors had improved and that he likely posed a low risk of viewing or possessing child pornography in future.

[36] The Court considered the two approaches adopted by the High Court (referred to earlier) and said it considered the correct position was that the court needed to be

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42 DC judgment, above n 14, at [15]–[17].
43 At [17].
44 HC judgment, above n 18, at [11]–[14].
45 See below at [45]–[48].
46 At [18].
47 At [55]. We discuss his evaluation of these factors below at [116]–[125].
48 At [56].
49 CA judgment, above n 20, at [31] and [43]. See also Order A.

satisfied that the risk posed by an offender was real, genuine, or actual and not fanciful or remote.[50] It considered that the factors set out in s 9(3) informed both the consideration of the threshold test set out in s 9(2) as well as the decision as to whether to make a registration order if that threshold is met.[51]

[37] The Court noted that Parliament had determined that an offender sentenced to any period of imprisonment for a qualifying offence was automatically placed on the register. It considered that this indicated that where the qualifying offence was sufficiently serious to attract a starting point exceeding two years' imprisonment, there would need to be a good reason to justify not making a registration order in a case where the offender is found to pose a real risk to the lives or sexual safety of children.[52]

[38] The Court noted the offences committed by the appellant, but did not comment on the fact that the offence under s 124(1) of the FVPC Act was not a qualifying offence and therefore not relevant to the decision to make a registration order.[53]

[39] Having evaluated the criteria set out in s 9(3) of the Registration Act, the Court determined that the order was correctly made and dismissed the appeal.[54]

Updating evidence

[40] As occurred in both the High Court and the Court of Appeal, the appellant sought to adduce updating evidence from Dr Rogers, outlining progress in his treatment since the report presented to the Court of Appeal. The respondent did not object to the admission of this evidence. We are satisfied that this evidence is fresh, credible and cogent,[55] relating both to the appeal against the making of the registration order and the application for anonymisation, and accordingly we admit it (as did both the High Court and Court of Appeal in relation to the updating evidence).[56]

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50 At [19].
51 At [20].
52 At [22].
53 At [23]. See below at [117].
54 At [42]. We discuss the Court's assessment of the s 9(3) criteria below at [116]–[125].
55 *Lundy v R* [2013] UKPC 28, (2013) 26 CRNZ 699 at [120]; and *Mark v R* [2019] NZCA 121 at [16].
56 The report of Dr Rogers was not an affidavit or formal statement, but the respondent agreed to its admission as updating evidence and we admit it under s 9(1)(a) of the Evidence Act 2006.

[41] Although all members of the Court agree that the report of Dr Rogers is relevant to the anonymisation issue, both William Young J and Glazebrook J query the legitimacy of considering this report, as well as the updating reports filed in the High Court and Court of Appeal, in the context of the assessment of risk.[57] We do not think it is necessary to address that issue in the present case, given that it was common ground that Dr Rogers' reports were relevant to the assessment of risk. Counsel for the respondent expressly recorded in his oral submissions that the respondent did not object to the Court considering this evidence as updating evidence of risk. The case was argued on the basis that the updating evidence was relevant in that context, as it had been in the Court of Appeal. The respondent did not challenge the decisions of both the High Court and Court of Appeal to take into account the updating reports provided by Dr Rogers in those Courts. We have therefore taken into account the reports of Dr Rogers not only in relation to the anonymisation issue, but also in relation to the risk assessment exercise.

[42] Dr Rogers recorded that the appellant completed SAFE treatment after the delivery of the Court of Appeal judgment and volunteered for further SAFE treatment. He also had self-referred for treatment related to his own experience of sexual abuse. She said the appellant was self-motivated to overcome his offending and issues relating to his own early experiences.

[43] Dr Rogers outlined various challenges faced by the appellant, including loss of employment and loss of friendships consequent upon the discovery of the nature of his offending. This resulted from the public availability on the internet of the Court of Appeal judgment, which included detailed personal information unknown to close family members. His reaction to this illustrated his positive coping style becoming more stable in the face of difficulty.

[44] Dr Rogers considered that this positive, proactive coping style is protective against further offending. She saw the appellant's reported lack of urge to revert to pornography, withdraw or seek support from online chat groups as suggesting that his risk of reoffending remains low. However, she considered that the public availability

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[57] See the reasons given by William Young J below at [305]–[309] and Glazebrook J below at [262].

of the Court of Appeal judgment (to which we will revert below) creates a personal risk to the appellant with regard to his mood difficulties and suicidality.

The two High Court approaches

[45] As noted earlier, the Court of Appeal sought to resolve a conflict in the approaches adopted in various High Court decisions made under s 9. These contrasting approaches are described in broad terms below.

[46] In *Johnston v Police*, Dobson J expressed the view that the level of risk required under s 9(2) to engage the power to make a registration order was that the offender would, as a matter of definition, be "a serious child sex offender" referred to in s 3, which sets out the purpose of the Registration Act.[58] He considered that if the level of risk posed by an offender was not of that magnitude, then the Registration Act regime would apply beyond the scope intended by Parliament as reflected in its statutory purpose.[59]

[47] Dobson J considered that, once the necessary level of risk was established to engage s 9(2), the court was required to balance the utility of having the offender's details on the register against the impact that registration would have on the offender. This required consideration of the offender's privacy interests, the additional stigma caused by registration and their right not to be subjected to disproportionately severe treatment or punishment in terms of s 9 of the Bill of Rights.[60]

[48] An alternative approach was proposed by Simon France J in *Goose v Police*.[61] Simon France J was concerned about the emphasis given by Dobson J to the term "serious child sex offender" in s 3, and the suggestion by Thomas J in *Fowler v R* that the level of risk required under s 9(2) must be "more than 'real and genuine'".[62] Simon France J considered that this risked raising the threshold too high, particularly

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58 *Johnston v Police* [2017] NZHC 1718 at [30]. The approach in *Johnston* was followed in *Fowler v R* [2017] NZHC 1892; *Escott v R* [2017] NZHC 2853; and *T v R* [2018] NZHC 3274. See also *Police v Carter* [2018] NZDC 2034, [2019] DCR 254 at [68]–[69].

59 At [31].

60 At [22].

61 *Goose v Police* [2017] NZHC 2453. The approach in *Goose* was followed in *Praditsin v New Zealand Customs Service* [2017] NZHC 48; and *Pauling v R* [2019] NZHC 1929.

62 *Fowler*, above n 58, at [30].

if combined with the further balancing analysis proposed by Dobson J in *Johnston* at the second stage when considering whether to exercise the discretion to make a registration order.[63] He believed that the discretion would not often be exercised against the making of an order in circumstances where an offender had been sentenced to home detention.[64]

Retrospectivity

[49] In the present case, the Registration Act applied to the appellant retrospectively. The appellant committed the qualifying offence prior to the commencement of the Act, but was convicted and sentenced after the Act came into force. The relevant dates are as follows:

(a) the appellant committed the qualifying offence in May 2016;

(b) the Registration Act came into effect on 14 October 2016 (the commencement date);

(c) the Registration Act was amended on 8 March 2017 but with retrospective effect to 14 October 2016;

(d) the appellant was charged on 20 April 2017;

(e) he pleaded guilty after receiving a sentence indication on 16 October 2017; and

(f) he was sentenced on 17 January 2018.

[50] There are two discrete issues in relation to retrospectivity. The first is whether the Registration Act applies retrospectively to an offender in the position of the appellant. That is, whether a registration order can lawfully be made in relation to a person who committed a qualifying offence before the commencement date and was convicted and sentenced after that date. If it can, the second is whether the court

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63 *Goose*, above n 61, at [26]–[27].
64 At [29]–[30].

should take into account the retrospectivity aspect in deciding whether a registration order should be made. We will deal with the first of these now. We will deal with the second when we come to our analysis of the application of the Bill of Rights in relation to the decision to be made by the court under s 9 of the Registration Act.[65]

[51] The first of those issues was not raised in the written submissions of the parties nor at the hearing in this Court. Counsel for the appellant did not initially argue that a registration order could not be made against the appellant because it was a retrospective punishment. The issue had not been raised in the Courts below, either. This Court sought further submissions from the parties on that issue after the hearing.

Retrospective penalties

[52] Section 6 of the Sentencing Act 2002 provides as follows:

> **6 Penal enactments not to have retrospective effect to disadvantage of offender**
>
> (1) An offender has the right, if convicted of an offence in respect of which the penalty has been varied between the commission of the offence and sentencing, to the benefit of the lesser penalty.
>
> (2) Subsection (1) applies despite any other enactment or rule of law.

[53] The right conferred on an offender by s 6 of the Sentencing Act is reflected in s 25(g) of the Bill of Rights. This confers on those who are charged:

> the right, if convicted of an offence in respect of which the penalty has been varied between the commission of the offence and sentencing, to the benefit of the lesser penalty:

[54] The principle codified in s 6 of the Sentencing Act and s 25(g) of the Bill of Rights is a truly fundamental one.[66] Butler and Butler consider that s 6(2) provides "a significantly more powerful protection than s 25(g)" as it overrides other enactments

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65 See below at [93]–[95].

66 Ross Carter *Burrows and Carter Statute Law in New Zealand* (5th ed, LexisNexis, Wellington, 2015) at 629.

inconsistent with the right.[67] The authors of *The New Zealand Bill of Rights* explain the relationship between ss 6 and 25(g) as follows:[68]

> The presence of s 4 in the Bill of Rights means, of course, that it is possible for an enactment both to enhance the potential sentence for an offence and to require that the new sentence be applied even to those already convicted. If the enactment is clear and unequivocal in producing that result, then it must prevail despite its inconsistency with s 25(g). It is ironic, then, that the protection against retrospective penalty increases is arguably less under s 25(g) of the Bill of Rights than it is under s 6(1) of the Sentencing Act 2002. This is because s 6 of the Sentencing Act affirms both the right against retrospective penalty increases and (in s 6(2)) provides that the right is to apply 'notwithstanding any enactment *or* rule of law to the contrary'. Section 6(2) is, therefore, the exact opposite to s 4 of the Bill of Rights. … As to contrary enactments passed subsequently, there would be a powerful claim that s 6(2) should supply the interpretive principle upon which the conflict between s 6(1) and the subsequent enactment must be resolved—namely, that the principle in s 6(1) is to prevail so that the other enactment is denied its effect (with sentencing therefore to proceed on the basis of the law otherwise in force at the time of the offence). Indeed, the argument would run that, unless the interpretive principle in s 6(2) was expressly repealed or overridden in the particular case, it must prevail. In that sense, s 6 of the Sentencing Act provides more protection against inconsistent legislation than s 25(g) of the Bill of Rights.

Is a registration order a "penalty"?

[55] Before turning to the specific provisions of the Registration Act, we examine briefly whether a registration order is a "penalty" for the purposes of s 25 of the Bill of Rights and s 6 of the Sentencing Act. Argument before us proceeded on the basis that a registration order is a penalty. But it is necessary to consider whether that is in fact so.

[56] In his report under s 7 of the Bill of Rights, the Attorney-General expressed the view that registration and the subsequent reporting obligations constitute a "punishment".[69] The Attorney-General referred to *Belcher v Chief Executive of the Department of Corrections*, where the Court of Appeal held that an extended supervision order (ESO) was a "punishment" for the purposes of ss 25 and 26 of the Bill of Rights.[70] In *R v Ofa*, Judge Earwaker held that a registration order amounts to

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67 Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [23.9.5].

68 Paul Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003) at 707 (footnotes omitted).

69 Finlayson, above n 23, at [11].

70 *Belcher v Chief Executive of the Department of Corrections* [2007] 1 NZLR 507 (CA) at [49].

a "penalty" for the purposes of the Bill of Rights and s 6 of the Sentencing Act.[71] And in *Bell v R*, the Court of Appeal observed that the effect of a registration order is punitive, "even if its primary purpose is the protection of further potential victims from harm".[72]

[57] The analogy between a registration order and an ESO is appropriate. Like an ESO, the trigger for a registration order is sentence for a criminal conviction. A person subject to a registration order is defined as a "registrable offender" and is referred to as such throughout the Act.[73] The Registration Act imports the appeal provisions of the Criminal Procedure Act 2011 for appeals against registration orders.[74] Failure to comply with reporting obligations without reasonable excuse is an independent offence punishable by up to one year's imprisonment.[75] These factors, which were relied upon in *Belcher*, strongly suggest that a registration order is a "penalty".[76]

[58] We accept that the purpose of the Registration Act is to reduce sexual reoffending against children.[77] But that does not change the fact that a registration order restricts a person's liberty (albeit to a considerably lesser extent than an ESO).[78] And as the Court of Appeal noted in *Belcher*, that the aim of the legislation is to reduce offending is not decisive in determining whether a consequence of criminal offending is a penalty.[79]

[59] We conclude that a registration order is a penalty for the purposes of s 6 of the Sentencing Act and s 25(g) of the Bill of Rights.

Relevant provisions of the Registration Act

[60] As mentioned earlier, the Registration Act was amended retrospectively, so an analysis of the relevant statutory provisions needs to address both the original and the amended version.

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71 *R v Ofa* [2017] NZDC 2371, [2017] DCR 764 at [16].
72 *Bell v R* [2017] NZCA 90 at [26]. See also *Taitapanui v R* [2018] NZCA 300 at [33].
73 Registration Act, s 7(1).
74 Section 9(4).
75 Section 39. See above at [26].
76 *Belcher*, above n 70, at [47].
77 Registration Act, s 3.
78 See below at [88]–[91].
79 *Belcher*, above n 70, at [48].

Registration Act as first enacted

[61] Section 7(1) of the Registration Act as first enacted (and now) provides:

> **7 Who is a registrable offender?**
>
> (1) A ***registrable offender*** is a person whom a court has, in respect of a conviction for a qualifying offence,—
>
> (a) sentenced to imprisonment; or
>
> (b) sentenced to a non-custodial sentence and made subject to a registration order.

[62] Section 9(1) of the Registration Act as enacted provided:

> If a court convicts a person of a qualifying offence and imposes a non-custodial sentence in respect of that offence, the court may order that the person must be placed on the register and must comply with the reporting obligations of this Act.

[63] Section 5 of the Registration Act (both as enacted and now) provides that the transitional, savings, and related provisions in sch 1 have effect according to their terms. Clause 1 of sch 1 as enacted was in these terms:

> **1 Retrospective application**
>
> (1) This Act applies to registrable offenders who, on the date this Act comes into force, are, in respect of a qualifying offence,—
>
> (a) serving, in custody, the sentence of imprisonment that was imposed for that offence; or
>
> (b) serving, on parole or other form of conditional release from custody, the sentence of imprisonment that was imposed for that offence; or
>
> (c) subject to an extended supervision order or an interim supervision order following that sentence; or
>
> (d) subject to a public protection order or an interim detention order following that sentence.

[64] Clause 1 imposed further, retrospective punishment, contrary to s 26(2) of the Bill of Rights, on those who at the commencement date were serving sentences of imprisonment (or subject to associated restrictions) in respect of qualifying offences committed before that date. There is no dispute that the Registration Act applies retrospectively to these offenders. We will call these cl 1(1) offenders.

[65] Sections 7 and 9 are triggered by sentencing for a qualifying offence. There is nothing in the wording of ss 7 and 9 to the effect that they apply to those who committed qualifying offences before the Registration Act came into force. But there are indications they were intended to apply to those who committed qualifying offences before the commencement date:

(a) "Qualifying offences" are listed in sch 2. Schedule 2 includes a number of offences pursuant to provisions which are noted as having been repealed.[80] This makes it clear that the legislature envisaged that offences committed prior to the commencement date could be relevantly "qualifying".[81]

(b) The transitional provisions in sch 1 pick up offenders who were, at the commencement date, subject to sentences of imprisonment imposed for qualifying offences.

[66] The Attorney-General's report to the House under s 7 of the Bill of Rights identified that the Bill as introduced was inconsistent with s 26(2) of the Bill of Rights.[82] This related to cl 1(1) offenders, because offenders who had been convicted and sentenced were to be subject to further punishment by being entered on the register. However, the report did not address the situation faced by offenders who committed a qualifying offence before the commencement date but had not been convicted and sentenced (or had been convicted but had not been sentenced) before that date. They were to be subject to a greater punishment than applied at the time of their offending, which engages s 25(g) of the Bill of Rights and s 6 of the Sentencing Act. But this was not drawn to the attention of Parliament in the report.

[67] In her speech on the introduction of the Bill, the responsible Minister, the Hon Anne Tolley MP, made it clear that Parliament intended the Registration Act to apply retrospectively on a comprehensive basis. She said:[83]

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80 For example, cl 1(a)(iii) lists as a qualifying class 1 offence "section 136 [of the Crimes Act 1961] (conspiracy to induce sexual intercourse), if the victim is under 16 (repealed)".

81 This was necessary to accommodate the application of the Registration Act to cl 1(1) offenders.

82 Finlayson, above n 23, at [2] and [40]–[41].

83 (15 September 2015) 708 NZPD 6634.

> The [B]ill applies to persons convicted after the Act comes into force. It also applies retrospectively to those serving a sentence of imprisonment, including when they are on parole or release conditions or are subject to an extended supervision order for a qualifying offence on the date the Act comes into force.

[68] This indicates that Parliament was aware the Bill was inconsistent with s 26(2) of the Bill of Rights (cl 1(1) offenders). However, there is no indication that Parliament considered the Bill was inconsistent with s 25(g) of the Bill of Rights and s 6 of the Sentencing Act (as it would be if it applied to those not yet sentenced at the commencement date for a qualifying offence committed before that date).[84]

Registration Act as amended in 2017

[69] After the Registration Act came into force, it became apparent that there were gaps in the retrospectivity provisions (not directly related to the issues now before us). An urgent amending Act was passed to address these gaps: the Child Protection (Child Sex Offender Government Agency Registration) Amendment Act 2017. The Amendment Act had retrospective effect: it received the Royal Assent on 8 March 2017, but s 2 provided that it would be taken to come into force on 14 October 2016, the date on which the Registration Act itself had come into force. As counsel pointed out, this meant Parliament retrospectively amended the retrospectivity provisions.

[70] Following the Amendment Act, cl 1 of sch 1 is now in these terms:

> **1 Retrospective application**
>
> (1) This clause applies to a person who, on 14 October 2016, is, in respect of a qualifying offence,—
>
> (a) serving, in custody, the sentence of imprisonment that was imposed for that offence; or
>
> (b) serving, on parole or on release from custody on release conditions, the sentence of imprisonment that was imposed for that offence; or
>
> (c) subject to an extended supervision order or an interim supervision order following the sentence of imprisonment that was imposed for that offence; or

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[84] The Minister's speech does not refer expressly to those who committed a qualifying offence *and were convicted* before the commencement date, but sentenced after that date.

(d) subject to a public protection order or an interim detention order following the sentence of imprisonment that was imposed for that offence; or

(e) no longer serving the sentence of imprisonment that was imposed for that offence, but still subject to release conditions following the sentence expiry date of that sentence.

(2) This clause applies to a person who—

(a) was convicted before 14 October 2016 of a qualifying offence; and

(b) on or after 14 October 2016, in respect of that conviction,—

(i) was or is sentenced to imprisonment; or

(ii) was or is sentenced to a non-custodial sentence and made subject to a registration order.

…

(4) A person to whom this clause applies—

(a) is a registrable offender for the purposes of section 7(1) and this schedule (if subclause (1) or (2) applies); and

…

(c) is subject to all other provisions of this Act with any necessary modifications.

[71] The amendment also inserted a revised s 9(1) and a new subs (1A):

(1) If a court imposes on a person a non-custodial sentence in respect of a conviction for a qualifying offence, the court may order that the person must be placed on the register and must comply with the reporting obligations of this Act.

(1A) For the purposes of subsection (1), the date on which the person was charged with the offence is irrelevant.

…

[72] The new s 9(1) provides that the trigger for the making of a discretionary order is the imposition of a sentence rather than, as it might have been considered before, conviction and then sentencing. This amendment brings s 9(1) into line with the wording of s 7 in relation to offenders sentenced to imprisonment.

[73] Section 9(1A) seems to be premised on the assumption that the date of charge might be material to the application of s 9(1). But it is not. The constraints on the retrospective application of s 9(1)—that is, to offences committed before the commencement date—are s 6 of the Sentencing Act and s 25(g) of the Bill of Rights. Both are triggered by the date of the commission of the offence, not the date of charge. This was alluded to in the parliamentary debates in relation to the amendments but no action was taken to remedy it.[85]

[74] The Attorney-General's report under s 7 of the Bill of Rights in relation to the Bill that became the Amendment Act identified inconsistencies with both s 26(2) and s 25(g) of the Bill of Rights.[86] In relation to s 25(g), the report stated that the Bill seeks to clarify that the Registration Act applies to persons who have been convicted of a qualifying offence before the commencement date but who are sentenced after that date.[87] This was said to be inconsistent with s 25(g) and not demonstrably justified under s 5 of the Bill of Rights.[88] It does not refer to those who committed a qualifying offence before the commencement date but were neither convicted nor sentenced until after that date (the position the appellant is in). Presumably this was because the report dealt only with the provisions of the Bill that became the Amendment Act, and did not address the provisions of the Registration Act as originally enacted. In any event, the Amendment Act did not provide for those who committed a qualifying offence before the commencement date but were neither convicted nor sentenced until after that date.

Our analysis

[75] The analysis in *R v Hansen* sets out the approach to the application of the Bill of Rights.[89] Section 25(g) of the Bill of Rights is engaged. However, where the issue of retrospectivity arises in the context of a penal enactment to which s 6 of the Sentencing Act applies, we do not consider there is any need to resort to a *Hansen*

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85 Both in Committee by David Clendon MP ((7 March 2017) 720 NZPD 16386) and at third reading by Jan Logie MP ((7 March 2017) 720 NZPD 16399).

86 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 [2] and [50].

87 At [45].

88 At [48]. See also the reference to s 6 of the Sentencing Act 2002 at [49].

89 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1.

analysis. In those cases, even without considering the Bill of Rights, if it is intended the legislation will impose a greater penalty than that applicable at the time the offence was committed, the legislation needs to be clear to achieve that result.

[76] This approach reflects the common law principle of legality. Lord Hoffmann in *R v Secretary of State for the Home Department, ex parte Simms* described that principle in the following terms:[90]

> Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. … The constraints upon [the exercise of this power] by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.

[77] In this case, we do not consider that the Registration Act is sufficiently clear to displace the presumption, reflected in s 6 of the Sentencing Act, that those whose offending pre-dated the coming into force of the Registration Act (and who were convicted after that date) cannot be the subject of a registration order.

[78] Section 9(1A) may have been an attempt to direct that s 9(1) should be interpreted retrospectively.[91] But it does not state in plain language that s 9 has retrospective effect. Section 9(1A) appears to be a necessary part of achieving the objective of retrospective application but it fails to achieve that objective. Indeed, the fact that express provision is made in sch 1 for where the Registration Act is to apply retrospectively, yet sch 1 does not cover the present situation, points to a contrary construction. In light of that, there is nothing in s 9 to suggest that the provision is generally retrospective in effect.

[79] A comparison with s 107C of the Parole Act 2002, which defines an "eligible offender" for an ESO, is instructive. Subsection (1) sets out the classes of eligible

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90 *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115 (HL) at 131.

91 We agree with Glazebrook J (see below at [190] and [233]–[235]) that the legislative history supports the view that Parliament intended s 9 to apply retrospectively.

offenders. The retrospective nature of the provision is recognised in subs (2), which provides:[92]

> To avoid doubt, and to confirm the retrospective application of this provision, despite any enactment or rule of law, an offender may be an eligible offender even if he or she committed a relevant offence, was most recently convicted, or became subject to release conditions or an extended supervision order before this Part and any amendments to it came into force.

[80] There is no similar wording in s 9 (or elsewhere in the Registration Act).

[81] The fact that the Registration Act is clearly retrospective in relation to some categories of offenders may be seen as supporting the argument that it also has retrospective application to offenders convicted and sentenced after the commencement date for an offence committed before that date. That would bring a coherence and consistency to the retrospectivity provisions. It would also reflect what appears to have been the parliamentary intention, as disclosed in the responsible Minister's speech referred to earlier and in the speeches during the passing of the Amendment Act.[93] But the question we must answer is whether Parliament has signalled, by express words or necessary implication, that the presumption that criminal penalties are not imposed retrospectively has been displaced. We see nothing in s 9 that gives that indication. As Lord Nicholls said in *B (A Minor) v Director of Public Prosecutions*, "clumsy parliamentary drafting is an insecure basis for finding a necessary implication elsewhere, even in the same statute".[94]

[82] We conclude that the effect of s 6 of the Sentencing Act is that the Registration Act does not apply to offenders who committed a qualifying offence before the commencement date and were convicted and sentenced after that date. Section 25(g) of the Bill of Rights and the principle of legality support that view. As the appellant falls into this category, he was not eligible to be placed on the register under s 9(1). The registration order must, therefore, be quashed. Although there was no argument relating to s 7, the same considerations appear to apply to that section. Whether that will have the consequences outlined by Glazebrook J will depend on whether

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92 See *Belcher*, above n 70, at [56]; and *McDonnell v Chief Executive of the Department of Corrections* [2009] NZCA 352, (2009) 8 HRNZ 770 at [65]. See also Geoff Hall *Hall's Sentencing* (online ed, LexisNexis) at [PA107C.2].

93 See (7 March 2017) 720 NZPD 16349.

94 *B (A Minor) v Director of Public Prosecutions* [2000] 2 AC 428 (HL) at 466.

Parliament decides to amend the Registration Act again to make it apply retrospectively to offenders in the categories she identifies.[95]

[83] The submissions of counsel for the appellant on retrospectivity focused on the decision of the Court of Appeal in *R v Pora*.[96] In that case, the Court of Appeal considered the effect of s 4(2) of the Criminal Justice Act 1985, the precursor to s 6(2) of the Sentencing Act. Section 2(4) of the Criminal Justice Amendment Act (No 2) 1999 provided for the imposition of a minimum period of imprisonment retrospectively. The Court split on the question as to whether the later specific provision prevailed over s 4(2) of the Criminal Justice Act.[97] The difference between that case and the present is that it was accepted in *Pora* that the later, specific provision, s 2(4) of the Criminal Justice Amendment Act (No 2), expressed its retrospective effect unambiguously, and thus did not leave room for a more rights-consistent interpretation.[98] As that is not the case in relation to s 9(1) of the Registration Act, we do not need to engage with the difficult issue that confronted the Court of Appeal in *Pora*.

[84] Our conclusion on this issue is sufficient to resolve the appeal. But we had full argument on whether a registration order should have been made (if the appellant had been eligible), and because those issues have been the subject of some inconsistency in the courts below, we go on to deal with them.

Bill of Rights

[85] Before evaluating the two competing High Court approaches referred to earlier, we turn to the role of the Bill of Rights in the determination of whether a registration order should be made.

[86] There was no dispute that the Bill of Rights is relevant to the decision. The difference between the parties was how the Bill of Rights was to be brought to bear.

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95 See the reasons of Glazebrook J below at [243]–[244].

96 *R v Pora* [2001] 2 NZLR 37 (CA).

97 Compare [49]–[50] and [56] per Elias CJ and Tipping J and [127] per Thomas J; and [116] per Gault, Keith and McGrath JJ.

98 See at [3] and [25] per Elias CJ and Tipping J, [116] per Gault, Keith and McGrath JJ and [127] and [169] per Thomas J.

[87] In order to set a framework for the discussion, it is first necessary to determine which rights are affected by the making of a registration order.

Freedom of movement, freedom of association and freedom of expression

[88] Counsel for the appellant argued that a registration order abridges the rights to freedom of movement (s 18) and expression (s 14) of the registered offender.[99] We accept that is correct. In our view, it also abridges the registered offender's freedom of association (s 17).

[89] In relation to freedom of expression, the interference is the coercing of the supply of information to the Commissioner by the registered offender and the restriction on changing name.[100] There is no suggestion that any other restraint on the freedom of the registered offender to express themselves applies. The interference with this right is, therefore, relatively minor.

[90] In relation to freedom of association, the interference is the requirement to disclose affiliations with certain clubs, organisations and social networks.[101] Again, the interference with this right is relatively minor.

[91] In relation to freedom of movement, a registration order requires the registered offender to give the Commissioner 48 hours' notice of intended travel away from his or her registered address. This applies to all overseas travel involving an absence from New Zealand for 48 hours or more and any domestic travel involving an absence from the registered address of 48 hours or more.[102] We accept this is a restraint on the exercise of the freedom of movement, preventing, as it does, travel at short notice and

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99 In his first s 7 report, the Attorney-General identified ss 14 and 18 as being restricted by a registration order—in the case of s 14 because reporting obligations are a form of compelled speech and in relation to s 18 because of the advance notification of any movement requirement: Finlayson, above n 23, at [12].

100 Rishworth and others, above n 68, at 333; and Butler and Butler, above n 67, at [13.27.1]. Section 53(1) of the Registration Act requires a registrable offender to obtain the consent of the Commissioner before applying to change his or her name.

101 Registration Act, s 16(1)(i) and (o). See *Shelton v Tucker* 364 US 479 (1960) at 485–486.

102 Registration Act, s 21. See also s 20(1)(a).

requiring, in the case of domestic travel, the provision of the addresses at which the registered offender intends to stay and other details.[103]

Privacy

[92] The registration order also affects the right to privacy. Although the right to privacy is not protected by the Bill of Rights, it is an important right and the fact that it is not included in the Bill of Rights does not diminish its importance.[104] The intrusion on the right to privacy of the offender is a relevant consideration in the s 9 exercise, as Dobson J acknowledged in *Johnston*.[105] The intrusion into the right to privacy is not as significant as it would be if the register were public.[106] But the requirement imposed on the registered offender to provide the Commissioner with reports of "relevant personal information" as defined in s 16 of the Registration Act is still a significant intrusion on the privacy of the registered offender.[107] This intrusion may also require consideration of the potential reporting of court proceedings, and we will revert to this issue when dealing with the anonymisation application.[108]

Retrospective punishment

[93] We have already outlined the retrospectivity issue. We have determined that the appellant is not eligible for registration.[109] But, as we heard full argument on the point, we go on to consider whether, in relation to an offender to whom s 9 of the Registration Act applies retrospectively, the breach of s 25(g) is a relevant consideration in the exercise of the discretion under s 9(1).

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103 *Melvaine v Police* [2012] SASC 32, (2012) 112 SASR 452 at [25]. See also Butler and Butler, above n 67, at [16.4.3]; and United Nations Human Rights Committee *CCPR General Comment No 27: Article 12 (Freedom of Movement)* UN Doc CCPR/C/21/Rev.1/Add.9 (2 November 1999) at [5] and [17].

104 The right to privacy is a right referred to in the International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976), art 17(1). See also *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [92] per Gault P and Blanchard J and [226] per Tipping J; and *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91 at [224] and [228] per Thomas J. Contrast the position taken by Elias CJ in *Brooker* at [40]. A right to privacy when reporting is recognised in s 26 of the Registration Act.

105 *Johnston*, above n 58, at [22].

106 Access to the register is limited: see ss 41 and 43–47. See above at [27].

107 See above at [23]–[25].

108 See below at [136]–[147].

109 See above at [82].

[94] Counsel for the appellant argued that a registration order can be made only if demonstrably justified in a free and democratic society. They argued that the fact that a registration order would be retrospective "is simply another matter added into the proportionality assessment".[110]

[95] Once it is determined that s 9 applies to an offender whose offence was committed before the Registration Act came into force, we do not think the issue of retrospectivity has any role in the decision required to be made under s 9(1). As we see it, s 9 must be applied to offenders whose offences pre-dated the Registration Act and offenders whose offences post-dated the Registration Act in the same manner.

The relevance of the Bill of Rights to the decision to make a registration order

[96] Counsel for the appellant, Mr Munro, argued that the Court of Appeal had impliedly excluded the Bill of Rights from consideration in the exercise of the s 9(1) power. He said this could be inferred because the Court recorded his argument that the court must determine whether the registration order can be justified in a free and democratic society, but then made no reference to the Bill of Rights when considering the correct approach to s 9.[111]

[97] In this Court, Mr Munro renewed his submission that the power in s 9(1) needed to be considered in light of s 6 of the Bill of Rights, and thus given a meaning that is consistent with the rights and freedoms contained in the Bill of Rights if that meaning is available. He cited in support of that proposition *Cropp v Judicial Committee*,[112] *Zaoui v Attorney-General (No 2)*[113] and *Dotcom v Attorney-General*.[114] In all of those cases, this Court has affirmed the role of the Bill of Rights in interpreting statutory provisions conferring discretionary powers.

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110 They accepted, however, that if the court was not satisfied that registration was demonstrably justified by reason *only* of its retrospective effect, s 4 of the Bill of Rights means the court must make the registration order.

111 CA judgment, above n 20, at [17] and [19]–[22].

112 *Cropp v Judicial Committee* [2008] NZSC 46, [2008] 3 NZLR 774 at [25].

113 *Zaoui v Attorney-General (No 2)* [2005] NZSC 38, [2006] 1 NZLR 289 at [90]–[91].

114 *Dotcom v Attorney-General* [2014] NZSC 199, [2015] 1 NZLR 745 at [100] and [161] per McGrath, William Young, Glazebrook and Arnold JJ.

[98] Mr Munro argued that the court should not exercise its discretion to make a registration order unless it has been established that registration would be a demonstrably justifiable limit on the rights affected.

[99] Mr Munro argued that the court should undertake the analysis described by Tipping J in *Hansen* when determining whether the "demonstrably justified" threshold was met.[115] That formulation was:

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

[100] *Hansen* was a case about the interpretation of a statutory provision, not the exercise of a statutory power. Mr Powell argued that this was a very significant difference, and that the *Hansen* formulation was not an appropriate methodology in this context. Tipping J's formulation in *Hansen* was, itself, based on the Canadian case of *R v Oakes*.[116] He noted that the Supreme Court of Canada had rejected the application of the *Oakes* methodology as an analytical tool in determining how the Canadian Charter of Rights and Freedoms[117] applies to the evaluation of the exercise of a discretionary power by a judge.[118] Instead, it adopted a simpler proportionality analysis, balancing the interference with the Charter values at issue against the statutory objectives of the legislation.[119]

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115 *Hansen*, above n 89, at [104].

116 *R v Oakes* [1986] 1 SCR 103.

117 Canadian Charter of Rights and Freedoms, pt 1 of the Constitution Act 1982, being sch B to the Canada Act 1982 (UK).

118 *Doré v Barreau du Québec* 2012 SCC 12, [2012] 1 SCR 395 at [37]–[38]; *Loyola High School v Attorney General of Quebec* 2015 SCC 12, [2015] 1 SCR 613 at [3]–[4] per LeBel, Abella, Cromwell and Karakatsanis JJ; and *Law Society of British Columbia v Trinity Western University* 2018 SCC 32, [2018] 2 SCR 293 at [57] per Abella, Moldaver, Karakatsanis, Wagner and Gascon JJ. The *Doré* framework was, however, criticised by Côté and Brown JJ in *Trinity Western* at [266] and [302]–[305]. It has also been subject to academic criticism: see, for example, Hoi L Kong "*Doré*, Proportionality and the Virtues of Judicial Craft" (2013) 63 SCLR (2d) 501; and Paul Daly "Prescribing Greater Protection for Rights: Administrative Law and Section 1 of the *Canadian Charter of Rights and Freedoms*" (2014) 65 SCLR (2d) 249.

119 *Doré*, above n 118, at [56].

[101] We agree that the *Hansen* methodology is not appropriate in this case. Rather, we see the task to be undertaken by the court under s 9 of the Registration Act as follows. Section 9 should be interpreted in accordance with the direction in s 6 of the Bill of Rights. That requires the power to make a registration order conferred by that section to be exercised consistently with the Bill of Rights to the extent possible: the level of risk that the offender poses must be of sufficient gravity to justify the making of a registration order with the consequent impacts on the rights of the offender. We do not consider any more complex an analysis is required to ensure that s 6 of the Bill of Rights is applied in the interpretation of s 9 and the exercise of the power conferred by it.

[102] We see this approach as consistent with that adopted by this Court in *Zaoui.*[120] This Court said those exercising the statutory power in issue in that case were required to exercise the power consistently with relevant provisions of the Bill of Rights and international conventions.[121] It is also consistent with the approach taken by the Court in *Brooker v Police*, albeit in a different context.[122]

Our approach

[103] We now turn to the approach that should be adopted in cases under s 9 of the Registration Act.

[104] The exercise undertaken by a court considering whether to make a registration order under s 9 of the Registration Act is a two-stage process. The power to make a registration order is engaged only if the court is satisfied that the offender poses a risk to the lives or sexual safety of one or more children, or of children generally, as set out in s 9(2). The first stage of the process is to determine whether that threshold has been met, having considered the factors set out in s 9(3). If it has not been met, then no registration order can be made.

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120 *Zaoui*, above, n 113.

121 At [91].

122 *Brooker*, above n 104, at [59] per Blanchard J, [91] per Tipping J and [130] per McGrath J. *Brooker* was not a case involving the exercise of a statutory power. It dealt with the question of whether the conduct of Mr Brooker amounted to disorderly behaviour within the meaning of s 4(1)(a) of the Summary Offences Act 1981.

[105] We agree with the Court of Appeal that the court making the assessment under s 9(2) must be satisfied the risk is real or genuine: it would not be correct to say that the risk must be "more than a real and genuine risk".[123] Nor do we consider that the determination as to whether an offender meets the threshold in s 9(2) is assisted by reference to the phrase "serious child sex offenders" in s 3 of the Registration Act.[124] That phrase is not a defined term and it is not used in s 9 itself.

[106] If the threshold has been met, the second stage is whether the discretion to make a registration order under s 9(1) should be exercised having regard to the level of risk posed by the offender. In order to embark on that assessment, the court must assess the nature and seriousness of the risk posed by the offender.

[107] Section 9(3) is introduced by the words, "For the purpose of assessing the risk posed by the person, the court must consider the following matters", which is clearly directed to the exercise of determining whether the risk threshold in s 9(2) is made out. However, given the discretion as to whether an order should be made is to be exercised in light of the risk posed by the offender, those factors will also have relevance to the exercise of the discretion if it has been determined that the level of risk set out in s 9(2) is met.

[108] Once a judge has determined the nature and seriousness of the risk posed by the offender, he or she must then determine whether that risk is sufficient to warrant the making of a registration order and subjecting the offender to the requirements of the Registration Act.[125] That assessment will involve a balancing of the protective objectives of the registration order[126] against the level of intrusion into the rights of the offender.

[109] This accords with the approach taken in Australia. In *Bowden v R*, the Court of Appeal of Victoria held that the inquiry under the Victorian equivalent to s 9(1) is a

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123 CA judgment, above n 20, at [19], referring to the comment to that effect in *Fowler*, above n 58, at [30].

124 As suggested by Dobson J in *Johnston*, above n 58, at [31].

125 See above at [101].

126 The reduction of sexual reoffending against child victims and of the risk posed by serious child sex offenders: Registration Act, s 3, quoted above at [19].

two-stage process.[127] The court must first be satisfied that the offender poses a real risk.[128] It must then determine the nature and magnitude of the risk and, in light of that risk and the consequences for the offender, whether an order should be made to give effect to the purposes of the legislation.[129] *Bowden* has been subsequently applied in Victoria[130] and was adopted by the Supreme Court of the Australian Capital Territory in *Znotins v Harvey*.[131]

[110] Counsel for the appellant submitted that the sheer number of offenders entered on the register makes monitoring all of them impractical.[132] In their written submissions, they said that there were 2,633 registered offenders as at 1 August 2019.[133] They argued that, as it could be expected that the limited resources available for monitoring would focus on the highest risk offenders, not those at the low-risk end of the spectrum like the appellant, the utility of registration for offenders at the low-risk end of the spectrum was doubtful.

[111] We acknowledge that where (as in the present case) the offences are limited to viewing material on the internet and no actual interaction with children has occurred, it is arguable that some of the requirements set out in s 16 may be of limited utility in assisting with any monitoring of the offender. To the extent the authorities endeavour

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127 *Bowden v R* [2013] VSCA 382, (2013) 44 VR 229 at [30]. The equivalent Victorian provision is s 11 of the Sex Offenders Registration Act 2004 (Vic). The Victorian Act applies to all sex offenders, not just those who offend against children. We accept the point made by Ellen France J below at [154] that the Victorian and Australian Capital Territory statutes differ from the Registration Act in that whether registration is automatic is determined by the seriousness of the offence rather than the sentence imposed (imprisonment as opposed to a non-custodial sentence). But this does not seem to us to require a different decision-making approach.

128 At [30] and [33].

129 At [40] and [42].

130 *Director of Public Prosecutions v Cartwright* [2015] VSCA 11, (2015) 45 VR 168 at [26]–[28]; and *Sayer v R* [2018] VSCA 177 at [92]–[93].

131 *Znotins v Harvey* [2015] ACTSC 241 at [36]–[40]. The equivalent provisions are ss 15 and 16 of the Crimes (Child Sex Offenders) Act 2005 (ACT).

132 A press release by the Hon Anne Tolley MP, the Minister for Social Development, at the time the Registration Act came into force, suggested 1,750 people would be on the register at the outset (of whom 550 would be living in the community and 1,200 in prison), rising to 3,000 (of whom 900 would be in the community) after five years: Anne Tolley "Legislation passed to establish first child sex offender register" (press release, 9 September 2016).

133 This includes 54 who have been deported. Counsel did not mention the source of that figure but the respondent did not contest it. We were not told what proportion of registered offenders were in prison and in the community respectively. The appellant says the number of registered offenders in New Zealand is 0.054 per cent of the population, compared to 0.036 per cent in the United Kingdom. The United Kingdom percentage figure is based on the number of offenders on the United Kingdom register (24,000) as noted in *R (F(A Child)) v Secretary of State for the Home Department* [2010] UKSC 17, [2011] 1 AC 331 at [51], so may not be accurate now.

to monitor these matters, it could be regarded as wasted effort, as noted by the Supreme Court of the United Kingdom.[134] However, that is the nature of the statutory regime. The assessment of the extent of the intrusion into the rights of the offender will be affected by the fact that there is no flexibility in the orders that can be made.

[112] Finally, we do not think that it is appropriate to approach that task with a presumption that an order should be made where an offender has been sentenced to home detention. No such presumption is provided for in the Registration Act and it is not necessary to meet the purpose of the Registration Act (set out in s 3) to read in such a presumption.

[113] We acknowledge that there may be a tension between cases where an offender has been sentenced to a short term of imprisonment and those where the offender has been sentenced to home detention for child sex offences of similar seriousness. In the former case, the offender will automatically be a registrable offender. In the latter case, the making of a registration order is a matter left to be assessed by the sentencing judge. There may be cases where imprisonment was imposed only because the offender was not able to provide a suitable address for home detention. In such a case, it is unfortunate that the consequences of that inability lead not only to the offender going to prison, but also to registration, when the offender may have been able to convince the court not to make a registration order if home detention had been imposed. This is, however, what the Registration Act provides for and we do not consider the fact that registration is automatic for an imprisoned offender bears on the court's task in determining whether an offender who is not imprisoned should be subject to a registration order.

Application to this case

[114] We now turn to the application of s 9 to the present case. Given the differences between our approach and that taken by the Court of Appeal, it is appropriate for us to make the determination afresh.

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[134] See the comments of Lord Phillips in *R (F(A Child))*, above n 133, at [51], where he referred to the registration of large numbers of low-risk offenders as imposing "an unnecessary and unproductive burden on the responsible authorities".

[115] We begin by addressing the matters set out in s 9(3), with reference to the views of the Courts below.

Seriousness of the qualifying offences

[116] The District Court Judge took a combined starting point for the two offences to which the appellant had pleaded guilty of two and a half years' imprisonment.[135] He observed that the offending was not in the most serious category of offending to which the Registration Act related, but that it was "within itself serious".[136] In the High Court, the Judge considered the two-and-a-half-year starting point indicated the offending was serious.[137] He found that the offending was moderately serious in nature.[138]

[117] The Court of Appeal considered the offending was moderately serious and justified a starting point of two and a half years' imprisonment.[139] In describing the offending, the Court confined itself to the offence under s 131A of the FVPC Act,[140] but did not note that the starting point was set to reflect both that offending and the offending under s 124(1).

[118] We regard the offending under s 131A of the FVPC Act as moderately serious offending of its type. As is apparent from the description of the offending at [28] above, the amount and nature of the material found on the appellant's computer was significant. But we do not think the seriousness of the s 131A offending can be assessed by reference to a starting point (or, for that matter, the end sentence) that was for both the offences of which the appellant was convicted, when one of them was not relevant to the registration decision. It is likely that the starting point for the s 131A offending on its own would have been lower than two and a half years. The Court of

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135 DC judgment, above n 14, at [7].

136 At [15].

137 HC judgment, above n 18, at [23]–[24]. However, this does not appear to allow for the fact that the sentencing involved the offending under s 131A and under s 124, but only the former was relevant to the decision to make a registration order. In his analysis of the offending, the Judge at [29] referred to the video clip which founded the s 124 offending, in the apparently mistaken belief that this was relevant to the determination as to whether a registration order should be made.

138 At [33].

139 CA judgment, above n 20, at [34].

140 At [22]–[24].

Appeal's reference to the two-and-a-half-year starting point may have meant it overestimated the seriousness of the s 131A offending.

Period of time since the offence was committed

[119] The District Court Judge noted the offending dated back to March 2016 and that the appellant had been on bail for 12 months without offending.[141] The High Court Judge considered that this was not a significant factor because the offending had been detected less than two years before the guilty plea was entered.[142] The Court of Appeal saw this as a neutral factor.[143] Like the Courts below, we see this factor as insignificant.

Age of the appellant

[120] The appellant was 26 years old when the offending was detected. The Court of Appeal said this indicated that the offending did not involve isolated youthful sexual experimentation.[144] We agree. But the appellant's comparative youth, combined with the fact that he had not offended before, indicates that he should have good prospects of rehabilitation.

Age of victims

[121] As the appellant's offending did not involve any physical contact with any victim, the victims are the unknown children depicted in the videos and photographs found on his computer. Some of the children depicted in these photographs and videos were very young and extremely vulnerable, including infants. The District Court Judge referred to the ages and vulnerability of the children involved as a factor in favour of making an order.[145] The High Court Judge also noted this with concern.[146] The Court of Appeal noted that the sexual exploitation of children was a particularly concerning feature of the case, and the making of videos and taking of photographs

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141 DC judgment, above n 14, at [15].
142 HC judgment, above n 18, at [35].
143 CA judgment, above n 20, at [35].
144 At [36].
145 DC judgment, above n 14, at [16].
146 HC judgment, above n 18, at [36]–[38].

depicting such exploitation continues only because people like the appellant support it.[147] We agree.

Difference in age between the victims and the appellant

[122] As noted, the appellant was 26 when the offending was uncovered and the children depicted in the material found on his computer were very young. The High Court Judge regarded this as a matter of real concern.[148] The very young age of the victims is a matter of concern because the appellant's conduct supports their exploitation by the makers of the videos and photographs. However, we do not see this as adding anything to the previous factor (the age of the victims).

Written assessment of the risk posed by the appellant

[123] There have now been four reports from Dr Rogers, each updating the preceding one. The report provided to the District Court Judge referred to the meetings the appellant had had with Dr Rogers and the progress the appellant had made during this treatment. She recorded that in her view the appellant's risk of reoffending had reduced from moderate to "low-moderate". The Judge considered this report was helpful in his decision not to impose a sentence of imprisonment.[149] However, he considered the "low to moderate" risk of reoffending was a factor of significance in his decision to make a registration order, given the importance of the protection of children.[150]

[124] The High Court Judge considered both the original report by Dr Rogers and an updated report she prepared for the High Court appeal. Having done this, he concluded that the appellant still remained a risk to young children even though he posed a lesser risk than he had before he began treatment.[151]

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147 CA judgment, above n 20, at [37].

148 HC judgment, above n 18, at [38]. However, his concern seemed in part to relate to what he called "potential victims", being young people who may have responded to messages left by the appellant on websites. This aspect of the offending was not, however, relevant to the registration order decision.

149 DC judgment, above n 14, at [8]–[9].

150 At [17].

151 HC judgment, above n 18, at [55].

[125] The Court of Appeal evaluated a further report of Dr Rogers, prepared for the appeal to that Court, as well as her two earlier reports. It considered that the District Court's assessment of the threshold risk was unimpeachable based on the information before the Judge.[152] Having considered the updating material, it said it was not persuaded that it could safely be concluded that the appellant's commendable rehabilitative efforts have been so successful that he no longer poses a risk to the sexual safety of children.[153] It agreed with the assessments made in the District Court and the High Court that the appellant posed a continuing risk to the sexual safety of children that justified the registration order and the attendant reporting obligations.[154]

Our assessment of the risk posed by the appellant

[126] We have considered the reports just referred to as well as the additional report prepared by Dr Rogers for the appeal to this Court. Her assessment now is that the appellant's risk of reoffending is low, though her observations are, at least in part, based on self-reporting by the appellant.[155]

[127] For the reasons given earlier, we see the seriousness of the appellant's offending as at a slightly lower level than the Courts below. But the nature of the material found on his computer and, in particular, the young age of some of the children depicted in it, is of obvious concern. We now have the benefit of the successive reports from Dr Rogers, which provide an accumulating narrative of the treatment undergone by the appellant and the positive results it has had, leading to her professional opinion that his risk of reoffending has reduced to the level that it can now be described as low.

[128] The fact that the risk is low does not mean that the appellant does not now pose a risk to the lives or sexual safety of one or more children or children generally, to use the words of s 9(2) of the Registration Act. This risk must be real or genuine, but, as discussed earlier, does not need to be more than that.[156] There remains a low, but nonetheless real, risk that the appellant will resort again to viewing and possessing

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152 CA judgment, above n 20, at [41].
153 At [41].
154 At [42].
155 See above at [42]–[44].
156 See above at [105].

videos and photographs of the kind involved in his offending. But it is a reduced—and reducing—risk from that which was assessed by the District Court Judge. We consider this is sufficient to satisfy the threshold in s 9(2).

Should a registration order be made?

[129] We now turn to the second stage: whether the discretion to make a registration order should be exercised. The question is whether the imposition of a registration order is a proportionate response to the risk identified, having regard to the intrusion on the appellant's rights that this will involve.

[130] Mr Olsen, who argued this aspect of the case for the appellant, pointed out that the appellant's offending did not involve contact offending with children and there is no evidence that he poses a risk of such offending. Dr Rogers said in the report she prepared for the High Court appeal that there was limited evidence suggesting the appellant would transition to contact offending given the nature of his offending, the nature of his sexual fantasies and his personality characteristics. This conclusion was also based on research as to the differences between contact and internet offenders. As the respondent accepts, this indicates a low risk of the appellant transitioning to contact offending.

[131] The imposition of a registration order will require the appellant to comply with all of the requirements of s 16. Some of these do not appear to address the risk posed by the appellant, given the nature of the offence he committed and the low risk of a transition to contact offending. Those items in s 16(1) which are most relevant to the appellant are:

> (m) details of any telecommunications service used, or intended to be used, by the offender, including—
>
> (i) the name of any landline or mobile telephone service provider used, or intended to be used, by the offender; and
>
> (ii) any phone numbers used, or intended to be used, by the offender:
>
> (n) the name of any Internet service provider, and the details of any routing or modem device, used, or intended to be used, by the offender:

(o) details of any username for any online social networks, online gaming accounts, or online storage accounts used, or intended to be used, by the offender:

(p) details of any website domain owned or website administered, or intended to be owned or administered, by the offender:

(q) details of any email addresses used, or intended to be used, by the offender.

[132] The appellant accepts the last four of these are relevant to him. We think the first is also relevant, having regard to the nature of the appellant's offending. Others will have less direct relevance to the appellant—for example, by allowing police to contact him if necessary.

[133] The appellant points out that registration does not mean the police can monitor his internet traffic. He argues registration does not reduce the risk but arguably increases it through stigmatisation, although that appears to be based more on the effect on the appellant of the publication of the fact he is subject to a registration order than the order itself.[157] The respondent says that the obligations of registration relating to the internet have a strong rational connection with the risk posed by the appellant. Counsel referred to *Praditsin v New Zealand Customs Service*, in which Katz J observed that the requirements in s 16(1)(m)–(q) may encourage a registered offender to self-regulate their online behaviour and, in that way, facilitate rehabilitation.[158]

[134] We accept that there are potential benefits in subjecting the appellant to the requirements of s 16(1)(m)–(q), but we acknowledge the point made by counsel for the appellant that these requirements do not allow monitoring of the appellant's internet traffic. They would, however, assist in the identification of the appellant as an offender if he committed further s 131A offences. The other reporting requirements in s 16 have no, or very limited, relevance to the appellant. There would therefore be some benefit in imposing a registration order on the appellant, but it is limited.

[135] The appellant poses a low risk of internet offending. His ongoing treatment by Dr Rogers has reduced this risk and there appear to be reasonable prospects of rehabilitation. On the other side of the balance is the limited benefit of a registration

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157 See below at [137]–[138].
158 *Praditsin*, above n 61, at [54].

order and the intrusion into the appellant's rights that we have highlighted earlier.[159] Our assessment is that the level of risk that the appellant poses to the sexual safety of children is not of sufficient gravity to justify the making of a registration order with the consequent impacts on the appellant's rights. We would, therefore, have allowed the appeal and quashed the registration order, even if we had found the Registration Act applied retrospectively to the appellant.

Anonymisation

[136] The appellant requested that the present judgment be anonymised (so that his name does not appear in the intituling or in the judgment itself). In addition, he seeks anonymisation of the judgments of the High Court, Court of Appeal and of this Court at the leave stage. He also submitted that, if he were successful in his appeal, a suppression order may be appropriate.

[137] The background to this request is the fact that the publication of the judgment of the Court of Appeal has had significant adverse impact on the appellant. That judgment contains detailed information about the appellant's background and medical history, the reports of Dr Rogers and the nature of the appellant's offending. Because the Court used the appellant's name throughout, there are some 64 references to his name in the judgment. It seems that this is at least in part the reason why, at the time of the hearing, the judgment was the first item appearing on a Google search of the appellant's name.

[138] In an affidavit supporting the application for anonymisation, the appellant says that he has lost employment as a result of the details contained in the Court of Appeal judgment becoming known by his employer. The availability of the information has also affected his social network. The judgment also contains information that close family members of the appellant were previously unaware of. This has caused significant distress to the appellant.

[139] Anonymisation of the judgment, unlike suppression, does not require the court to make any formal order. There is Australian authority supporting the position for

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159 Above at [88]–[92].

which the appellant contends. For example, the Court of Appeal of Victoria determined that it was appropriate to use a pseudonym instead of the name of the appellant in a case involving a challenge to a registration order made under the Sex Offenders Registration Act 2004 (Vic) (the Victorian Act).[160] The Court considered that, while the sentence was a matter of public record, the effect of naming an appellant in an appeal judgment could give wide publicity to the fact that the person had been placed on the register as a result of sex offending, when the contents of the register are intended to be confidential. The prospect of disclosure could discourage a person from challenging their registration.[161] The Court also noted that the policy of the Victorian Act was generally against disclosure of the contents of the register.[162]

[140] More recently, the Federal Court of Australia made a suppression order in a case involving an application for judicial review of a decision by the Chief Commissioner of Victoria Police refusing permission for a person registered under the Victorian Act to travel overseas.[163] There, Wheelahan J said:

> [120] In this case, the identification of the applicant or his wife would be inconsistent with the policy embedded in the Sex Offenders Registration Act that the fact of the applicant's registration as a sex offender is generally to remain confidential. The prospect that registrable offenders may have to be publicly identified is liable to have a chilling effect on the bringing of proceedings such as the present.

[141] In other states, courts have made suppression orders or anonymised judgments in cases involving appeal or review proceedings brought by persons on sex offender registers under legislation similar to the Registration Act.[164]

[142] We are satisfied that anonymising the present judgment is appropriate, given that the Child Sex Offender Register is confidential.[165] We accept the submission made by the appellant that publication of appeal judgments in these circumstances

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160 *MSB (a pseudonym) v Chief Commissioner of Police* [2018] VSCA 345, (2018) 57 VR 360 at [57].
161 At [53].
162 At [54] and [56].
163 *AB v Chief Commissioner of Police* [2020] FCA 14. Compare *Godla v Commissioner of Police, New South Wales Police Force* [2020] FCA 489 at [7]–[13].
164 *DKG v Commissioner of Police* [2019] NSWSC 523 at [6]; and *Re an application for admission as a legal practitioner by MCF* [2015] QCA 154 at [24].
165 Registration Act, ss 41 and 47. See above at [27]; and Hall, above n 92, at [CP(CSOGAR)A1.8].

will, in many cases, undermine the confidentiality of the register and, potentially, act as an inhibition against bringing appeal proceedings that may be meritorious.

[143] Although the appellant did not press the case for suppression, we nevertheless record that had an application for suppression been made in this case, we would not have granted it. This is because it is essentially now too late to make a suppression order, given the public availability of the Court of Appeal judgment, the fact that the Court of Appeal and High Court judgments have been cited in other cases using the appellant's name, the Court of Appeal judgment is reported under the appellant's name in the New Zealand Law Reports and, as already noted, it is readily discoverable by a Google search. As the Court of Appeal put it in *Lewis v Wilson & Horton Ltd*, "Where information as to the identity of someone appearing before the Court is already in the public domain, it will not generally be appropriate to grant name suppression."[166]

[144] In any event, we consider anonymisation rather than suppression is the better response to the situation where a registered offender appeals against the making of an order or commences other proceedings concerning the order. While the register is confidential, we do not think it would be appropriate to make a suppression order in circumstances where the sentencing notes (including the decision to make the registration order) are publicly available and not subject to any publication restriction.

[145] In the present case, anonymising this Court's judgment will mean no further information about the appellant enters the public domain. We are also satisfied that we should recall and reissue this Court's leave judgment in anonymised form, given it too is accessible by Google search. It is not clear to us what the impact of this will be on a Google search. It may be that the appellant will need to request that Google removes the reference to the judgment once anonymisation has taken place.

[146] We do not think it is appropriate for this Court to make orders in relation to the judgments of the lower Courts. But it is open to the appellant to ask both the High Court and the Court of Appeal to recall their judgments and reissue them in an

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166 *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 (CA) at [94].

anonymised form.[167] It will be up to each of those Courts to determine whether that is the appropriate course.

[147] We therefore anonymise the present judgment and will do likewise with the leave judgment. We leave it to the appellant to approach the Court of Appeal and High Court about the possibility of recalling and reissuing their judgments with his name anonymised. It will be for those Courts to determine whether that would be appropriate in the present case.

Result

[148] The application to adduce further evidence is granted. The appeal is allowed. The registration order made by the District Court is quashed.

ELLEN FRANCE J

Approach to section 9

[149] I agree with Winkelmann CJ and O'Regan J, for the reasons given, that the power to make a registration order is engaged only where the court is satisfied that the offender poses a real or genuine risk "to the lives or sexual safety of 1 or more children, or of children generally".[168] It would not be correct to describe s 9(2) of the Child Protection (Child Sex Offender Government Agency Registration) Act 2016 (the Registration Act) as requiring some heightened risk. However, I write separately to explain the approach I think is applicable where, in the case of a person sentenced to home detention, the court is satisfied that the offender poses a real risk in terms of s 9(2).

[150] In summary, in such a case I do not consider there is a great deal of scope for the court to exercise the discretion against making a registration order.

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167 It appears that the Supreme Court of Victoria judgment in *MSB* was anonymised after the Court of Appeal (above at n 160) released its judgment ruling that anonymisation was appropriate: *MSB v Chief Commissioner of Police* [2018] VSC 374.

168 See the reasons given by O'Regan J above at [104], with reference to the Child Protection (Child Sex Offender Government Agency Registration) Act 2016, s 9(2).

[151] I consider that view is consistent with the statutory scheme. I do not see the Registration Act as providing for much distinction to be made between those cases where the offender is automatically a registrable offender and those cases where the making of a registration order is a matter for the sentencing judge. The key part of the scheme is that registration is automatic for every eligible offender provided he or she is subject to at least the short-term sentence of imprisonment[169] that must inevitably also underpin a sentence of home detention.[170]

[152] That latter point arises from s 15A(1)(b) of the Sentencing Act 2002. Section 15A(1)(b) states that home detention may be imposed "only if … the court would otherwise sentence the offender to a short-term sentence of imprisonment". Accordingly, where an offender is sentenced to a term of home detention, the sentencing judge must have determined that the offending, but for home detention being available, merits a term of imprisonment. In other words, the relevant assessment of the offending to which registration is anchored is the same.

[153] Further, the difference in outcome (home detention or imprisonment) will often reflect matters not directly pertinent to registration, but peripheral matters such as the availability of a suitable address.[171] Therefore, any major differentiation between these two outcomes in terms of whether a registration order is made has the potential for arbitrary results.[172]

[154] This characteristic – the absence of any difference in the underlying assessment of offending – distinguishes the New Zealand statutory scheme from that in Victoria[173] and in the Australian Capital Territory.[174] The legislation in both Australian jurisdictions provides that, in some situations, registration follows automatically.[175] In other situations the court may make an order which achieves the same result.[176] The distinction made between the two situations (automatic as opposed to those where a

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169 Section 7(1)(a).
170 *Goose v Police* [2017] NZHC 2453 at [29]–[30].
171 At [30].
172 *Praditsin v New Zealand Customs Service* [2018] NZHC 48 at [30]–[32] and [57(b)].
173 Sex Offenders Registration Act 2004 (Vic) [Victorian Act].
174 Crimes (Child Sex Offenders) Act 2005 (ACT) [ACT Act].
175 Victorian Act, ss 3(1), 6 and 7; and ACT Act, ss 8 and 10.
176 Victorian Act, ss 6, 7 and 11; and ACT Act, ss 8, 10 and 15.

court order is required) is based on the nature of the offending in issue. Broadly speaking, sexual offences against children are in the automatic category.[177] Other sexual offending is in the category where a court order is required.[178] Accordingly, while the approach to the discretion taken in these two jurisdictions is of some assistance, I see the New Zealand statutory scheme as different in this respect.[179]

[155] There is also support for the approach I favour in s 9 itself. The text and structure of s 9 suggest that the work to be done by the court largely takes place when the court is assessing whether the offender poses the requisite risk. Section 9(1) provides that the court "may" order that the offender be placed on the register. Section 9(2) makes it clear that the court "may" only do so if satisfied the requisite risk is present. The section then goes on, in s 9(3), to set out the matters that must be considered for the "purpose of assessing" that risk.

[156] It is in the context of assessing that risk that the court can consider the fact that the consequences of making a registration order are static and apply uniformly to all offenders subject to a registration order. That consideration will therefore involve some assessment of proportionality (which Winkelmann CJ and O'Regan J say is to be undertaken at the second stage)[180] but the context is the assessment of risk. I see that as consistent with the statutory purpose as set out in s 3, namely:

> … to establish a Child Sex Offender Register that will reduce sexual reoffending against child victims, and the risk posed by serious child sex offenders, by—
>
> (a) providing government agencies with the information needed to monitor child sex offenders in the community, including after the completion of the sentence; and
>
> (b) providing up-to-date information that assists the Police to more rapidly resolve cases of child sexual offending.

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177 Victorian Act, schs 1 and 2; and ACT Act, s 10(2)–(3) and schs 1 and 2.

178 Victorian Act, schs 3 and 4; and ACT Act, s 15. In Victoria, another distinction between the two situations is the age of the offender. Adult offenders who commit sexual offences against children are automatically registrable (Victorian Act, s 7(1)(a)–(b)), whereas child offenders who commit sexual offences against children are in the category where a court order is required (s 11(2)).

179 Compare the reasons given by O'Regan J above at [109].

180 See the reasons given by O'Regan J above at [108].

[157] It follows that I agree with the Court of Appeal that:[181]

> … in cases such as the present where the qualifying offence was sufficiently serious to attract a starting point exceeding two years' imprisonment, the court will need good reason to justify not making a registration order if it is satisfied the offender continues to pose a real risk to the lives or sexual safety of children.

[158] Accordingly, if the court is satisfied that an offender subject to a sentence of home detention continues to pose a real risk to the lives or sexual safety of children, it is likely that it will be an infrequent case where the discretion points away from registration.[182]

[159] It is not, however, necessary for me to consider how this approach would apply to the appellant. That is because I agree with Winkelmann CJ and O'Regan J for the reasons given that the appellant was not eligible to be placed on the register under s 9(1), which means that the registration order must be quashed. I also agree the judgment should be anonymised.[183] I add that, for the reasons given by O'Regan J, I take the view that it was appropriate in this case to take into account the reports of Dr Rogers not only in relation to the anonymisation issue, but also in relation to the risk assessment exercise.[184]

GLAZEBROOK J

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181 *[D] v New Zealand Police* [2019] NZCA 30, [2019] 2 NZLR 778 (Kós P, French and Gilbert JJ) at [22].

182 *Goose*, above n 170, at [30]; and *Pauling v R* [2019] NZHC 1929 at [54]. See also *Praditsin*, above n 172, at [28]–[29].

183 See the reasons given by O'Regan J above at [142].

184 See the reasons given by O'Regan J above at [41].

Introduction

[160] I write separately because I take a different view on retrospectivity.[185] I also disagree with the view expressed in the reasons given by O'Regan J that the registration order should in any event be set aside.[186]

[161] I agree that registration is a penalty.[187] I agree that, should a registration order be made, the appellant would be subjected to an additional penalty over and above the penalty that applied at the date of his offending. I agree that this engages s 25(g) of the New Zealand Bill of Rights Act 1990, s 6 of the Sentencing Act 2002, the principle of legality and New Zealand's international obligations. I differ, however, as to the consequences of this.

[162] In summary, I consider that ss 7 and 9 of the Child Protection (Child Sex Offender Government Agency Registration) Act 2016 (Registration Act), both as originally enacted and as amended in 2017, cover offenders like the appellant who were convicted after the Registration Act came into force, even if their offences were committed before this date. This is the clear meaning of the relevant sections, as ascertained from the text in the light of its purpose. The purpose is evident from the words used,[188] the scheme of the Act[189] and the legislative history.[190] It is not possible

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185 The majority approach to retrospectivity is set out above at [49]–[84] in the reasons given by O'Regan J. Ellen France J adopts this approach above at [159] in her reasons.
186 See at [135].
187 I thus agree with [55]–[59] of the reasons given by O'Regan J.
188 See below at [224]–[233].
189 See below at [242]–[248].
190 See below at [184]–[223].

to interpret the Act in any other more rights-consistent manner and it must be applied.[191] The regime therefore applies to the appellant.[192]

[163] To explain my difference in view on retrospectivity, I first outline the general approach that should be taken to the retrospectivity provisions and, in particular, discuss s 25(g) of the Bill of Rights and s 6 of the Sentencing Act.

[164] Having explained why I consider the appellant is subject to the regime, I then outline my reasons for finding that the registration order should not be overturned.[193]

Approach to retrospectivity provisions

[165] Legislation imposing a retrospective increase in penalty undoubtedly limits rights. As noted by O'Regan J, both s 25(g) of the Bill of Rights and s 6(1) of the Sentencing Act affirm the right of those convicted of an offence where the penalty is varied between the commission of the offence and sentencing to the benefit of the lesser penalty of the two.[194] So too does art 15(1) of the International Covenant on Civil and Political Rights (ICCPR),[195] to which New Zealand is a party, and which is relevant through the presumption of consistency with New Zealand's international obligations.[196] More generally, the principle of legality encapsulates a presumption that Parliament does not intend to legislate contrary to fundamental human rights.

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191 See below at [252]–[257].

192 See below at [258].

193 See below at [259]–[264].

194 See the reasons given by O'Regan J above at [52]–[53].

195 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976).

196 *New Zealand Air Line Pilots' Assoc Inc v Attorney-General* [1997] 3 NZLR 269 (CA) at 289; *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104 at [24] per Blanchard, Tipping, McGrath and Anderson JJ; *Zurich Australian Insurance Ltd v Cognition Education Ltd* [2014] NZSC 188, [2015] 1 NZLR 383 at [40]; *Helu v Immigration and Protection Tribunal* [2015] NZSC 28, [2016] 1 NZLR 298 at [143] per McGrath J and [207] per Glazebrook J; and *Ortmann v United States of America* [2020] NZSC 120 at [96] and [313].

Section 25(g) of the Bill of Rights

[166] The approach to the application of the Bill of Rights was set out by a majority of this Court in *R v Hansen*.[197] Tipping J's summary was as follows:[198]

> Step 1. Ascertain Parliament's intended meaning.
>
> Step 2. Ascertain whether that meaning is apparently inconsistent with a relevant right or freedom.
>
> Step 3. If apparent inconsistency is found at step 2, ascertain whether that inconsistency is nevertheless a justified limit in terms of s 5.
>
> Step 4. If the inconsistency is a justified limit, the apparent inconsistency at step 2 is legitimised and Parliament's intended meaning prevails.
>
> Step 5. If Parliament's intended meaning represents an unjustified limit under s 5, the Court must examine the words in question again under s 6, to see if it is reasonably possible for a meaning consistent or less inconsistent with the relevant right or freedom to be found in them. If so, that meaning must be adopted.
>
> Step 6. If it is not reasonably possible to find a consistent or less inconsistent meaning, s 4 mandates that Parliament's intended meaning be adopted.

[167] There is an issue as to the considerations that should be taken into account at step one of this test.[199] Tipping J suggested that the "initial interpretation exercise should proceed according to all relevant construction principles, including the proposition inherent in s 6 that a meaning inconsistent with the rights and freedoms affirmed by the Bill of Rights should not lightly be attributed to Parliament".[200] This would mean considering, at step one, statutory purpose and the presumption of

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197 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1. The majority approach is that expressed by Blanchard J at [57]–[61], Tipping J at [88]–[94] and McGrath J at [192]. I note that all three of these Judges in *Hansen* recognised that the approach set out may not be appropriate in all cases: at [61] per Blanchard J, [93]–[94] per Tipping J and [192] per McGrath J. See also Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [7.10.5] and [7.19.1]–[7.19.11].

198 At [92].

199 See for example Claudia Geiringer "The Principle of Legality and the Bill of Rights Act: A Critical Examination of *R v Hansen*" (2008) 6 NZJPIL 59 at 83–86; and Paul Rishworth "Human Rights" [2012] NZ L Rev 321 at 330–331.

200 *Hansen*, above n 197, at [89]. This may accord with a view that the Bill of Rights is no more than a legislative manifestation of the principle of legality: see Geiringer, above n 199, at 63. Hanna Wilberg's view is that the principle of legality continues to have relevance, for example in respect of common law rights that do not feature in the Bill of Rights: Hanna Wilberg "Common Law Rights have Justified Limits: Refining the 'Principle of Legality'" in Dan Meagher and Matthew Groves *The Principle of Legality in Australia and New Zealand* (The Federation Press, Sydney, 2017) 139 at 142.

consistency with human rights. Professor Geiringer says that to take a different approach would "detach the initial assessment of legislative meaning from the rich, value laden context in which it has traditionally unfolded".[201]

[168] On the other hand, if this approach is taken, it appears to leave step five with no content.[202] This is because the *Hansen* majority held that s 6 of the Bill of Rights does not permit a court to adopt a meaning that goes beyond Parliament's purpose.[203] Professor Rishworth has suggested instead that the meaning taken at step one should be the meaning contended for by the protagonist in the litigation (usually the Crown).[204] This appears to be more consistent with the approach of Blanchard J, who called this first step the "natural meaning",[205] and McGrath J, who referred to it as the "ordinary meaning" or "natural meaning".[206] It also appears to me to be a more logical approach, especially in cases where the consequences of that contended-for meaning cannot be justified under s 5 of the Bill of Rights.[207] If the Rishworth approach is taken and all fundamental principles that point towards rights consistency are saved until step five, then different meanings between steps one and five may be possible.

[169] It is not necessary to come to a definitive view on the correct approach to step one.[208] This is because a purposive interpretation of the provision is required at some stage, whether at the first or fifth step. Taking such a purposive approach to the interpretation of the Registration Act, and differing from the majority, I consider the appellant to be subject to that Act.

[170] For completeness, I mention at this point that Professor Geiringer considers that s 6 of the Bill of Rights, and thus step five of the *Hansen* analysis, may in certain

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201 Geiringer, above n 199, at 85.

202 At 83–84.

203 *Hansen*, above n 197, at [61] per Blanchard J, [156] and [158] per Tipping J and [252] per McGrath J.

204 Rishworth, above n 199, at 331. He says that this is in fact how the *Hansen* judges proceeded and how the test has been applied in other cases: see at 331–334.

205 *Hansen*, above n 197, at [57] and [60].

206 At [200]–[201].

207 There is controversy on how s 5 should be applied but it is not necessary to engage with that in this appeal. See for example Kris Gledhill *Human Rights Acts: The Mechanisms Compared* (Hart Publishing, Oxford, 2015) at 240–246; and Hanna Wilberg "Resisting the siren song of the Hansen sequence: The state of Supreme Court authority on the sections 5 and 6 conundrum" (2015) 26 PLR 39.

208 And we did not hear argument on this issue.

circumstances permit the courts to go beyond Parliament's purpose.[209] It is not necessary to decide on this point for the purposes of this appeal. For the reasons outlined later, this is not the type of case Professor Geiringer had in mind.

Section 6 of the Sentencing Act

[171] As noted above, s 6(1) of the Sentencing Act provides that an offender has the right, if convicted of an offence in respect of which the penalty has been varied between the commission of the offence and sentencing, to the benefit of the lesser penalty. Section 6(2) of the Sentencing Act states that subs (1) "applies despite any other enactment or rule of law".

[172] Butler and Butler, as quoted by O'Regan J,[210] consider that s 6 of the Sentencing Act is therefore a "significantly more powerful protection than s 25(g)" of the Bill of Rights as it "overrides other enactments that are inconsistent with that right".[211] Similarly, the authors of *The New Zealand Bill of Rights* consider that s 6 may have a very powerful effect, writing that:[212]

> As to contrary enactments passed subsequently, there would be a powerful claim that s 6(2) should supply the interpretive principle upon which the conflict between s 6(1) and the subsequent enactment must be resolved—namely, that the principle in s 6(1) is to prevail so that the other enactment is denied its effect (with sentencing therefore to proceed on the basis of the law otherwise in force at the time of the offence). Indeed, the argument would run that, unless the interpretive principle in s 6(2) was expressly repealed or overridden in the particular case, it must prevail. In that sense, s 6 of the Sentencing Act provides more protection against inconsistent legislation than s 25(g) of the Bill of Rights.

[173] The effect of the very similarly-worded precursor to s 6(2) of the Sentencing Act, s 4(2) of the Criminal Justice Act 1985, was considered by the Court of Appeal in *R v Pora*.[213] The issue was the retrospective imposition of a minimum period of

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209 Geiringer, above n 199, at 86–91.

210 See above at [54].

211 Butler and Butler, above n 197, at [23.9.5].

212 Paul Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003) at 707 (footnote omitted).

213 *R v Pora* [2001] 2 NZLR 37 (CA). Mr Pora was subsequently cleared of all charges after an appeal to the Privy Council: *Pora v R* [2015] UKPC 9, [2016] 1 NZLR 227.

imprisonment through s 80 of the Criminal Justice Act, as amended by s 2(4) of the Criminal Justice Amendment Act (No 2) 1999.[214]

[174] Elias CJ, Tipping and Thomas JJ considered that s 4(2) of the 1985 Act prevailed over s 2(4) of the 1999 Act and, in that sense, was the dominant provision.[215] They considered that the meaning of both s 4(2) and s 2(4), taken separately, was clear, and that the issue before the Court was simply how to resolve the conflict between these provisions appearing in the same Act.[216] Although earlier in time and dealing with the general rather than the specific, they held that s 4(2) should prevail as it encapsulated a fundamental principle that is consistent with the Bill of Rights, the common law presumption against retroactivity, s 7 of the Interpretation Act 1999 and international conventions, and itself stated that it applied "notwithstanding any other enactment or rule of law to the contrary".

[175] Of additional importance for these Judges was that, as they saw it, Parliament may not have understood that it was abrogating a fundamental right.[217] Elias CJ and Tipping J considered that there was no indication in the parliamentary debates that Parliament appreciated that the adoption of s 2(4) was inconsistent with the rules against retrospective punishment.[218] This could indicate, they suggested, that "Parliament acted under the misapprehension that a minimum period of imprisonment affected only the administration of parole" and was therefore not a penalty.[219] They said:[220]

> It is inconceivable that Parliament would have acted so casually had it appreciated the implications. In the circumstances we do not accept that it is proper to draw an inference from the temporal sequence of the legislation or from the more specific terms of s 2(4) that Parliament intended it to prevail.

[176] Gault, Keith and McGrath JJ took a different view. Their primary focus was on the meaning of s 2(4) of the 1999 Act. They accepted that, if read to have

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214 The inconsistency was therefore within the same Act, the Criminal Justice Act 1985.

215 *Pora*, above n 213, at [49] per Elias CJ and Tipping J and [171] per Thomas J.

216 At [26] per Elias CJ and Tipping J and [131]–[133] per Thomas J.

217 At [45]–[46] per Elias CJ and Tipping J and [153] per Thomas J.

218 At [45].

219 At [46]. Thomas J similarly said at [153] that "it is possible that Parliament did not perceive the imposition of a minimum period of imprisonment as a penalty. On this view, s 4(2) was not confronted because it was not appreciated that the new provision related to an 'order in the nature of a penalty' in terms of that subsection."

220 At [48].

retrospective effect, s 2(4) amounted to a "serious breach of a fundamental rule of our legal and constitutional system and of New Zealand's international obligations".[221] They also accepted that the courts should "strive to interpret legislation consistently with that fundamental rule".[222] But they considered that Parliament's words and purpose were "so plain" that the breach could not be removed by judicial interpretation.[223] Additionally, to them, the issue as to whether Parliament properly characterised the power as a penalty, rather than relating to the administration of the penalty, was irrelevant in that particular case:[224]

> Any mischaracterisation in this case affects in no way the plain parliamentary purpose that the new threshold and the new 13-year minimum were to apply in respect of offences committed earlier if the offenders had yet to be sentenced.

[177] As it turned out, on the approach adopted by the majority (Richardson P and Gault, Keith and McGrath JJ) to the meaning of s 2(4) of the 1999 Act, the appeal was resolved in favour of the appellant on other grounds.[225] For this reason, Richardson P did not express a view on whether s 4(2) of the 1985 Act or s 2(4) of the 1999 Act was the dominant provision.[226]

[178] The first point to note is that in this case, unlike in *Pora*, it is not a question of inconsistency within the same Act. The issue rather is the effect of s 6 on another later piece of legislation. Even were this not the case, I am inclined to agree with Gault, Keith and McGrath JJ that, where parliamentary purpose is clear, it must prevail over this provision of the Sentencing Act.[227] The effect of the approach of Elias CJ, Tipping and Thomas JJ (and indeed the majority in this case[228]) would import a requirement that Parliament use specific words or "magic formulas"[229] in later legislation to overcome a presumption created by s 6(2) of the Sentencing Act. This is beyond even

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221 At [116].
222 At [116].
223 At [116].
224 At [115].
225 Richardson P, Gault, Keith and McGrath JJ determined that the provision could not apply to Mr Pora as the power to impose minimum periods of imprisonment under s 80 of the Criminal Justice Act 1985 was conferred prospectively on 1 September 1993 through the Criminal Justice Amendment Act 1993, and he had been convicted for an offence committed before this date.
226 At [60].
227 I do, however, leave open the possibility that the position may be different where Parliament had not realised it was breaching a fundamental right: see above at [175].
228 See the reasons given by O'Regan J above at [77]–[80].
229 To use the expression of Keith J in *Pora*, above n 213, at [111].

a manner and form provision.[230] I do not believe that Parliament can bind future Parliaments in this way.

[179] Instead, s 6 of the Sentencing Act must yield to a later provision that, on its text and in light of its purpose, cannot be read in any other way. I agree therefore with the view of Butler and Butler:[231]

> The approach of Elias CJ and Tipping J has been criticised as going too far … In particular, the language of s 2(4) was clear in purport, and its retrospective purpose was made abundantly clear during the parliamentary debates. While s 2(4) did not explicitly state that it was overriding s 4(2) of the [Criminal Justice] Act or s 25(g) of BORA, it did not have to, since it is clear that that was what was intended.[232]

[180] This means that there is no practical difference between the *Hansen* approach to s 25(g) of the Bill of Rights and the approach to s 6 of the Sentencing Act. Both must yield to Parliament's words interpreted in the light of their purpose.[233]

Common law presumptions

[181] In this case, I consider that the common law presumptions may be put to one side. This is because they only apply to the extent there is not a clear parliamentary purpose to legislate contrary to such rights.[234]

Conclusion

[182] The approaches discussed above mean that a provision that is not rights-consistent will have to be applied if no other more rights-consistent approach is

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230 A manner and form requirement is where the legislature binds itself to follow a particular method in passing or revoking laws. This could be by adopting an entrenchment provision such as s 268 of the Electoral Act 1993. Parliament has committed itself to only revoke these provisions with a supermajority of 75 per cent of the House. A majority of this Court in *Ngaronoa v Attorney-General* [2018] NZSC 123, [2019] 1 NZLR 289 at [70] accepted that the authorities "indicate the pendulum has swung in favour of enforceability [of manner and form provisions]" but preferred not to resolve the issue without argument on the point.

231 Butler and Butler, above n 197, at [7.12.28]. This contrasts with their comments set out above at [54] of the reasons given by O'Regan J and above at [172] of my reasons.

232 See Andrew Butler "Implied Repeal, Parliamentary Sovereignty and Human Rights in New Zealand" [2001] PL 586.

233 Although I leave open whether, in relation to the Bill of Rights, it may be possible, in some circumstances, to go beyond Parliament's purpose: see above at [170] and below at [253].

234 *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115 (HL) at 131 per Lord Hoffmann.

possible on its text in light of its purpose.[235] As will be clear from the discussion to follow, I consider the words and purpose of the Act clear and that Parliament was also well aware of the apparent breach of the Bill of Rights with regard to retrospectivity.[236]

Structure of reasons

[183] In the analysis that follows, I start with the legislative history of the Registration Act as this is important in ascertaining the parliamentary purpose. I then consider the Act's text, purpose and scheme. After that, I discuss (briefly) the extent to which any apparent breach of the Bill of Rights may be justified and proportionate before considering whether any alternative, more rights-consistent interpretation is available. Finally, I address how the Act applies to the appellant.

Legislative history

The Registration Act as enacted in 2016

[184] Section 7(1)(a) of the Registration Act provided (and still provides) that a registrable offender is a person the court has sentenced to imprisonment in respect of a conviction for a qualifying offence. Section 7(1)(b) of the Act provided (and still provides) that a registrable offender is a person who the court has sentenced to a non-custodial sentence in respect of a conviction for a qualifying offence and has made subject to a registration order. Qualifying offences are set out in sch 2 of the Act.[237]

[185] Section 9 set out (and still sets out) the circumstances where the court could make a registration order against an offender given a non-custodial sentence. As

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235 With possible exceptions discussed above at [170], [175], n 227 and n 233, which do not apply here.

236 I say "apparent" in that Parliament may have considered the breach justified under s 5, contrary to the view of the Attorney-General: see below at [238] and [241].

237 There are three classes of offending set out in sch 2 of the Child Protection (Child Sex Offender Government Agency Registration) Act 2016 [Registration Act]. Under s 35, those imprisoned for class 1 offences have reporting requirements for 8 years, class 2 for 15 years and class 3 for life. Those who have registration orders made against them after being sentenced to a non-custodial sentence also have reporting requirements for 8 years.

enacted, s 9 on its terms was triggered on conviction.[238] In relevant part it stated:

> **9 Court may make registration order**
>
> (1) If a court convicts a person of a qualifying offence and imposes a non-custodial sentence in respect of that offence, the court may order that the person must be placed on the register and must comply with the reporting obligations of this Act.
>
> (2) A court may make an order under this section (a **registration order**) only if the court is satisfied that the person poses a risk to the lives or sexual safety of 1 or more children, or of children generally.
>
> …

[186] I note at this point the apparent inconsistency between s 7, which refers to sentence, and s 9(1), which refers to conviction.

[187] Section 5 and cl 1(1) of sch 1 further provided (and still provide) that the Act has retrospective application to those sentenced to imprisonment in respect of a conviction for a qualifying offence who were still serving their sentence (or subject to certain associated restrictions) at the time the Act came into force on 14 October 2016. These are called cl 1(1) offenders by O'Regan J.[239]

[188] Thus the Act, from the time of its enactment, explicitly applied to serving prisoners who had been convicted and sentenced, and thus necessarily to those who had offended, before it came into force. It also applied to those who, at the time of enactment, were no longer in custody but were on parole or other form of conditional release, subject to an extended or interim supervision order, or subject to a public protection or interim detention order.[240]

[189] Schedule 2 of the Act included (and still includes) a number of offences which are noted as having been repealed. This makes it clear that it was contemplated that

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238 Section 9 was amended in 2017 through the Child Protection (Child Sex Offender Government Agency Registration) Amendment Act 2017 [Registration Amendment Act], which is discussed below from [208].

239 See the reasons given by O'Regan J at [64].

240 Registration Act, sch 1 cl 1(1)(b)–(d) (as enacted). Amendments were made to these other groups (see below at [211]), but this is accurate at the time of enactment.

the Registration Act, as originally enacted, would apply to offences committed before 14 October 2016.[241]

Parliamentary history of enactment

[190] As noted by O'Regan J,[242] it is clear from the speech on the introduction of the Bill of the Minister in charge, the Hon Anne Tolley MP, that the Registration Act was intended to apply to all those convicted after it came into force. The Minister explicitly stated that it "applies to persons convicted after the Act comes into force".[243] In addition, she made it clear that the Act was intended to apply retrospectively to those offenders covered by cl 1(1) of sch 1, even though they had (obviously) already been convicted and sentenced when the Act came into force.

[191] The Minister stated that the "double jeopardy" retrospectivity was "considered necessary in order to remove the not inconsiderable immediate risk presented by already sentenced child sex offenders moving into the community after the Act comes into force and not being subject to the Bill's reporting requirements".[244] The same sentiment was expressed in the select committee report and in the Minister's speeches at the second reading and third reading.[245]

[192] The Attorney-General's report pursuant to s 7 of the Bill of Rights concluded that the Bill was inconsistent with s 9 (disproportionately severe treatment or punishment) and s 26(2) (double jeopardy), and that it could not be justified under s 5.[246] The Attorney-General did not address s 25(g) of the Bill of Rights or s 6 of the Sentencing Act.

[193] The concern expressed with s 9 was that there was no ability to review lifetime reporting obligations for those convicted of the most serious offences, even if they no

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241 As O'Regan J concedes at [65](a) of his reasons.
242 See above at [67].
243 (15 September 2015) 708 NZPD 6634.
244 (15 September 2015) 708 NZPD 6635.
245 Child Protection (Child Sex Offender Register) Bill 2015 (16-2) (select committee report) at 8; (1 June 2016) 714 NZPD 11623; and (8 September 2016) 716 NZPD 13567.
246 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) [Registration Bill s 7 report] at [41].

longer constitute a risk.[247] As to s 26(2), the Attorney-General considered that registration could be seen as part of the original sentence for "prospective child sex offence convictions and therefore might not be seen as being punished 'again' for the same offence".[248] However, he considered that there was limited retrospective application to those already serving a sentence for a qualifying offence or subject to an extended supervision order following that sentence. Section 26(2) was engaged for such offenders, estimated in the original Cabinet paper to number around 472.[249]

[194] In terms of whether the retrospectivity was justified and proportionate under s 5 of the Bill of Rights, the Attorney-General accepted that the objective of the Act was sufficiently important to justify some limitation on the rights and freedoms guaranteed by the Bill of Rights, saying: "Child victims of sexual abuse are amongst the most vulnerable and the resultant harm is often very serious and long lasting."[250]

[195] He then considered whether there was a sufficient rational connection between the limit and the objective. On balance, he found there was.[251] He considered that the evidence needed to be "weighed against the severe harm caused to the victims of sexual offences against children".[252] He said: "Limited retrospective application will therefore help to address the immediate risks presented by qualifying offenders as they move into the community."[253]

[196] Next, the Attorney-General considered whether the impairment on the right was greater than reasonably necessary to achieve the purpose of reducing the risk posed by child sex offenders. He noted that the Legislation Advisory Committee has stated that retrospective application "may be appropriate where it is intended to address a matter that is essential to public safety".[254] He considered this requirement

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247 At [21] and [23]–[24].
248 At [28].
249 At [29]–[30]. The Social Services Select Committee was told that as at 1 July 2016 (the date the Act was expected to come into force) there would be 969 people in prison and 360 in the community affected retrospectively: New Zealand Police and Department of Corrections *Child Protection (Child Sex Offender Register) Bill: Response to Questions from the Social Services Committee* (5 February 2016) at 6.
250 At [32].
251 At [33]–[35].
252 At [34].
253 At [34].
254 At [36].

was met in this case. He also reiterated that the measure had narrow retrospective application and did not amount to an explicit deprivation of liberty.[255]

[197] Despite these factors, he concluded that the Bill did not minimally impair the rights of those offenders to whom it would retrospectively apply.[256] He said that the Bill could, for example, have limited the period of registration or reporting obligations for such offenders or included a review mechanism.[257] He said:[258]

> People to whom the Bill retrospectively applies will have no effective means to seek relief from the effects of their double punishment. Due to the risk that this punishment will become disproportionately severe I therefore also consider the limit on s 26(2) is not in due proportion to the importance of the objective.

[198] In response to the Attorney-General's s 7 report, the Social Services Select Committee recommended inserting a review mechanism into the Bill to provide that an offender put on the register for life could apply to the District Court for a review of registration after a period of 15 years on the register.[259] The Committee noted its belief that this amendment would also "address some of the concerns around the retrospective aspects of the [B]ill".[260]

[199] At both second and third reading, the Minister stated her view that the Bill as reported back with this insertion went "some way" to addressing the Attorney-General's concerns.[261] On s 26(2) of the Bill of Rights in particular, the

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255 At [37].

256 The Supreme Court of Canada recently delivered a judgment in relation to the registration of sex offenders in Ontario: *Ontario (Attorney-General) v G* 2020 SCC 38. Although a discrimination case, the first two steps of the *Oakes* test were applied with the same conclusions as the Attorney-General's s 7 report in this case: both parties and the Court considered that the register's purpose – to assist in the investigation and prevention of sexual offences – was pressing and substantial, and that the limits it places on Charter rights are rationally connected to that purpose: at [73]. The test failed on minimal impairment. This is because an individualised assessment for those found not criminally responsible on account of mental disorder, as was applied to those found guilty, could have achieved these purposes just as well while impairing the right less: at [74]–[76].

257 Registration Bill s 7 report, above n 246, at [38].

258 At [40].

259 Child Protection (Child Sex Offender Register) Bill 2015 (16-2) (select committee report) at 4 and 8. This would be inserted as new cl 36A. In inserting this mechanism, the Committee accepted the suggestion of the New Zealand Police.

260 At 8.

261 (1 June 2016) 714 NZPD 11623; and (8 September 2016) 716 NZPD 13567.

Minister stated at second reading that "the retrospective provisions are now ameliorated by the new review provisions".[262]

Issues that arose with the Act as first enacted

[200] Two main issues arose in relation to the Registration Act as enacted. The first related to the use of the term "conditional release" in cl 1(1). Conditional release only captures within its ambit those who are subject to recall to prison, whereas it appears that the intention had been that all those who were still on "release conditions" would be placed on the register. Parliament was told that this affected 107 offenders.[263]

[201] The second issue was whether registration orders could be made in relation to those offenders who were convicted before but sentenced after the Act came into force. It appears that there were 68 such offenders.[264] This issue had arisen soon after the Act came into force.

[202] In *R v Hutcheson*, Mr Hutcheson pleaded guilty in early October 2016 (before the Act came into force on 14 October 2016) to two representative charges of historical indecent assault on girls under 12.[265] On 9 November 2016, he was sentenced to 11 months' home detention.[266] Having imposed this non-custodial sentence, Judge Harrop then considered whether a registration order should be made under s 9 of the Registration Act. He noted that the Act "clearly is retrospective where a sentence of imprisonment is imposed" but it was less clear for those sentenced to a non-custodial sentence.[267] The Judge had been told that the issue was being considered by Crown Law and, until it was resolved, prosecutors were not seeking registration for people like Mr Hutcheson.[268] The Judge therefore did not make an

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262 (1 June 2016) 714 NZPD 11623.

263 (7 March 2017) 720 NZPD 16349. See also New Zealand Police *Departmental Disclosure Statement: Child Protection (Child Sex Offender Government Agency Registration) Amendment Bill* (2 March 2017) [Departmental Disclosure Statement] at 5.

264 Departmental Disclosure Statement, above n 263, at 5.

265 *R v Hutcheson* [2016] NZDC 22159 at [1].

266 At [36].

267 At [43].

268 At [43].

order.[269] This Crown policy was referred to in other judgments from around the same time.[270]

[203] The uncertainty arose because of the differences in the wording of ss 7 and 9 as originally enacted.[271] Section 7 appeared to apply to all those sentenced after the Act came into force. It was the only operative provision for those sentenced to imprisonment. However, those receiving a non-custodial sentence needed also to be captured by s 9, which referred to conviction and thus could have been interpreted as requiring both conviction and sentence to post-date the Act coming into force, especially when combined with the comments of the Minister in charge during the parliamentary process that, "The [B]ill applies to persons convicted after the Act comes into force."[272]

[204] Questions were also raised relating to the retrospective effect on those convicted before the Act came into force and subsequently sentenced to imprisonment. These offenders argued that they should not be made subject to registration under s 7(1)(a) because of s 25(g) of the Bill of Rights. While accepting that this did amount to a retrospective penalty, the Crown seems to have considered that the text and legislative intent was clearer for those sentenced to imprisonment and continued to seek registration for such offenders. In *R v Ofa*, Judge Earwaker explained why he considered the Crown position was correct:[273]

> [19] The Crown submitted that it would be absurd if the Register were to apply to all those currently serving sentences for qualifying offences committed before the commencement of the Act and to those who are in the future charged for historic sexual offending, but not those sentenced to imprisonment following the commencement of the Act who were charged before the commencement date. Such a result, the Crown submits would be directly contrary to the express intent of Parliament to ensure that recently convicted sexual offenders are covered by the new legislation. The Crown

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269 At [44].

270 See, for example, *R v Inga* [2016] NZDC 24515 from 1 December 2016, where Judge Winter recorded at [9] that "In this case the Crown solicitor has directed that as there is a serious question about the applicability of discretionary orders applied retrospectively, that Crown counsel around the country have been directed not to seek discretionary orders at this time"; and *R v [R]* [2016] NZDC 22965, where Judge Rowe referred at [69] to "a legal issue raised by the Crown as to whether I could have retrospectively made an order".

271 As set out above at [61]–[62] and described at [184]–[186].

272 (15 September 2015) 708 NZPD 6634. The effect of s 7 of the Interpretation Act 1999 is that the correct reading of the Registration Act was that it only applied to those convicted after commencement. This is also discussed below at [224]–[225].

273 *R v Ofa* [2017] NZDC 2371, [2017] DCR 764 (footnote omitted).

> further argue that the intent to cover those offenders can also be seen by the breadth of the retrospective application in sch 1 of the Act. Not only does it apply to those currently serving sentences of imprisonment but it also applies to those on parole or under extended supervision or public protection orders. The intent to include offenders whose offending occurred well before the commencement of the Act can also be seen by the inclusion of a number of historic offences long since repealed in the list of qualifying offences in the Act.
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> [20] I accept the Crown submission that there is clear legislative intent in the scheme of the Act providing for broad retrospectivity to encompass those earlier convicted of qualifying sexual offending. There is no other tenable interpretation than that s 7 applies to all those sentenced to imprisonment for a qualifying offence after the commencement of the Act, regardless of when the offence was committed or when they were charged with the offence.

[205] Judge Blackie in *R v Oti* made very similar comments.[274] Other Judges applied registration against offenders sentenced to imprisonment who had been convicted before the Act's commencement without any comment on the retrospectivity issue.[275]

[206] Judge Butler reached a different result in *R v [JJ]*.[276] This sentencing from 3 February 2017 related to historical sexual offending, to which the offender had pleaded guilty prior to enactment of the Registration Act. The offender was sentenced after the Act came into force to six years' imprisonment. The Judge's decision not to order registration was based on the timing issue. The Judge said that the Registration Act "is not applicable in your case because you pleaded guilty to this charge prior to that Act coming into force and effect".[277] There was thus conflicting authority on whether those convicted before the Act came into force but sentenced to imprisonment after were to be entered on the register.

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274 *R v Oti* [2017] NZDC 807 at [8]–[10]. The most recent offending was in April 2015, he pleaded guilty in September 2016 and sentencing was in November 2016. Mr Oti re-appeared before the Court on 19 January 2017 "so that an issue [could] be determined as to the application of the provisions of the Child Protection (Child Sex Offender Government Agency Registration) Act 2016". Judge Blackie concluded that "as the clear legislative intent of the scheme that is set out in the Act, providing for broad retrospectivity to encompass those earlier convicted of qualifying sexual offending, there can be no other tenable interpretation but that s 7 applies to not only those persons, it also applies to you".

275 See, for example, *R v Page* [2016] NZHC 2762 (Edwards J) at [63], in which the last offending was committed in March 2015, conviction was on 17 June 2016 and sentencing was on 18 November 2016; and *R v Nelson* [2016] NZHC 2963 (Wylie J) at [127]–[128], in which the last offending was committed in early 2015, conviction was on 14 September 2016 and sentencing was on 7 December 2016.

276 *R v [JJ]* [2017] NZDC 2073.

277 At [15].

[207] By contrast, in line with the Crown's clear view described above,[278] it does not appear that any issue was raised during this period in relation to those, like the appellant, who were convicted after the Act came into force for offending that predated its commencement. Those who were sentenced to imprisonment had orders made against them as a matter of course.[279] Those who received non-custodial sentences were considered for discretionary orders with the time of offending treated as irrelevant.[280] Such offenders were accepted to be subject to the regime.

The amendments in 2017

[208] Against this background of uncertainty about the Act's application to those convicted before but sentenced after its commencement, in March 2017 the Registration Act was amended under urgency with retrospective effect to 14 October 2016, the date the Act originally entered into force.[281] It is clear from both the text of the Child Protection (Child Sex Offender Government Agency Registration) Amendment Act 2017 (Registration Amendment Act) and its legislative history that these amendments were directly targeted at the issues described above.

[209] Section 9(1) was amended so that it no longer referred to conviction but to sentence. It now reads:

> If a court imposes on a person a non-custodial sentence in respect of a conviction for a qualifying offence, the court may order that the person must be placed on the register and must comply with the reporting obligations of this Act.

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278 See above at [204].

279 See, for example, *R v Hart* [2017] NZHC 211 (Davison J) at [93]–[98], in which the latest offending was committed in July 2016, conviction was on 13 December 2016 and sentencing was on 17 February 2017; and *R v Bird* [2017] NZDC 3360 (Judge Barkle) at [23], in which the latest offending was committed in January 2016, conviction was on 1 December 2016 and sentencing was on 21 February 2017.

280 See, for example, *New Zealand Customs Service v Noble* [2017] NZDC 2838 (Judge Burnett) at [6]–[10], in which the latest offending was committed in September 2016, the date of conviction is unrecorded but it is fair to assume it was after enactment (both because of the turnaround time and because the Crown applied for a discretionary order), and sentencing was on 14 February 2017; and *New Zealand Police v [M]* [2017] NZDC 642 (Judge Emma Smith) at [26], in which the latest offending was in September 2016, the date of conviction is unrecorded but it is fair to assume was after enactment (both because Judge Smith noted there was a delay in entering a guilty plea (at [22]) and because the Crown applied for the discretionary order), and sentencing was on 17 January 2017.

281 See the reasons given by O'Regan J above at [69].

[210] Added was s 9(1A), which provides that, "For the purposes of subsection (1), the date on which the person was charged with the offence is irrelevant."

[211] The Registration Amendment Act also amended sch 1. Clause 1(1)(b) was altered and a new cl 1(1)(e) added to bring under the Registration Act those no longer in prison but subject to release conditions. A new cl 1(2) was added to sch 1 to provide that the Registration Act applies to a person convicted before 14 October 2016 of a qualifying offence and sentenced on or after 14 October 2016 in respect of that conviction, whether to imprisonment or a non-custodial sentence. The new cl 1(4) of sch 1 provides that a person to whom cl 1(1) or (2) applies is a registrable offender for the purposes of s 7(1) and the schedule.

[212] Finally, the Registration Amendment Act added a new cl 4 to sch 1 to the Registration Act to enable the Commissioner of Police to apply to the sentencing court for a registration order under s 9 in respect of an offender sentenced between 14 October 2016 (the date the Registration Act came into force) and 13 March 2017 to a non-custodial sentence for a qualifying offence. However, this clause does not apply if, at the time of sentencing, the court declined to make a registration order because it was not satisfied that the person posed a risk to the lives or sexual safety of one or more children, or of children generally.[282]

[213] Clause 4 is therefore targeted at those who may have avoided registration orders because of the lack of certainty as to whether the legislation applied – and, in particular, those against whom registration was never sought because of the Crown policy referred to above.[283]

Parliamentary history of amendment

[214] The Registration Amendment Bill was introduced under urgency. The Leader of the House explained why this was necessary:[284]

> The House may well wonder why we are back here so quickly. It is because, in the pedantic world of legal interpretation, there could be some confusion

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282 Registration Act, sch 1 cl 4(3).
283 See above at [202].
284 (7 March 2017) 720 NZPD 16348.

> over exactly who should be on the register and when they should be there. The intention of Parliament was very, very clearly stated, though, … and this simply goes to a point where we are clarifying further the intention of Parliament so that there may be no misinterpretation of the intention.

[215] The explanatory note to the Registration Amendment Bill recorded that its purpose was to "amend the retrospective application of [the Act] so that all relevant child sex offenders will be registrable under the Act as originally intended".[285] The provisions were said to clarify the position. The explanatory note said, in relation to s 9(1), that the wording change was necessary "to clarify that the court's power to make a registration order turns on sentencing, not on conviction (which is a precondition)". The addition of s 9(1A) was related to this, introduced "to provide that the date on which a person was charged with the qualifying offence is irrelevant to the court's power to make the registration order".[286]

[216] In relation to cl 1(2) of sch 1, it said that this "clarifies that a person is a registrable offender for the purposes of section 7(1) if the relevant conviction occurred before the commencement of the Act but the relevant sentence is imposed after commencement".[287] As to cl 4, the explanatory note says that it "enables the Commissioner of Police to apply to the sentencing court for a registration order under section 9 in respect of an offender sentenced between 14 October 2016 and 11 March 2017 to a non-custodial sentence for a qualifying offence".[288]

[217] In similar terms to the explanatory note, the Minister in charge, who was now the Hon Paula Bennett MP, stated in her first reading speech, "This amendment [B]ill amends the principal Act to reflect the original retrospective policy intent of the legislation. There is no new policy involved."[289] She then explained what that intent was:[290]

> It was intended that the retrospective provisions of the principal Act would apply to all child sex offenders who had been released from prison and were subject to release conditions under Department of Corrections oversight when the Act came into force. It was also intended to include all those child sex

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285 Child Protection (Child Sex Offender Government Agency Registration) Amendment Bill 2017 (243-1) (explanatory note) at 1.
286 At 2.
287 At 3.
288 At 3.
289 (7 March 2017) 720 NZPD 16349.
290 (7 March 2017) 720 NZPD 16349.

> offenders who had been convicted of a qualifying offence prior to the Act coming into force but were yet to be sentenced.
>
> …
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> The second issue relates to the application of the principal Act to those convicted of a qualifying offence before the principal Act came into force but who had not yet been sentenced. The principal Act does not make it sufficiently clear that registration applies to all offenders who are sentenced after commencement of the Act, regardless of when they were convicted. Sixty-seven offenders had been convicted but not yet sentenced when the Act came into force.

[218] This view was reiterated in the other speeches by the Minister. In particular, at Committee stage, she stated that she decided not to send the Bill to select committee because she was "not changing the intent of the legislation at all".[291] At third reading, she explained her belief that "the public expects these offenders to be covered by the register", and for that reason they were "acting with urgency to make Parliament's intention clear and to remove any doubt that these people are subject to registration".[292]

[219] Several questions about the amendments were raised during the Registration Amendment Bill's passage through the House, most relevantly for our purposes by David Clendon MP in Committee and Jan Logie MP at third reading. Both questioned the amendment to the wording of s 9 of the Registration Act, with Mr Clendon stating that he struggled to see anything other than "wordsmithing" in the change. Both also questioned why it was necessary to insert a clause providing that the date on which a person is charged is irrelevant.[293] No further explanations from the Minister were forthcoming.

[220] The Attorney-General filed a report on the Registration Amendment Bill.[294] This time the report addressed not only s 26(2) but also s 25(g) of the Bill of Rights and s 6 of the Sentencing Act.[295]

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291 (7 March 2017) 720 NZPD 16374.

292 (7 March 2017) 720 NZPD 16392.

293 (7 March 2017) 720 NZPD 16386 (Clendon); and (7 March 2017) 720 NZPD 16399 (Logie).

294 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) [Registration Amendment Bill s 7 report].

295 At [12]–[13] it was noted that s 9 of the Bill of Rights had been addressed through the inclusion of s 38 of the principal Act following the recommendation of the Social Services Select Committee. See above at [198].

[221] The Attorney-General considered that s 26(2) did not apply to those sentenced after the Act came into force as registration could be seen as part of the original sentence.[296] However, he considered that the retrospective application of the Act meant that a person already sentenced for their offending faces an additional punishment for the same offence and this engages s 26(2).[297] For the same reasons as in his first report, he concluded the limitation on rights was not justified and proportionate.[298]

[222] In relation to s 25(g), the Attorney-General acknowledged that the amending Bill sought to "clarify" that the Registration Act applies to persons who had been convicted of a qualifying offence before 14 October 2016 but who were sentenced on or after 14 October 2016.[299] Accordingly, he considered whether the requirement to register and the attendant reporting obligations constitute a variation in the penalty for the purposes of s 25(g). He concluded that they did, and that the limit was not justified, because of the lack of a review mechanism or shorter applicable period for those registered retrospectively.[300] He also said:[301]

> In addition to the reasons given above, I also note that s 25(g) is mirrored in s 6(1) of the Sentencing Act 2002. Section 6(2) of that Act provides that the right applies despite any other enactment or rule of law. That the right affirmed in s 25(g) is specifically and powerfully recognised elsewhere in legislation emphasises its importance and further suggests the intrusion on that right is not in due proportion to the importance of the objective.

[223] This s 7 report on the Amendment Bill was not referred to in any of the speeches during the passage of the Registration Amendment Bill.[302] Parliament passed the Bill without any amendments to its substance.

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296 At [20]. This was the same conclusion as in his first report: see above at [193].

297 At [21]

298 At [42]. He further noted at [34] that the revised retrospective application of the Bill was broader, "essentially attempting to capture all persons who were not, at 14 October 2016, completely free of the repercussions of a prior conviction for child sex offences".

299 At [45].

300 At [47]–[48].

301 At [49].

302 David Clendon MP did, however, refer to the Attorney-General's original s 7 report, although he was the only one to do so: (7 March 2017) 720 NZPD 16355.

Text of the Act

As enacted

[224] Section 7(1) of the Registration Act as enacted (and now) defined a registrable offender as a person who a court has, in respect of a conviction for a qualifying offence, either sentenced to imprisonment or sentenced to a non-custodial sentence and made subject to a registration order.[303] Section 9 as enacted stated that the court was permitted to make an offender subject to a registration order, if the court "convicts a person of a qualifying offence and imposes a non-custodial sentence in respect of that offence", and the "court is satisfied that the person poses a risk to the lives or sexual safety of 1 or more children, or of children generally".[304]

[225] On the basis of the text of ss 7 and 9 as originally enacted, therefore, all those convicted after the Act came into force were subject to the regime regardless of when they committed their offences.[305] I do not consider the text of s 9 itself was ambiguous. The ambiguity only related to those who had been convicted before the Act came into force but who were sentenced after the Act came into force to a non-custodial sentence. This was because of the different wording in ss 7 and 9.[306] I also do not consider there was any issue about the Act applying to those sentenced to imprisonment after the Act came into force for the reasons set out by Judges Earwaker and Blackie.[307]

As amended

[226] The Registration Amendment Act amended s 9(1) with retrospective effect to state that a registration order may be made if a court "imposes on a person a non-custodial sentence in respect of a conviction for a qualifying offence". On its text, it now applies, like s 7, to any person who is sentenced after the Act's commencement,

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303 See above at [184].

304 See above at [185].

305 Conviction and sentence had to follow the Act's commencement as s 7 of the Interpretation Act requires enactments to be read prospectively and there was nothing in the Registration Act to suggest this did not apply (other than cl 1 of sch 1 which provided the Act applied to offenders already subject to a sentence of imprisonment). I also accept that, had this stood alone, it may have been interpreted consistently with s 25(g) of the Bill of Rights in the manner set out at [282] of William Young J's reasons (subject to the issue of parliamentary purpose, discussed above at [168]–[170] and [182]).

306 See above at [203].

307 See above at [204]–[205]. It follows that I consider Judge Butler (see above at [206]) was wrong.

rather than, as before, to any person convicted after that date. The appellant was clearly sentenced after the date of the Act's commencement. The Act thus, on the basis of the text of s 9(1), applies to him.[308]

[227] This conclusion is strengthened by the fact that the Amendment Act also added a new s 9(1A) stating that the date a person is charged is irrelevant. This is significant. Whatever the motivation behind the addition of s 9(1A), as the Crown points out, it manifests a clear intention to apply the Act to offences committed before 14 October 2016 because offences must precede a charge.[309] This does not entail a reading of s 9(1A) as the date the person committed the offence.[310] It is just a clear and necessary effect of the words used.[311]

[228] The majority put emphasis on the fact that "express provision is made in sch 1 for where the Registration Act is to apply retrospectively, yet sch 1 does not cover the present situation [of those, like the appellant, who were convicted and sentenced after the Act came into force for an offence committed before this date]".[312] In my view, the reliance on this omission is misplaced, particularly in light of the legislative history. It cannot, in any event, override the plain words of s 9, discussed above.

[229] Schedule 1, as originally enacted, dealt with s 26(2) retrospectivity. It applied to those already convicted and sentenced to imprisonment before the Act came into force.[313] I accept that s 25(g) was also engaged by the Registration Act as enacted but, as noted above, the Attorney-General's report did not deal with this section.[314]

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308 I also note that sch 2, which listed qualifying offences, included repealed offences. This is another indication that the Act was to have retrospective effect.

309 As neither David Clendon nor Jan Logie MP were told why s 9(1A) was included, we can only speculate as to its purpose. The concern could have been that, as charging and conviction precede sentencing, they can be seen as inextricably linked to it. It may have been thought that it had to be made clear that it was the actual sentencing date rather than the entry into the criminal justice system that had to have occurred after the Act came into force.

310 Contrary to the view expressed by William Young J below at [289].

311 Contrary to the view of the majority on this point: see the reasons given by O'Regan J above at [78]. In my view, s 9(1A) means that the wording is as clear in expressing retrospective intent as that in *Pora*, contrary to the view of the majority (see the reasons given by O'Regan J above at [83]). It will be apparent I do not agree with William Young J that s 9(1A) is problematical: see below at [287].

312 See the reasons given by O'Regan J above at [78].

313 See above at [187]–[188] and [193].

314 Set out above at [192].

[230] The Amendment Act was enacted to remove the uncertainty as to whether the Act applied to those convicted before but sentenced after the Act came into force.[315] For the members of this group already sentenced before the Amendment Act came into force, s 26(2) was engaged.[316] As discussed below, it needed to be made clear that all those in this group who had been sentenced since the Act came into force were subject to the additional punishment of registration, as was done through cl 1(2). There also had to be a mechanism for the reconsideration of sentences (as provided in cl 4 of sch 1) for this group if they had received non-custodial sentences in the period up to the passing of the Amendment Act.[317]

[231] As originally enacted, all those convicted after the Registration Act came into force, like the appellant, were already covered by the regime.[318] Section 26(2) was not engaged, either at the time of original enactment or the Amendment Act, in relation to this group.[319] It is thus unsurprising that this group is not mentioned in the amended sch 1.[320]

Conclusion on text of the Act

[232] The text of the Registration Act as enacted shows that it was intended to apply to those whose offending pre-dated the Act but who were convicted after the Act came into force.[321] This is how the Act was applied in the period between its enactment and the Amendment Act.[322]

[233] The text of the Act as amended, including in particular s 9(1A), makes it clear that the Act continued to apply to this group.[323] Further, as I discuss below, the purpose and scheme of the Act, which are largely excluded from the reasons of the majority,

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315 See above at [201]–[206].

316 Assuming there was no jurisdiction to make a registration order in respect of offenders in this group before the Amendment Act. Section 25(g) was also engaged but, as noted above, sch 1 at enactment dealt with s 26(2) retrospectivity.

317 Given the policy referred to above of not seeking registration orders for this group: see above at [202].

318 There had been no uncertainty as to the application of the regime to his group: see above at [207].

319 See above at [193] and [221].

320 See above at [225].

321 It will be apparent I generally agree with William Young J's reasons below at [283]–[286].

322 See above at [207].

323 In addition, now to those who were convicted before the Act came into force but sentenced afterwards.

also clearly show that Parliament intended s 9 to have retrospective effect to offenders such as the appellant.[324] Indeed, I note that the majority accepts that the legislative history supports the view that Parliament intended s 9 to apply retrospectively.[325]

Purpose of the Act

[234] As noted above, it is clear from the text of the Act, both as enacted and as amended, that it was intended to cover those who had been convicted after the Act came into force.

[235] The Act's purpose in this regard is also clear from the legislative history. The Registration Act was always intended to apply and did apply to all those convicted of qualifying offences after the Act had come into force, as is shown by the Minister's speech on its introduction.[326] In passing the Amendment Act, Parliament was legislating in response to the uncertainty relating to whether the Act applied to those convicted before but sentenced after the Act came into force.[327] No similar issue had arisen with regard to those convicted and sentenced after the Act had come into force and so no change was needed in relation to that group.[328]

[236] Those who had been convicted before the Act came into force but sentenced after that date (including to sentences of imprisonment) did need to be included explicitly in sch 1. Otherwise, the aim of the Registration Amendment Act – that this group be included retrospectively back to 14 October 2016, the date the Act came into force – would not have been met.[329]

[237] It is also important to remember that Parliament had before it two reports of the Attorney-General, both dealing with s 26(2) of the Bill of Rights and the second one also dealing with s 25(g) of the Bill of Rights and s 6 of the Sentencing Act. Parliament was thus aware that the Attorney-General considered that, in order to be

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324 Section 5(1) of the Interpretation Act provides: "The meaning of an enactment must be ascertained from its text and in the light of its purpose."

325 See the reasons given by O'Regan J above at n 91 and [81].

326 See above at [190].

327 See the discussion above at [202] of *Hutcheson*, above n 265; and [206] of *R v [J]*, above n 276.

328 See above at [207].

329 There were a number of offenders affected by this, due to the Crown policy described above at [202], and the mixed caselaw regarding offenders in this group sentenced to imprisonment described above at [204]–[206].

compliant with the Bill of Rights, a review mechanism was needed or shorter periods for those affected by retrospectivity.

[238] Despite the first report, Parliament passed the original Act, only including an amendment introducing a review of orders for life. Parliament thus may have disagreed with the Attorney-General's report and considered that the Act was now compliant with the Bill of Rights without further amendment. Or alternatively it may have decided that it would pass the legislation even if it was not Bill of Rights-compliant (as is its right under s 4 of the Bill of Rights).

[239] It is true the Attorney-General's first report did not deal with s 25(g) of the Bill of Rights. It is, however, clear from the second report that his view of that section coincided with his view on s 26(2). It is also true that the second Attorney-General's report did not deal specifically with those like the appellant convicted after the Act came into force. This is unsurprising.[330] Such reports only deal with the legislation before the House and do not suggest amendments to legislation already in force. In this case, for the reasons set out above, it was clear that the Act as enacted was intended to, and did, apply to all those who were convicted after it came into force.

[240] There is no policy reason to distinguish between those convicted and sentenced after the Act came into force and those sentenced after the Act came into force but convicted before. There is thus no reason to think that the Attorney-General (or Parliament) would have come to a different view on the two groups. Indeed, those convicted after the Act came into force did know at the date of their conviction that they would either automatically go on the register (if sentenced to imprisonment) or, in the case of a non-custodial sentence, that they may be placed on the register. They are therefore less affected by the breach of s 25(g) than a person who, for example, pleaded guilty before the Act was passed only to find at sentencing that a new additional penalty applied.

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330 The majority accept that the second Attorney-General's report would not have dealt with this group because it only addressed the provisions of the Registration Amendment Bill rather than the Registration Act as enacted: see the reasons given by O'Regan J above at [74].

[241] Parliament was clearly aware that passing the Amendment Act without amendment would, at least in the view of the Attorney-General, unjustifiably limit both the s 26(2) and the s 25(g) rights. In passing the Amendment Act without making the changes suggested by the Attorney-General, Parliament again either disagreed with the Attorney-General and reached a different conclusion as to whether the Amendment was rights-compliant or it accepted the Amendment Act was inconsistent in this regard with the Bill of Rights and passed it anyway (again as it is entitled to do).

Scheme of the Act

[242] The majority accepts that the Act has retrospective effect for many offenders who had offended and been sentenced to imprisonment before the Act came into force (a breach of s 26(2) and s 25(g) of the Bill of Rights).[331] The majority also accepts that the Act has retrospective effect for those who offended and who were convicted before it came into force but who were sentenced afterwards (a breach of s 25(g) of the Bill of Rights).[332] The majority says, however, that the Act does not have retrospective effect for those convicted and sentenced after it came into force for offences committed before the Act came into force.[333]

[243] The Act, therefore, according to the majority, differentiates between a person convicted on 13 October 2016 and one convicted on 15 October 2016, even if the two persons offended on the same date and were sentenced on the same date.[334] There seems no reason in policy why that should be the case. And it would be a very odd scheme if the Act is not retrospective for those convicted after it came into force but is retrospective for many who had already been sentenced before it came into force and for those already convicted but not yet sentenced. Both of these (and particularly the first) are more egregious forms of retrospectivity.

[244] It must be remembered that the majority reasoning applies not only to those convicted after the Act's commencement who are sentenced to a non-custodial sentence but also to those sentenced to imprisonment.[335] This means that an offender

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331 See the reasons given by O'Regan J above at [81].
332 This is implicit in the reasons given by O'Regan J: see above at [77] and [82].
333 At [82].
334 The Registration Act came into force on 14 October 2016.
335 See the reasons given by O'Regan J above at [82].

convicted on two charges of rape of a 13-year-old girl for offending occurring in June 2016 should, according to the majority, not have been registered when he was sentenced in February 2017 to nine years and two months' imprisonment because he pleaded guilty in December 2016.[336] Had he pleaded guilty in September 2016, he would have been registrable. Similarly, an offender convicted in December 2016 on charges including representative charges of sexual violation by rape and unlawful sexual connection against a victim who was aged between nine and 14 when the events took place between March 2011 and August 2015, is not registrable, although he would have been had he pleaded guilty three months earlier.[337]

[245] By contrast, the majority accepts that those who, when the Act came into force, had been released from prison at their statutory release date and had reached their sentence expiry date but who still were subject to standard release conditions are, since the Amendment Act, subject to the regime. So, too, is a person like Mr Hutcheson eligible for a registration order, specifically because he was convicted before the Act came into force as opposed to after.[338]

[246] I also note that the majority's interpretation will continue to affect a significant number of cases that Parliament was clearly intending to include under the Act. There are often significant delays before child sexual abuse is reported.[339] For example, the Australian Royal Commission into Institutional Responses to Child Sexual Abuse commissioned a research project using police and court data for two decades from the mid-1990s in New South Wales and South Australia to examine delayed reporting of child sexual abuse.[340] In New South Wales, 24 per cent of reports to police of child sexual offences were not made until five or more years later.[341] For South Australia this figure was around 19 per cent.[342]

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336 *Hart*, above n 279.

337 *R v Reid* [2017] NZDC 6835. Mr Reid was sentenced in April 2017 to 16 years' imprisonment with a minimum period of imprisonment of eight years. He was registered, which was uncontentious.

338 See above at [202].

339 This is recognised in s 127 of the Evidence Act 2006.

340 Judy Cashmore and others *The impact of delayed reporting on the prosecution and outcomes of child sexual abuse cases* (report prepared for the Royal Commission into Institutional Responses to Child Sexual Abuse, University of Sydney, Sydney, August 2016). The New South Wales data was for 1995 until 2015 and the South Australia data was for 1992 until 2012.

341 At 73.

342 At 146.

[247] There is no reason to believe that the situation is very different in New Zealand. It can be expected therefore that the police are still dealing with a significant number of offences that occurred before the Act came into force and that there will continue to be offenders who are convicted and sentenced after the Act came into force for offences committed prior to that date.

[248] The clear indication from Parliament was that it did not intend any of the above consequences. Rather, it sought to enact a scheme that would apply to all those convicted after the Registration Act came into force.[343] The interpretation of the majority runs counter to this purpose.

Demonstrably justified in a free and democratic society?

[249] Steps two through four of *Hansen* require consideration of whether there is a prima facie limitation on a right contained in the Bill of Rights and, if there is, whether this limitation is prescribed by law and can be demonstrably justified in a free and democratic society.[344]

[250] In this case, the Attorney-General considered that the Act, as amended, is an unjustified limitation on the right contained in s 25(g). However, it is notable that the Attorney-General appears to have considered that retrospectivity itself could have been justified if there had been a review mechanism or a shorter period for those affected retrospectively.[345]

[251] Because of the conclusion in the next section, it is not necessary for the purposes of this appeal to come to any conclusion on whether the Act is an unjustified limitation on the right protected by s 25(g).[346]

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343 And later it clarified through the Amendment Act that the regime was to capture all those sentenced after the commencement date and all those subject to release conditions.

344 As set out above at [166].

345 Registration Amendment Bill s 7 report, above n 294, at [30]–[33] and [48]. See above at [222]. See also the majority reasoning in the Canadian Supreme Court case of *R v KRG* 2016 SCC 31, [2016] 1 SCR 906. I note that the incursion into offenders' rights was more extensive in that case as, while also being a retrospective increase in penalty, it enabled orders prohibiting convicted offenders from engaging in conduct rather than merely reporting requirements on a non-public register. On the other hand, there was an ability to tailor the orders to the offenders' circumstances and a review mechanism in the Canadian legislation.

346 Or indeed on the role of the courts with regard to s 5.

Is a more rights-consistent interpretation available?

[252] In my view, there is only one available interpretation if the text of the Act is read in the light of its purpose, its legislative history and the scheme of the Act. The Registration Act applies to all those convicted after the Act came into force, whatever the date of their offence.[347] On the approach of the majority in *Hansen*, s 6 of the Bill of Rights cannot operate to give the Act a more rights-consistent meaning that does not accord with its text and purpose. Section 4 of the Bill of Rights, on this approach, means the legislation must be applied.

[253] In the United Kingdom the courts have been prepared to go further than in *Hansen*.[348] As noted above, Professor Geiringer suggests that in certain cases the courts in New Zealand should likewise be prepared to override Parliament's purpose in enacting a provision. Relevant factors in considering whether they should do so include the importance of the right at stake, the nature of the breach, the forcefulness with which the purpose was expressed and the legislative history (including what consideration Parliament gave to human rights concerns).[349]

[254] In this case the right to a lesser penalty is important, but there are also other important rights at stake – the protection of vulnerable children from major harm, as recognised by the Attorney-General.[350] Further, the requirement to register on a non-public register is a relatively minor incursion into an offender's rights. Parliament was also made aware, through the Attorney-General's reports that, without the addition of a review mechanism or a shorter period, the Act breached s 25(g) of the Bill of Rights for those who offended before the Act came into force. It nevertheless decided to pass the Amendment Act without adding any of the suggested qualifications. This means that not only was Parliament's text and purpose clear, but it also was aware that, at least in the opinion of the Attorney-General, the Act breached s 25(g), and it knew

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347 In addition to the other groups covered by sch 1.

348 See *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557, the far-reaching approach in that case having (it is said) become the "orthodoxy" in the United Kingdom: Gledhill, above n 207, at 412.

349 Geiringer, above n 199, at 89–90. See above at [170].

350 See above at [194]–[195].

what needed to occur to remedy that breach. This is also not a situation where Parliament was unaware that the legislation unjustifiably limited rights.[351]

[255] In addition, assuming that the Attorney-General is correct, it is not retrospectivity in itself that is the issue – it is the lack of a review mechanism or a shorter period for those affected by retrospectivity. To make the legislation Bill of Rights-compliant, therefore, would require the Court to read in such qualifications. This is something that not even the United Kingdom courts, with a generally more far-reaching approach, would do. In *Ghaidan v Godin-Mendoza*, as Professor Geiringer points out:[352]

> … their Lordships held that the courts cannot make decisions for which they are not institutionally equipped.[353] This might be the case, for example if making the legislation Convention-compatible would involve the substitution of a detailed statutory scheme,[354] if a policy choice needs to be made between different methods for achieving Convention-compliance,[355] or if the decision would have far-reaching practical repercussions that the courts are not well-equipped to evaluate.[356]

[256] At least two of those factors exist in this case.[357] It would therefore not be a case where a court should override parliamentary purpose, even if that were permissible.[358]

[257] All of the above means that ss 7 and 9 of the Registration Act apply to all those convicted after the Registration Act came into force, regardless of when they offended.[359]

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351 Unlike, possibly, in *Pora*, above n 213: see above at [175]–[176]. I therefore do not need to decide whether the Elias CJ, Tipping and Thomas JJ approach would apply.

352 Geiringer, above n 199, at 80, referring to *Ghaidan*, above n 348.

353 At [33] per Lord Nicholls.

354 At [49] per Lord Steyn and [110] per Lord Rodger.

355 At [33] per Lord Nicholls.

356 At [34] per Lord Nicholls and [115] per Lord Rodger. See also Claudia Geiringer "It's Interpretation, Jim, But Not As We Know It: *Ghaidan v Mendoza*, the House of Lords and Rights-Consistent Interpretation" (2005) 3(6) Human Rights Research 1.

357 For example, a review mechanism created by the courts to assess all those offenders affected retrospectively would involve the substitution of a detailed statutory scheme.

358 As noted above at [170], it is not necessary for the purpose of this case to decide whether it would be permissible or not.

359 From the enactment of the Registration Amendment Act, the Registration Act applied to all those sentenced after it came into force as well as to all those subject to release conditions, and to those originally covered by sch 1. The Amendment Act itself had retrospective effect to the date the Registration Act came into force.

Application of the Act to the appellant

[258] The appellant pleaded guilty after a sentencing indication received on 16 October 2017 and was given a non-custodial sentence on 17 January 2018 for qualifying offences committed in May 2016. The Registration Act as amended therefore applies in respect of his conviction for a qualifying offence after the Act came into force. He clearly falls under s 7. The question is whether a discretionary order under s 9 should have been made against him.

[259] I agree that, once it is determined that s 9 applies to an offender whose qualifying offence was committed before the Registration Act came into force, the issue of retrospectivity has no role in the decision that must be made under s 9(1).[360] I thus agree that s 9 must be applied to offenders whose offences pre-dated the Registration Act and to offenders whose offences post-dated the Registration Act in the same manner.[361]

[260] I agree with Winkelmann CJ and O'Regan J that the exercise undertaken by a judge in deciding whether to make a registration order is a two-stage process and with what this entails.[362]

[261] On the first stage of the process, Winkelmann CJ and O'Regan J assess the level of risk of recidivism posed by the appellant as low.[363] They also note that the Crown agrees that the risk of the appellant transitioning to physical offending is low.[364]

[262] Their conclusion as to the level of risk of recidivism is based on reports of Dr Rogers that were updated after the District Court sentencing and showed the appellant's "reduced – and reducing" risk through ongoing treatment.[365] The assessment of low risk is thus dependent on changes that have occurred after sentencing. Like William Young J, I have reservations as to whether it is legitimate in

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360 See the reasons given by O'Regan J above at [93]–[95] and William Young J below at [300].
361 See the reasons given by O'Regan J above at [95]. I agree also that the *Hansen* methodology is not appropriate at this point: see above at [99]–[101].
362 At [103]–[113].
363 At [127]–[128].
364 At [130]. This information was before the District Court although not as explicit as in the updated report for the High Court.
365 At [128].

the context of the Registration Act to assess risk by reference to the risk the appellant poses not at the time of sentencing but at the time of appeal, although not for all of the same reasons.[366] I take the view that risk should be assessed at the time of sentence because of the scheme of the Registration Act, which (mostly) does not provide for a review of registration orders even if the level of risk has changed.[367] At the time of sentencing the assessment of risk was low-moderate, and in my view it is that level of risk that must be considered.[368]

[263] With regard to the second stage of the process, the issue is whether the placement of the appellant on the register is a proportionate response to the risk identified (low-moderate), having regard to the limitations on the appellant's rights arising out of registration. In my view, this proportionality assessment must take into account not just the level of risk of recidivism, but the seriousness of the consequences if recidivism occurs. In this regard, the appellant's offending was moderately serious offending of its type. The likely harm if the offending is repeated is obvious from the amount and nature of the material on the appellant's computer.[369] The intrusion on the appellant's rights, on the other hand, is relatively limited given it is not a public register and the requirements are largely reporting requirements, meaning some relatively minor inconvenience.[370] Further, I do not agree that the requirements other than those listed in s 16(1)(m)–(q) are of little or no relevance to those who offend in a similar manner to the appellant.[371] The presence of children in a household where a convicted child sex offender resides or in any work or leisure organisation in which an offender is involved is an obvious issue.[372] There is at the least the possibility of children being exposed to harmful material. There is also always a risk that such offenders progress

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366 See below at [308]–[309].

367 I thus agree with [309] of William Young J's reasons. I do not comment on William Young J's main reason for not taking into account updated material: at [306]–[308]. I thus leave open whether, in light of s 250 of the Criminal Procedure Act 2011, new information available at the time of appeal could be considered in other contexts. In other words, I leave open whether updating material can be considered in other sentencing appeals.

368 There were signs, however, before the District Court of reducing risk as the risk had already been reduced by the time of sentencing from moderate to low-moderate. The updated reports were at least relevant (and admissible) to confirm that this assessed trajectory was correct. Even though the Crown did not object to the admission of the updated reports, this does not make them generally admissible or relevant to the assessment of risk.

369 See the reasons given by O'Regan J above at [28]–[29] and [121]–[122].

370 I do of course accept that these are restrictions on protected rights; for instance, the 48-hour notice requirement affects the right to freedom of movement contained in s 18 of the Bill of Rights.

371 See the reasons given by O'Regan J above at [131]–[134].

372 Registration Act, s 16(1)(d)–(e) and (h)–(i).

to physical as against virtual offending.[373] This may be of particular concern, for example, if offenders were to travel overseas, as normal controls may not be present.[374] The physical address of an offender is also important to monitor any risk.[375]

[264] In my view, taking all the above into account, the registration order was proportionate to the level of risk the appellant posed at the time of sentencing and the serious harm that would result from any repeat of the offending to very young and vulnerable children.[376] I would have dismissed the appeal.

[265] I agree with O'Regan J's discussion on anonymisation.[377]

WILLIAM YOUNG J

General position

[266] I would dismiss the appeal. This is because I consider that:

(a) Sections 7 and 9 of the Child Protection (Child Sex Offender Government Agency Registration) Act 2016, to which I will refer as the Registration Act, apply to all those sentenced after the commencement of the Registration Act for qualifying offences, including for offences committed before commencement. I therefore see those sections as having retrospective effect.

(b) The making of the registration order was appropriate because:

(i) the sentencing Judge rightly assessed the appellant as posing a risk to the lives or sexual safety of children; and

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373 Although there is a low risk of this in the appellant's case, it is still possible the offending may escalate.

374 See ss 21–23.

375 Section 16(1)(d).

376 Victims of course have rights too, and, in particular, children have the right to grow up free from violence and abuse.

377 See the reasons given by O'Regan J above at [136]–[147]. I agree that the updated report is relevant to the issue of anonymisation.

(ii) in the context of the Registration Act, this conclusion was a sufficient basis for making the registration order.

[267] I agree that the judgment should be anonymised, but this is for reasons distinctly more limited than those advanced by the rest of the Court.

Registration order regimes – an overview

[268] Registration order regimes have their origins in the United States.[378] An example of such a regime is that provided by the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act of 1994,[379] which was supplemented in 1996 by what is usually referred to as Megan's Law.[380] Less onerous regimes have since been adopted in a number of other jurisdictions, including the United Kingdom, Australia and New Zealand.[381]

[269] The underlying purposes of registration order regimes have included the reduction of re-offending and facilitating the investigation of such re-offending as may occur. Reduction of re-offending may result from a combination of deterrence and opportunities for monitoring offender behaviour. As well, regimes which provide for public notification of, or access to, information in relation to offenders' criminal records or impose residential or other restrictions on offenders may limit opportunities for re-offending. This is of some (albeit limited) relevance to the Registration Act as it provides for disclosure in the case of threats in relation to a particular child or children (see s 45) and also restricts the ability of offenders to change their names (see ss 52–54).

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378 The origins of these laws are traced in Charles Patrick Ewing *Justice Perverted: Sex Offense Law, Psychology, and Public Policy* (Oxford University Press, New York, 2011) at 73–83.

379 Enacted through the Violent Crime Control and Law Enforcement Act Pub L No 103–322, title 17 § 170101, 108 Stat 2038 (1994) and in the United States Federal Code as the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program 42 USC § 14071.

380 Enacted through Megan's Law Pub L No 104–145, § 2, 110 Stat 1345 (1996) as a subsection of the Jacob Wetterling Act.

381 For the United Kingdom, see Part 2 of the Sexual Offences Act 2003 (UK). For Australia, see Child Protection (Offenders Registration) Act 2000 (NSW); Sex Offenders Registration Act 2004 (Vic); Child Protection (Offender Reporting) Act 2004 (Qld); Child Sex Offenders Registration Act 2006 (SA); Community Protection (Offender Reporting) Act 2004 (WA); Community Protection (Offender Reporting) Act 2005 (Tas); Child Protection (Offender Reporting and Registration) Act 2004 (NT); and Crimes (Child Sex Offenders) Act 2005 (ACT).

[270] There is considerable variation in the detail of these schemes. Such variation extends to:

(a) the types of offender the schemes apply to, which may be confined to those who have offended sexually against children, as in New Zealand, or may encompass other offenders;

(b) the intensity of the monitoring; and

(c) the extent to which the public have access to the register or associated information.

[271] The usual difficulties of establishing cause and effect relationships between particular crime reduction measures and offending patterns apply to registration order regimes. They are compounded by the substantial variations in the ways in which the regimes operate (with the result that studies have limited cross-jurisdictional value) and a low baseline incidence of recidivism by those convicted of offending sexually against children.

[272] Consistently with this, the regulatory impact statement which accompanied the Bill preceding the Registration Act cautiously noted:[382]

> There are some constraints on the analysis in this Regulatory Impact Statement. In particular, there is limited research evidence from other jurisdictions about the effectiveness of sex offender registers and the best practice for long term monitoring of high risk sex offenders in the community after their sentences end. This has meant that an estimate of the value of the anticipated benefits has not been possible.

In terms of the likely benefits and costs of what was proposed, the regulatory impact statement went on to say:[383]

> There is insufficient information to undertake a cost-benefit analysis of this proposal. Over ten years, it is estimated that 4 to 34 child sex offence convictions may be prevented, as well as the prevention of many undisclosed, or unreported child sex offences. The register will provide for information

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382 New Zealand Police and Department of Corrections *Regulatory Impact Statement: Child Protection Offender Register and Risk Management Framework* (6 June 2014) at 1.

383 At [13]–[14].

sharing between agencies resulting in additional opportunities for pro-active interventions to reduce offending.

The 10 year costs for this proposal are $146.054 million comprising the capital and operating costs of setting up and running the Register as well as the operating costs associated with managing those on the Register. This cost includes staff time.

[273] I will come back later in these reasons to the significance of this analysis.

The core statutory provisions

[274] Section 7(1) provides:

> **7 Who is a registrable offender?**
>
> (1) A **registrable offender** is a person whom a court has, in respect of a conviction for a qualifying offence,—
>
> (a) sentenced to imprisonment; or
>
> (b) sentenced to a non-custodial sentence and made subject to a registration order.

[275] Primarily in issue in the appeal is s 9 of the Registration Act. It relevantly provides:

> **9 Court may make registration order**
>
> (1) If a court imposes on a person a non-custodial sentence in respect of a conviction for a qualifying offence, the court may order that the person must be placed on the register and must comply with the reporting obligations of this Act.
>
> (1A) For the purposes of subsection (1), the date on which the person was charged with the offence is irrelevant.
>
> (2) A court may make an order under this section (a ***registration order***) only if the court is satisfied that the person poses a risk to the lives or sexual safety of 1 or more children, or of children generally.
>
> …

Construed literally, s 9(1) applies to anyone who, after the commencement date, receives a non-custodial sentence for a qualifying offence.

[276] Heavily relied on by the majority is s 6 of the Sentencing Act 2002:

> **6 Penal enactments not to have retrospective effect to disadvantage of offender**
>
> (1) An offender has the right, if convicted of an offence in respect of which the penalty has been varied between the commission of the offence and sentencing, to the benefit of the lesser penalty.
>
> (2) Subsection (1) applies despite any other enactment or rule of law.

[277] Rather more material, from my point of view, is s 25(g) of the New Zealand Bill of Rights Act 1990, which confers on those who are charged:

> the right, if convicted of an offence in respect of which the penalty has been varied between the commission of the offence and sentencing, to the benefit of the lesser penalty:

Section 6 of the Bill of Rights Act provides:

> **6 Interpretation consistent with Bill of Rights to be preferred**
>
> Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

[278] I agree that a registration order is a penalty and that making a registration order in relation to offending which was before the commencement of the Registration Act is inconsistent with:[384]

(a) s 6 of the Sentencing Act; and

(b) s 25(g) of the Bill of Rights Act (thereby engaging s 6 of that Act as to the interpretation of the Registration Act).

The appellant is subject to the Registration Act

Overview

[279] In issue is the retrospective application of s 9(1) of the Registration Act. The considerations which apply to this issue also generally apply to s 7 of the Registration

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[384] See the reasons given by O'Regan J above at [55]–[59].

Act, which provides for mandatory registration in respect of those sentenced to imprisonment. For ease of discussion I will generally focus on s 9(1).

[280] The drafting of the Registration Act is convoluted and, in part, premised on surprising misunderstandings as to the way in which the courts approach the retrospective application of statutes. As well, there is a reasonably complex legislative history. All of this is thoroughly reviewed in the reasons of Glazebrook J, with whom, on this aspect of the case, I substantially agree. Against the background of her explanation, I can express my reasons in short form.

The text and purpose of s 9(1)

[281] While there is a good deal of jurisprudence (and debate) as to the proper application of s 6 of the Bill of Rights Act, the fundamental principle is that it does not require the adoption of a rights-consistent interpretation which is inconsistent with the parliamentary purpose.[385] I see this as bringing into play, and not displacing, the direction in s 5(1) of the Interpretation Act 1999:

> **5 Ascertaining meaning of legislation**
>
> (1) The meaning of an enactment must be ascertained from its text and in the light of its purpose.

So to be specific, I do not see it as consistent with their proper role for the courts to interpret a statutory provision so as to produce a result which is inconsistent with its text and purpose.

[282] If s 9 of the Registration Act stood alone, I would construe it as applying only to offences committed after the commencement of the Act. This would be on the basis that, consistently with s 25(g) of the Bill of Rights Act, it would be appropriate to attribute to Parliament the purpose of not legislating retrospectively. I would thus construe it as if it read:

> If a court imposes on a person a non-custodial sentence in respect of a conviction for a qualifying offence *committed after the commencement of this*

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[385] *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [61] per Blanchard J, [156] and [158] per Tipping J and [252] per McGrath J.

> *Act*, the court may order that the person must be placed on the register and must comply with the reporting obligations of this Act.

[283] That interpretation, however, is impossible for textual reasons. Most relevantly, "qualifying offences" are defined in the Registration Act as including offences under provisions which had been repealed before the commencement date. It follows that "qualifying offence" cannot sensibly be treated as encompassing only offences committed after the commencement date.

[284] As I understand the majority approach, s 9(1) should be read as if it said:

> If a court imposes on a person a non-custodial sentence in respect of a conviction for a qualifying offence *either committed after the commencement of this Act or as stipulated in the transitional provisions*, the court may order that the person must be placed on the register and must comply with the reporting obligations of this Act.

[285] This approach involves a reasonably complex insertion into s 9(1) which I see as flatly inconsistent with the purpose of the Registration Act.[386] Again, there are a number of reasons for this which are explored in the reasons of Glazebrook J. I will therefore confine myself to two of them (which, as will become apparent, overlap):

(a) Under the transitional provisions, those convicted before, but sentenced after, the commencement date in respect of a qualifying offence are subject to the registration order regime.[387] That transitional provision would be completely illogical unless those convicted and sentenced after the commencement date are likewise subject to the registration order regime (which, after all, is what s 9 says). On the approach of the majority, that transitional provision is a transition to nowhere.

(b) On the approach adopted by the majority, the application of the Registration Act to those who offended before its commencement date is based on a haphazard scheme which could not have been within the purpose of any rational legislature.

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386 Which Glazebrook J outlines above at [234]–[241] of her reasons, and the majority accepts at n 91.

387 Child Protection (Child Sex Offender Government Agency Registration) Act 2016 [Registration Act], s 5 and sch 1 cl 1(2) and (4).

[286] For essentially the same reasons, I see the text and purpose of the relevant provisions of the Registration Act as so clearly requiring retrospective application as to leave no scope for the argument that s 6 of the Sentencing Act is controlling. The Registration Act prevails as the later and more specific statute. As will be apparent, I adopt the approach to this issue which was favoured by Gault, Keith and McGrath JJ in *R v Pora*.[388]

Section 9(1A)

[287] Section 9(1A) is problematical. It is expressed in clarificatory terms; as having the apparent purpose of making explicit something which might otherwise have been only implicit or perhaps open to doubt on the wording of s 9(1). If s 9(1) is to be construed literally – which I consider it is – the date of charge is irrelevant. So, s 9(1A) is correct – in that on the true interpretation of s 9(1) the date of charge is irrelevant. The problem with s 9(1A) is that it assumes an issue – the possible relevance of the date of charge – which did not exist. For that reason, s 9(1A) does not add much, if any, clarification to s 9(1), save perhaps that it provides an illustration of how s 9(1) operates – that is, as applying where charges were laid before 14 October 2016. It is, however, not unusual for "avoidance of doubt" clauses to address a doubt which is of no moment. Provided the provision in respect of which doubt is avoided is construed consistently with the avoidance of doubt clause, coherence is preserved.

[288] While a clarificatory provision may often be surplus to requirements (because clarification was not required) it would be unusual for a court to conclude that a clarificatory provision is plain wrong. To construe s 9(1) as never being able to be applied where charges were laid prior to 14 October 2016 would be to contradict s 9(1A).

[289] On any view, the legislature has made a mistake; either in thinking that there was a problem to be addressed relating to the date of charge or in the wording of s 9(1A). Given the clear legislative purpose of maintaining retrospective application of s 9(1) evident from the amendments to the Registration Act and the legal irrelevance of the date of charge, I would, if necessary, read "was charged with" in s 9(1A) as

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388 *R v Pora* [2001] 2 NZLR 37 (CA) at [116].

"committed". So construed, s 9(1A) would resolve a doubt which some may experience as to the otherwise retrospective effect of s 9(1). Since that is a doubt that I do not share, my conclusion as to s 9(1)'s effect is not dependent on my reading of s 9(1A).

The making of the registration order was appropriate

The jurisdiction to make an order

[290] Having imposed a non-custodial sentence on the appellant in respect of a qualifying offence, the sentencing Judge was required to consider whether to make a registration order against the appellant. For the purposes of s 9(2), the sentencing Judge was satisfied that the appellant posed a "risk to the lives or sexual safety of 1 or more children, or of children generally".[389] That conclusion was upheld in the High Court[390] and Court of Appeal[391] and is accepted by Winkelmann CJ, Glazebrook and O'Regan JJ in this Court.[392] I also agree with it.

[291] Accordingly I am satisfied that the sentencing Judge had jurisdiction to make a registration order.

A two-stage process?

[292] A registration order can only be imposed if the sentencing judge is satisfied that the offender "poses a risk to the lives or sexual safety of 1 or more children, or of children generally". I agree that it is only if a risk is "real" that a registration order may be made. Other terms that might be applied are "genuine" or "tangible". I see no basis in the statutory language for imposing a higher threshold.

[293] A person who has committed a qualifying offence and poses a real risk to the lives or sexual safety of children might be thought to be an obvious candidate for a registration order. Where, as here, the jurisdiction to make a particular order turns on

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389 *New Zealand Police v [D]* [2018] NZDC 665 (Judge David Sharp) at [17].
390 *[D] v New Zealand Police* [2018] NZHC 563 (Lang J) at [55].
391 *[D] v New Zealand Police* [2019] NZCA 30, [2019] 2 NZLR 778 (Kós P, French and Gilbert JJ) at [42].
392 See the reasons given by O'Regan J above at [128] and Glazebrook J above at [262]. Ellen France J did not comment on this issue.

a conclusion which largely occupies the ground as to whether that order should be made, it may be open to a court to conclude that the jurisdiction threshold is not only a necessary, but also a sufficient, precondition to the making of that order.

[294] As the regulatory impact statement makes clear, it was always envisaged that the registration order regime would prevent only a limited number of sexual offences against children – in respect of those that would be reported, perhaps as few as four or as many as 34, over 10 years.[393] The corollary of this is that it was recognised that the registration order regime would make no relevant difference to the future offending (or non-offending) of the vast majority of those to whom it would apply. This is a function of the low baseline level of recidivism for child sex offenders and the likely limited efficacy of the registration regime when looked at offender by offender. The efficacy assumption on which the regime is predicated rests on a widely cast net. It follows that the approach of the Chief Justice and Glazebrook and O'Regan JJ – that a registration order should only be imposed under s 9 if assessed by the sentencing judge as proportionate to the risk the particular offender poses – will operate to frustrate the legislative purpose. This is because, viewed individual offender by individual offender, the likelihood of a registration order making a difference will always be extremely low.

[295] Although the restrictions associated with a registration order are penal in character, they are of limited moment. The legislature has provided for them on a "one size fits all" basis. It seems to me to be unlikely that the legislature envisaged that the making of a registration order would turn on an assessment of the proportionality of each of the restrictions (or their totality) to the risk posed by the particular offender. Rather, the legislative assumption is that registration orders are appropriate for those who are convicted of qualifying offences and pose a risk to the lives or sexual safety of children.

[296] On my approach to the legislative scheme, the risk assessment is essentially binary. If there is no risk, an order cannot be made. If there is a risk, an order will, at least in ordinary circumstances, be appropriate. The Chief Justice and Glazebrook and

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393 See above at [272].

O'Regan JJ accept that the jurisdiction to make an order does not turn on there being a "heightened risk". Yet, in concluding that a registration order was not appropriate, Winkelmann CJ and O'Regan J say:[394]

> Our assessment is that the level of risk that the appellant poses to the sexual safety of children is not of sufficient gravity to justify the making of a registration order with the consequent impacts on the appellant's rights.

The corollary of this is that where the making of an order is discretionary, more than a "risk" to the lives and sexual safety of children will always be required, a conclusion which I see as inconsistent with the legislative scheme and purpose.

[297] Also relevant to me is the requirement for registration in the case of an offender who is sentenced to imprisonment. Whether what would otherwise be a sentence of imprisonment is, in effect, commuted to one of home detention depends on a variety of factors, some of which could not be seen as material to the appropriateness of a registration order. The culpability of an offender sentenced to 12 months' home detention is likely to be more than one who is sentenced to six months' imprisonment.

[298] I do not go as far as saying that a registration order should be imposed in every case in which an offender who has committed a qualifying offence poses a risk to the lives or sexual safety of children. But that said, I am of the view that the combination of a conviction for a qualifying offence and a risk to the lives or sexual safety of children is a sufficient basis for the making of such an order.

[299] As will be apparent, in respect of this aspect of the case, I agree with Ellen France J.

Allowance for retrospectivity?

[300] I agree with the view expressed in the reasons of the majority that at this point in the process no allowance need be made for retrospectivity.[395]

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394 See the reasons given by O'Regan J above at [135]. Glazebrook J agrees with this approach to s 9: above at [260].

395 See the reasons given by O'Regan J above at [95], with whom Glazebrook J agrees above at [259].

Did the lower courts erroneously take into account offending not covered by the Registration Act?

[301] Section 9(3) of the Act is set out in the reasons given by O'Regan J.[396] It provides a list of matters which the court must consider in assessing risk. One of these, in s 9(3)(a), is "the seriousness of the qualifying offence".

[302] In assessing the seriousness of the offending, the High Court and Court of Appeal had regard to the overall starting point (of 30 months' imprisonment) adopted by the sentencing Judge. That starting point included allowance for offending under the Films, Videos, and Publications Classification Act 1993 of a sexual character but where the other party was over 16 and was thus not a qualifying offence for the purposes of the Registration Act.

[303] The approach adopted in the reasons given by O'Regan J is that in assessing risk by reference to a starting point sentence which encompassed non-qualifying offences, the High Court and Court of Appeal, and perhaps the District Court, were in error.

[304] I see this as an inconsequential issue. Yes, the non-qualifying offending did not fall to be considered under s 9(3)(a). But given the relevance of this offending to the likelihood of the appellant re-offending against children, both generally and in ways that involve contact, it was plainly able to be taken into account under s 9(3), which also provides for consideration of:

> (i) any other submission or evidence relating to the risk posed by the person:
>
> (j) any other matter that the court considers relevant.

A reducing level of risk?

[305] As recorded in the reasons given by O'Regan J, additional risk reports have been provided at each stage of the appellate process. These reports suggest that, with the effluxion of time since sentence, the risk posed by the appellant has reduced. The approach adopted in the reasons given by O'Regan J has been to determine whether a

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396 See the reasons given by O'Regan J above at [20].

registration order ought to have been made by reference not to the risk posed by the appellant at the time he was sentenced, but rather the risk he now poses, over three years later. I confess to some reservations about this.

[306] Section 250 of the Criminal Procedure Act 2011 (which applied to the appeal from the District Court to the High Court) provides:

> **250 First appeal court to determine appeal**
>
> (1) A first appeal court must determine a first appeal under this subpart in accordance with this section.
>
> (2) The first appeal court must allow the appeal if satisfied that—
>
> (a) for any reason, there is an error in the sentence imposed on conviction; and
>
> (b) a different sentence should be imposed.
>
> (3) The first appeal court must dismiss the appeal in any other case.

[307] The language of s 250 requires that the focus of the exercise is whether there was an error in the sentence.[397] This suggests that the focus should be on the position as it was at the time of sentence. This does not exclude new evidence, at least if it is addressed to the situation as it was at the time of sentence. On this basis I would have no difficulty with an appeal being decided on the basis of new evidence which shows that the level of risk posed by the offender at the time of sentencing was overstated. But I see no basis for a conclusion to that effect.

[308] The logic of the approach of the Chief Justice and O'Regan J is that a registration order which might be well justified on the basis of the level of risk posed by the offender at the time of sentence can be challenged later (in this case, in this Court, over three years later) on the basis that the level of risk has subsequently reduced. This does not sit easily with s 250 as a diminishing level of risk over time does not imply that there was an error in the sentence when it was imposed.

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[397] The same focus is apparent from the language used in s 256 of the Criminal Procedure Act 2011 (which applied to the appeal from the High Court to the Court of Appeal) and s 259 of the Criminal Procedure Act (which applies to this appeal from the Court of Appeal).

[309] I do not propose a doctrinaire approach to the admission of new evidence on sentence appeals; this because I accept that appellate courts have, on rare occasions, allowed appeals based on changes in circumstance after sentencing. But, as is noted by O'Regan J, the Registration Act does not provide for reviews of registration orders. In this context, allowing an appeal, over three years after sentencing, on the basis of a diminishing level of risk does not sit easily with the legislative scheme.

So should the registration order be set aside?

[310] As will be apparent, I would dismiss the appeal. At the time of sentencing, the appellant posed a real risk to the lives or sexual safety of children. In the context of the statutory scheme, the making of the registration order was appropriate.

Anonymity

[311] Given what I regard as the limited practical (as opposed to theoretical) impact of the registration order on the appellant and the significant potential impacts on him of reporting in the news media, he was unwise to proceed with appeals to the High Court and Court of Appeal without having secured orders for anonymisation or suppression in advance of those appeals being heard. If refused anonymisation or suppression, he could then have made an informed decision whether to proceed.

[312] As events have occurred, the adverse consequences for him of the publicity he has attracted as a result of the Court of Appeal judgment will outweigh what I think are the limited practical benefits of securing the discharge of the registration order. In large measure this is because of the way in which the Court of Appeal judgment was structured. I have in mind the appellant's name being used no less than 64 times in the judgment. This is apparently the reason why, prior to our leave judgment, the Court of Appeal judgment was the first item to appear on a Google search of his name.[398] As well, the extensive discussion of his background, medical history and psychological reports in the Court of Appeal judgment has put into the public domain far more adverse information about him than would have been revealed had his sentencing in the District Court received news media coverage at the time.

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[398] The first item is now our leave judgment.

[313] As it has turned out, he has been successful in his appeal. If we do not anonymise references to him, the associated round of publicity (at a time when the evidence is that the risk he poses to children is more limited than it has been in the past) will result in this success being Pyrrhic. As well, anonymising the judgment does not detract from the ability of the public to understand the issues the case raised and how they have been dealt with.

[314] For these reasons, which are very particular to this case, I do not oppose anonymisation (including the recall and reissue of the leave judgment). I am, however, distinctly uneasy about the breadth of the reasons given by O'Regan J. In particular, I do not accept that there should be anything approaching a presumption that anonymisation or suppression is appropriate in cases in which registration orders are challenged.

[315] While it is true that the contents of the Child Sex Offender Register are confidential, the making of registration orders is not. The appellant was made subject to a registration order in open court when he was sentenced. It would have been entirely open to the news media to report that at the time. For sentencing remarks delivered in open court, anonymisation is not a practical option and I do not accept that the confidentiality of the register justifies suppressing publication of the imposition of registration orders. There being no basis for routine suppression of the imposition of registration orders, I can see no logical basis why later proceedings by way of challenge to such orders should be subject to routine anonymisation or suppression.

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