Privacy Commissioner
Te Mana Matapono Matatapu

Privacy Commissioner's submission to the Social Services Committee on the Child Protection (Child Sex Offender Register) Bill 16-1

1. Introduction

1.1. The Child Protection (Child Sex Offender Register) Bill will enable the creation of a register of convicted sex offenders and allow the Police, Department of Corrections and other specified agencies to share information about people on the Register. This represents an important contribution to the Government's programme of work to combat offending against children. I welcome this opportunity to assist the Committee in its considerations.

1.2. I support the aim of this Bill and note it contains some useful safeguards that will help to protect the personal information of individuals who will be subject to the regime. In particular, the Bill restricts who may be classified as a registrable offender under the proposed regime and enables those individuals' obligations to be modified as necessary. The Bill also provides that the Register will not to be available to the public and that access by government officials will be limited to specified agencies for defined purposes.

1.3. However, I am concerned that as it stands, the procedural and governance safeguards for information sharing arrangements in this Bill are inadequate. Without these, there is a risk that information sharing may disproportionately disadvantage those on the Register and harm those it aims to protect.

1.4. I recommend additional measures be included to provide for:

- independent consultation in the development of information sharing procedures;
- regular oversight in their implementation through audit and review; and
- individuals subject to the regime to be able to request a review of their classification as a registrable offender if they consider they no longer pose a risk, and have it recorded if they consider Register information is inaccurate.

2. Registerable offenders should have an ability to seek a review of their registration status

2.1. The Bill provides that a person who believes they have been placed on the Register in error, or that an error has been made in working out the length of their reporting period may write to the Police Commissioner seeking review of those decisions (clause 47). The Bill provides no scope for offenders to seek review of their classification as registrable offenders or to apply to have their classification as a registrable offender revoked on the basis they no longer pose a risk to children.

2.2. Given the long-term reporting obligations under the proposed regime and the government's objectives of supporting reintegration of offenders into the community, the lack of opportunity for registrable offenders to seek a review of the terms or duration of a registration order is a significant omission. The Attorney-General has also voiced his concerns that the lack of ability for registrable offenders to seek independent review of their (potentially lifelong) reporting obligations is inconsistent with section 9 of New Zealand Bill of Rights Act 1990 (NZBORA). The Attorney-General's view was that this does not constitute a reasonable limit on the right to be free from disproportionately severe punishment.[1]

2.3. The Attorney-General also raised concerns about the retrospective application of the Bill and the lack of protection against double jeopardy. These concerns are heightened by the lack of mechanism for registrable offenders to seek a review of the registration and the conditions that apply.

2.4. Should a Child Sex Offender Register be established, I recommend the Bill be amended to include provision for registrable offenders to be able to apply to the Court for review of their classification as registrable offenders and to have their classification as a registrable offender revoked on the basis they no longer pose a risk to children.

3. Information-sharing arrangements for domestic agencies

3.1. The Bill does not define parameters for the sharing of information between agencies and provides for no independent oversight. The permitted uses of information on the Register are potentially very broad, However, the Bill does not address how agencies will manage the transfer of information to each other or to third parties delivering services of their behalf, for example, private sector housing providers or other non-governmental social sector agencies. The Bill also does not define how the proposed legislation is intended to align with other existing information sharing mechanisms that apply.

3.2. I consider the Corrections Act 2004 contains valuable prescription for information sharing between domestic agencies. These could usefully be carried over into any new legislation arising from this Bill to give transparency and to provide for independent oversight.

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[1] Attorney-General, Report of the, under the New Zealand Bill of Rights Act 1990 on the Child Protection (Child Sex Offender Register) Bill, presented to the House of Representatives pursuant to section 7 of the New Zealand Bill of Rights Act 1990 and Standing Order 265 of the Standing Orders of the House of Representatives (J.4). http://www.parliament.nz/en-nz/pb/presented/papers/51DBHOH_PAP64664_1/attorney-general-report-of-the-under-the-new-zealand

3.3. Applicable provisions in the Corrections Act are:

- agencies may develop inter-agency information sharing agreements (section 182A);
- information sharing agreements must specify what information will be shared and the manner in which the information may be disclosed, and set out how the information privacy principles of the Privacy Act will be complied with; and
- agencies must consult with the Privacy Commissioner before any such an agreement is concluded, reviewed, or substantially amended (section 182D).

3.4. Since 2009, the same four agencies specified under this Bill (the Police, the Department of Corrections, the Ministry of Social Development and Housing New Zealand) have operated an information sharing protocol for managing child sex offenders released from prison on conditions or extended supervision. This information sharing arrangement enables the agencies to share information for specified purposes including monitoring compliance with release conditions and facilitating reintegration of offenders into the community.

3.5. Clause 41(3) of the Bill provides that section 182A of the Corrections Act will still apply, but it does not address how information sharing under the proposed legislation and under the Corrections Act mechanism are intended to operate alongside one another, nor does it apply any of the safeguards in the existing framework to the new regime.

3.6. Clause 41(2)(e) of the Bill provides for external consultation with the Privacy Commissioner only where there is an intention to define a public sector agency, other than the four currently listed, as a specified agency. There is no requirement for consultation on what information agencies might share, or how it might be used or disclosed to third parties once approval is granted.

3.7. I therefore recommend that the Bill be amended to include:

- a requirement that agencies wishing to share information under clause 41 be required to enter into an agreement, approved by the Chief Executives of the agencies concerned, that would govern any disclosure;
- provision for such agreements to include protections equivalent to those included in sections 182A, 182D and 182E of the Corrections Act;
- a specific acknowledgement that nothing in the operation of such an agreement should limit the application of the Privacy Act but should set out how the information privacy principles will be complied with; and
- an obligation for agencies to consult with the Privacy Commissioner before any such agreement is concluded, reviewed or subsequently amended.

4. Information-sharing with overseas agencies

4.1. This Bill contains none of the safeguards governing the sharing of personal information I would normally expect be included in any international information sharing agreement.

4.2. Clause 42 of the Bill permits the Police Commissioner to share information on the Register with their international counterparts responsible for administering similar registers under corresponding overseas legislation. However, it does not include any provision for independent oversight of the use of this power.

4.3. The Law and Order Committee has recently noted the need for additional controls on the Police's disclosure of information to overseas jurisdictions. Specific controls for that purpose are included in proposed amendments to the Policing Act 2008 contained in the Omnibus Organised Crime and Anti-corruption Legislation Bill (the Organised Crime Bill) currently before the House.

4.4. The Organised Crime Bill provides for agency-to-agency agreements (an international disclosure instrument that is an agreement between the Police and one or more corresponding overseas agencies). Agreements must ensure the disclosure of personal information must be reasonably necessary to enable the corresponding agency to perform their relevant functions.

4.5. The Organised Crime Bill also requires consultation with the Privacy Commissioner in the development or amendment of any agency-to-agency international disclosure agreements. It also requires any such agreement to be made publicly available as soon as is practicable after they enter into force.

4.6. To ensure equivalent protections are in place for any international information sharing undertaken under this new regime, I recommend that a process for exercising the power to share information internationally be specified in the legislation. To ensure consistency with similar legislation governing Police information sharing, I recommend this Bill be amended to include a specific reference to the application of the proposed new sections 95A through 95E of the Policing Act 2008 (as proposed in clauses 60 and 61 in subpart 10 of the Organised Crime Bill, cross-headed *International policing: information sharing*).

5. Disclosure to third parties

5.1. Clause 39 of the Bill provides that access to the Register must be in accordance with guidelines issued by the Police Commissioner. However, there is no requirement for independent consultation when guidelines are developed.

5.2. The process for disclosing information to third parties will need to be managed carefully. For example, the implications of disclosing any information concerning a child sex offender to affected persons (e.g. custodial parents, caregivers or teachers, as allowed for by clause 43) in circumstances where a suppression order has been imposed will need to be managed particularly carefully. The Bill does not currently provide assurance this will happen as it does not include any criteria for assessing the risks of information disclosure.

5.3. I recommend the Bill require the Police Commissioner to consult with the Privacy Commissioner when developing guidelines relating to the disclosure of information to third parties, and whenever such guidelines are amended. This would ensure the privacy implications for all potentially affected individuals, including potential risks to those who suppression orders are designed to protect, can be considered fully before sensitive information is disclosed.

6. Registrable offenders' rights in relation to the Register

6.1. The proposed Register requires registrable child sex offenders to regularly provide a range of personal information to the Police for inclusion on a central database. The provisions of the Privacy Act should apply to this information. However, the way the Bill is drafted creates the potential for confusion.

6.2. Clause 46 of the Bill addresses a registrable offender's rights of access to and correction of personal information. The Police Commissioner must provide the registrable offender with all reportable information held on the Register if asked in writing to do so and must amend any identified errors in the reportable information, but only if they are satisfied that information is incorrect. There is no obligation to attach any statement of correction or record that the registrable offender has questioned the accuracy of the information if the Commissioner is not satisfied the information recorded is incorrect.

6.3. Principle 7 of the Privacy Act provides that an agency that holds personal information shall, if requested by the individual concerned or on its own initiative, take reasonable steps to correct information to ensure it is accurate, up to date, complete, and not misleading. If the agency is not willing to correct disputed information they must take reasonable steps to attach a statement of correction, in such a way that it will always be read with the information concerned.

6.4. The explicit provision in the Bill for correction where the Police Commissioner agrees there is an error, but lack of any requirement for a note of correction to be included on the record where this is not the case could bring the application of principle 7 into question.

6.5. Clause 46 appears to effectively override the principle 6 and 7 access and correction rights of an individual, without providing equivalent rights to have matters at issue placed on record.

6.6. The provisions governing information correction also raise concerns in relation to principle 8 of the Privacy Act which requires agencies to take reasonable steps to ensure information is accurate, up to date, complete, relevant, and not misleading before use. Clause 41(1)(b) enables agencies to share information to verify that information, however, in the absence of notes of correction, agencies may not be aware the accuracy of information has been questioned.

6.7. I recommend these uncertainties be rectified by removing clause 46 from the Bill. The existing provisions of principles 6 and 7 of the Privacy Act will continue to apply. The Police Commissioner would not be obliged to alter information on the Register, but would be required to include a statement to identify the information had been disputed.

7. Collection and retention of Register information by the Police

7.1. I recommend the Bill should explicitly require that the obligations relating to destruction of relevant personal information under clause 47(6) extend to any information (including photographs and fingerprints or finger scans) taken by the Police under clauses 28 and 29 and stored by the Police under clause 31.

7.2. Clause 29 empowers a constable receiving a report in person from a registrable offender to take fingerprints or finger scans (clause 28) or photographs (clause 29). The Bill requires registrable offenders be notified of the purpose for which the powers will be used and that the Police will retain any fingerprints or finger scans or photographs.

7.3. However, while clause 28 specifies that fingerprints or finger scans will only be taken where there is not reasonable satisfaction as to the identity of the individual, the Bill does not define the purposes for which photographs collected under clause 29 may be taken.

7.4. Clause 47(6) requires that if the Commissioner revokes a decision to place a person on the register (e.g. where a relevant conviction is quashed), they must ensure that the person's relevant personal information is removed from the register, and that "any copies of documents, fingerprints, fingerscans, or photographs taken from the person under this Act are not kept."

7.5. However, clause 31 provides that "any identifying particulars of a person and any other information obtained by the Police under [that] subpart may be entered, recorded, and stored on a Police information recording system", but that "information recorded on any Police information recording system is not information held in the register for the purposes of [the] Act." This means that the protections afforded by the Police Commissioner's obligations to remove information from the Register will not apply to any duplicate records held by the Police, or to any photographs taken pursuant to clause 29.

7.6. Clause 31(2) effectively provides for the Police to maintain a duplicate database of all information held in the Register that would not be subject to any of the administrative or oversight protections that apply to the Register. Extending the destruction requirements in clause 47(6) to cover information recorded by the Police under clause 31 would address this.

8. Monitoring and review

8.1. Cabinet has agreed that the first three operational years of the Register and the supporting risk management framework be evaluated, with the findings for the evaluation reported back to Cabinet in 2017/2018.[2] However, the Bill itself includes no provisions for periodic review of Register use or its impact on offenders or potentially affected persons.

8.2. Clause 10 of the Bill provides that the Commissioner of Police, who is responsible for administering the Register, must consult with the Chief Executive of the Department of Corrections before making any "*significant operational decisions about the way in which the Register is administered*". However, the Bill includes no provisions for independent oversight to ensure any changes are proportionate to identified risks that are not adequately addressed under the existing framework.

8.3. Legislative oversight mechanisms would provide strong public assurance for a regime such as this which has significant potential to affect individual privacy. They would also provide a greater incentive for compliance than executive oversight and generic complaints mechanisms alone.

8.4. I therefore recommend the Bill be amended to require the Police Commissioner to consult also with the Privacy Commissioner before making any "*significant operational decisions*" about the Register's administration.

9. Conclusion and recommendations

9.1. I recommended that:

9.1.1. registrable offenders should be able to apply to the Court for review of their classification as registrable offenders and to have their classification as a registrable offender revoked on the basis they no longer pose a risk to children;

9.1.2. any sharing of Register information between domestic specified agencies (as provided for under clause 41) or with third parties (including affected persons, under clause 43) should be subject to a formal information sharing arrangement, approved by the Chief Executives of the specified agencies, with requirements equivalent to those in sections 182A, D and E of the Corrections Act 2004;

9.1.3. a specific acknowledgement that nothing in the operation of such an agreement should limit the application of the Privacy Act but should set our how the information privacy principles will be complied with;

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[2] Child Protection Offender Register and Risk Management Framework, CAB Min (14) 20/3.

9.1.4. the Commissioner of Police and Chief Executive of the Department of Corrections be required to consult the Privacy Commissioner before the specified agencies enter into, or vary any such agency-to-agency agreement;

9.1.5. any disclosure of Register information to overseas agencies (as provided for under clause under clause 42) should be covered by formal consultation and review requirements equivalent to those under the proposed new sections 95A through 95E of the Policing Act 2008 (under clauses 60 and 61 of the Organised Crime and Anti-corruption Bill currently before the Law and Order Committee);

9.1.6. the Police Commissioner should be required to consult the Privacy Commissioner in the development (or amendment) of any guidelines in relation to access to the Register by any person, or class of person (as provided for in clause 39);

9.1.7. clause 46 of the Bill, governing a registrable offender's rights and the Police Commissioner's obligations in relation to the correction of information on the Register, should be removed to ensure that the existing provisions of principles 6 and 7 of the Privacy Act will continue to apply;

9.1.8. any information obtained by Police pursuant to clause 31 of this Bill should be subject to the same deletion requirements as govern all information on the Register, as provided for under clause 47(6);

9.1.9. as well as consulting with the Chief Executive of the Department of Corrections (as required under clause 10), the Police Commissioner be required to consult also with the Privacy Commissioner before making any "*significant operational decisions about the way in which the Register is administered*".

9.2. I consider such measures represent the minimum set of safeguards necessary in the legislation to ensure consistent, robust, and independent oversight in the development and implementation of the proposed information sharing regime.

9.3. I do not request to appear to speak to this submission, but would be pleased to address the Committee to discuss the matters raised in this submission if that would assist the Committee in its considerations.

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