IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA204/2018
[2019] NZCA 30

BETWEEN	KALANA YASASSRI DAYARATNE Appellant
AND	NEW ZEALAND POLICE Respondent

Hearing: 14 February 2019

Court: Kós P, French and Gilbert JJ

Counsel: J D Munro and J N Olsen for Appellant
C A Brook and J A Eng for Respondent

Judgment: 5 March 2019 at 10.30 am

JUDGMENT OF THE COURT

A The application to adduce further evidence is granted.

B The appeal is dismissed.

REASONS OF THE COURT

(Given by Gilbert J)

[1] Mr Dayaratne appeals against an order of the District Court that he be placed on the Child Sex Offender Register (the register).[1] This order was confirmed on appeal to the High Court.[2] There are divergent views in the High Court on the correct approach to the exercise of the discretion to order registration in cases such as

1 *Police v Dayaratne* [2018] NZDC 665 [District Court judgment].
2 *Dayaratne v Police* [2018] NZHC 563 [High Court judgment].

the present where registration is not automatic because a non-custodial sentence is imposed for a qualifying offence. For that reason, leave to bring a second appeal was granted by this Court in a judgment delivered on 31 August 2018.[3]

[2] Two issues are therefore raised by the appeal. The first concerns the correct approach to the exercise of the court's discretion to make a registration order. The second is whether it was appropriate for the District Court to make a registration order in Mr Dayaratne's case.

[3] Before addressing the specific provisions dealing with the court's discretion to make a registration order, it is helpful to give a brief summary of the legislative scheme.

Legislative scheme

[4] The register was established by the Child Protection (Child Sex Offender Government Agency Registration) Act 2016 (the Act). Its purpose is to reduce sexual reoffending against child victims and the risk posed by serious child sex offenders by providing government agencies with information needed to monitor such offenders in the community, including after completion of their sentence, and by providing up-to-date information to assist the police to resolve cases of child sex offending more rapidly.[4]

[5] A person sentenced to imprisonment following conviction for a "qualifying offence" (listed in sch 2 of the Act) committed after the person attained the age of 18 years is a "registrable offender"[5] and automatically has their name and other specified particulars entered on the register.[6] If such a person receives a non-custodial sentence the court has a discretion to make a registration order.[7] The court may only make a registration order if it is satisfied the person poses a risk to the lives or sexual safety of one or more children, or of children generally.[8]

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3 *Dayaratne v Police* [2018] NZCA 337.
4 Child Protection (Child Sex Offender Government Agency Registration) Act 2016, s 3.
5 Section 7.
6 Section 10.
7 Section 9(1).
8 Section 9(2).

Section 9(3) sets out the matters the court must consider in assessing the risk posed by the offender.

[6] Registrable offenders have ongoing reporting obligations. They are required to report "relevant personal information" set out in s 16 of the Act to the Commissioner of Police within 72 hours of being released from custody in relation to a qualifying offence or, if a non-custodial sentence is imposed, upon being made subject to a registration order.[9] Relevant personal information includes personal identifying particulars, place or places of residence, particulars of any child who generally resides with the offender and the principal caregiver for each child, particulars of employment including work address, affiliations with clubs or organisations that include child membership or child participation, passport details, details of telecommunications and internet services used or intended to be used, details of any website domain owned or administered by the offender and any email addresses.

[7] Registrable offenders must also submit "periodic reports" annually until their reporting period ends.[10] Changes to relevant personal information and travel plans must be reported promptly.[11]

[8] The length of the reporting period and continuance on the register depends on the seriousness of the qualifying offence.[12] The period is eight years if the registrable offender is sentenced to imprisonment for a class 1 offence or receives a non-custodial sentence. The registration and reporting period is 15 years if the offender is sentenced to imprisonment for a class 2 offence. The offender remains on the register for life if sentenced to imprisonment for a class 3 offence. An offender subject to lifetime reporting obligations may apply to have their reporting obligations suspended indefinitely after 15 years if they meet the requirements set out in s 38 of the Act. However, the court may only make an order indefinitely suspending the reporting obligations if the offender satisfies the court that he or she does not pose a risk to the lives or sexual safety of children.[13]

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9 Section 17.
10 Section 18.
11 Sections 20 and 22.
12 Section 35.
13 Section 38(4).

[9] If a registrable offender fails without reasonable excuse to comply with any reporting obligation, he or she commits an offence punishable by up to 12 months' imprisonment or a fine not exceeding $2,000 or both.[14] If a registrable offender provides information knowing it to be false or misleading, he or she commits an offence punishable by up to two years' imprisonment or a fine not exceeding $4,000 or both.[15]

[10] Access to information in the register is restricted to those authorised by the Commissioner of Police in accordance with guidelines promulgated under s 41 of the Act. These guidelines are to ensure the information is used for the specified purposes of preventing, detecting, investigating and prosecuting qualifying offences and monitoring registrable offenders in the community. Specified government agencies listed in s 43 may share personal information contained on the register with each other for the purposes of monitoring the whereabouts of the offender, verifying personal information reported by the offender, managing the risk that the offender may commit further sexual offences against children and managing any risk or threat to public safety.[16]

Discretionary registration

[11] Section 9 of the Act provides:

> **9 Court may make registration order**
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> (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.
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> (1A) For the purposes of subsection (1), the date on which the person was charged with the offence is irrelevant.
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> (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.
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> (3) For the purpose of assessing the risk posed by the person, the court must consider the following matters:

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14 Section 39.
15 Section 40.
16 Section 43(1).

(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.

High Court authorities

[12] As noted, divergent approaches to the exercise of the discretion under s 9 have been taken in the High Court. All decisions recognise that a two-step process is required. First, the judge must consider whether the threshold risk under s 9(2) exists. Second, the judge must consider whether to exercise the discretion. The divergence of opinion concerns what each step involves.

[13] In *Johnston v Police*, Dobson J considered the requisite s 9(2) risk would only be met by a person falling into the category of a "serious child sex offender":[17]

> [30] The approach I adopt is that the requirement in s 9(2) that the person is one who poses a risk to the lives or sexual safety of a child or children may reflect a standalone assessment of the s 9(3) considerations. A consequence would be that anyone found to pose such a risk will, as a matter of definition, be a serious child sex offender in terms of the s 3 purpose.
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> [31] This approach means that the level of risk identified for the purposes of s 9(2) must be assessed via s 9(3), but that risk must nonetheless be consistent with that created by a person whose offending is that of a serious child sex offender. If that minimum ranking of the nature of the risk is not applied, then the regime would apply beyond the scope Parliament intended, as reflected in its statutory purpose.

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17 *Johnston v Police* [2017] NZHC 1718.

[14] Where such a risk is established, Dobson J considered the court must then balance the utility of having the person's details on the register against the impact on the offender taking account of their 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 New Zealand Bill of Rights Act 1990 (BORA).[18] The Judge considered s 9 of BORA imposes an overarching constraint on the exercise of the discretion.[19]

[15] Thomas J adopted Dobson J's approach in *Fowler v R*.[20] In allowing the appeal and quashing the registration order that had been made by the District Court, Thomas J stated the risk threshold under s 9(2) must be "more than 'real and genuine'"[21] and the risk must be that of a "serious child sex offender".[22] Thomas J elaborated in her more recent decision in *Escott v R*:[23]

> [39] Parliament has given the judiciary the role of ensuring the limitations on rights contained in the Act are justified in each case where the discretion applies. An offender should not be denied the discretion on the basis a home detention sentence is analogous to a sentence of imprisonment if the risk he or she poses is not that of a serious child sex offender.

[16] Simon France J expressed reservations about this approach in *Goose v Police*.[24] The Judge was concerned the emphasis on the term "serious child sex offender" in s 3 of the Act and the suggestion by Thomas J that the threshold risk must be "more than real and genuine" risked raising the threshold too high, particularly if combined with the further balancing analysis proposed in the second step.[25] Simon France J suggested the discretion would not often be exercised against registration in circumstances where an offender is sentenced to home detention.[26] Katz J preferred to follow this approach in *Praditsin v New Zealand Customs Service*.[27]

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18 At [22]–[26].
19 At [22].
20 *Fowler v R* [2017] NZHC 1892 at [32]–[33].
21 At [30].
22 At [34].
23 *Escott v R* [2017] NZHC 2853.
24 *Goose v Police* [2017] NZHC 2453.
25 At [26]–[27].
26 At [29]–[30].
27 *Praditsin v New Zealand Customs Service* [2017] NZHC 48.

Submissions on the correct approach

[17] Mr Olsen, who handled this aspect of the argument for Mr Dayaratne, submits the approach favoured by Dobson J and Thomas J is the correct one. The threshold risk in step one must be that of a "serious child sex offender" and must be a real or actual risk. If the court is satisfied this threshold risk exists, it must then balance the benefits of registration against the intrusion on the offender's rights when considering how the discretion should be exercised. Ultimately, the court must determine whether the registration order can be justified in a free and democratic society.

[18] Ms Brook for the Crown submits the threshold question under s 9(2) is not informed by the concept of a "serious child sex offender". Instead, the question is simply whether the person poses a real and genuine risk to the lives or sexual safety of children. Once the threshold test has been met, Ms Brook submits the court would require a principled reason for finding that an offender who poses a real and genuine risk to the safety of children should not be placed on the register.

Our view

[19] In our view, the adjectives proposed by counsel — "real", "genuine", "actual" — all appropriately capture the evident intent of the legislature in assessing the threshold level of risk required to engage the discretion to make a registration order. It is unlikely Parliament intended the reporting obligations under the Act consequent upon registration should be imposed on persons to guard against a risk that can be discounted as fanciful or remote. However, we do not consider any further gloss on the provision is justified. The concept of a "serious child sex offender" does not qualify or assist in informing the statutory test which is clearly set out in s 9(2). Nor do we see any justification for a requirement that the risk must be *more than* a real and genuine risk (however that might be assessed) as has been suggested.

[20] The assessment of whether the threshold risk is met requires consideration of the matters set out in s 9(3) of the Act. These matters inform the answer under both steps.

[21] Once satisfied the threshold test in s 9(2) is met, the court's discretion to make a registration order is not fettered and it would be unwise to attempt to detail the sorts of circumstances in which its exercise would be appropriate. The proper exercise of the discretion in each case will inevitably depend on a close examination of the matters set out in s 9(3) and the assessment of the nature and degree of the risk posed by the offender. This assessment will guide the determination of whether a registration order should be made to mitigate the risk consistent with the purpose of the legislation and its singular focus on the protection of children from sexual offending.

[22] The seriousness of the qualifying offence is a mandatory consideration in making the risk assessment. Parliament has determined that whenever an offender is convicted of a qualifying offence and sentenced to *any* period of imprisonment, they are automatically placed on the register. This indicates that 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. It is also important to keep in mind that the enquiry is focused on risk to the lives and sexual safety of children not the culpability of the offender or punishment. A registration order could be appropriate to guard against risk even where the offender's culpability is low such that no sentence of imprisonment could be justified.

Was it appropriate to make a registration order in Mr Dayaratne's case?

Mr Dayaratne's offending

[23] Mr Dayaratne pleaded guilty to a charge of making an objectionable publication having reasonable cause to believe the publication was objectionable, contrary to s 124(1) of the Films, Videos, & Publications Classification Act 1993. This offence is punishable by a term of imprisonment of up to 14 years. Mr Dayaratne also pleaded guilty to a representative charge of having objectionable publications in his possession knowing or having reasonable cause to believe these were objectionable contrary to s 131A(1) of the Films, Videos, & Publications Classification Act and

punishable by a term of imprisonment of up to 10 years. This is a class 1 qualifying offence under the Act, the least serious of the three categories.

[24] The following brief facts are drawn from the summary of facts to which Mr Dayaratne pleaded guilty. In May 2016, following execution of a search warrant at Mr Dayaratne's home, 1,260 video files and 1,890 photographs of child pornography were found stored on his computer featuring the sexual exploitation of young children posing in various stages of undress and engaging in various forms of sexual activity. Included were videos showing: a girl approximately five years old engaging in vaginal sexual penetration with a pre-pubescent boy; a naked child of approximately 18 months being anally penetrated by an adult male; a two-year-old boy naked from the waist down being anally penetrated by an adult male; a pre-pubescent boy naked from the waist up with his hands tied behind his back being forced to perform oral sex on an adult male who strikes him twice with a belt; and a 12-year-old girl undressing until she is completely naked while chanting sexual references, then lying down on a bed and having her genitals licked by a dog. This offending gave rise to the representative charge of having objectionable publications in his possession knowing or having reasonable cause to believe that these were objectionable.

[25] The other charge of making an objectionable publication arose out of a video showing Mr Dayaratne naked facing another naked male with their penises touching. Mr Dayaratne urinates on them both and into his own mouth.

District Court judgment

[26] In sentencing Mr Dayaratne, Judge D J Sharp adopted a starting point of two and a half years' imprisonment.[28] Allowing discounts for Mr Dayaratne's rehabilitation efforts and his guilty pleas, the Judge concluded that a short-term sentence of imprisonment was appropriate.[29] The Judge accordingly sentenced Mr Dayaratne to nine months' home detention.[30]

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28 District Court judgment, above n 1, at [7].
29 At [7].
30 At [11].

[27] The Judge ordered Mr Dayaratne's name be placed on the register for reasons summarised in the following passages of his judgment:

> [15] … While the Child Protection legislation involves the most serious categories of offending and this offending does not reach the categories of that most serious offending, it is within itself serious. There is material that was involved here which is of the most serious of the material that can be provided in relation to objectionable material. The dissemination, possession and/or dissemination of material in relation to objectionable images concerning children is a matter of significant concern. The time period here does relate back to March 2016 and there has been a 12 month period in which you have been on bail and no offence has been made known to the Court.
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> [16] There is a question about the ages and vulnerability of the children involved and the point is made by the prosecution that this material involved very young infants and has children of a most vulnerable age being involved in the images which were possessed.
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> [17] There is a question of risk, and this to my mind is a critical question. Your risk level has moved from moderate to low to moderate, but it has to be said in considering the protection of children the presence of low to moderate risk for somebody in a position you are in is a factor of significance. I consider that this is a case in which I am bound to have you included in the registration provisions. There will be an order to that effect made.

Submissions

[28] Mr Munro, who dealt with this aspect of the appeal for Mr Dayaratne, addressed each of the matters in s 9(3) of the Act. He accepts that Mr Dayaratne's offending was moderately serious and he acknowledges the significant age disparity between Mr Dayaratne and his victims. Mr Munro notes the offending material was seized in May 2016 when Mr Dayaratne was aged 26, whereas he is now 28. Mr Munro argues the passage of time is significant because the treatment Mr Dayaratne has received in the intervening period has been successful in reducing his risk of reoffending. This is the main thrust of Mr Munro's submission that a registration order is not justified and the appeal should be allowed.

[29] Shortly after Mr Dayaratne was apprehended, he commenced treatment with Dr Loshni Rogers, a clinical psychologist. Dr Rogers provided a report dated 15 January 2018 for the purposes of sentencing in which she summarised the background to Mr Dayaratne's offending and assessed his risks of reoffending. Prior to treatment, Dr Rogers assessed Mr Dayaratne's overall risk of sexual reoffending as being moderate. However, after completing 31 one-hour sessions with

her, Dr Rogers considered Mr Dayaratne's risk of sexual reoffending had reduced to low to moderate. She recommended additional treatment to lower the risk further.

[30] Mr Dayaratne applied to adduce further evidence from Dr Rogers in support of his appeal in the High Court being an addendum to her earlier report. This addendum is dated 1 March 2018 and was prepared shortly after sentencing took place in the District Court. Lang J was prepared to consider this evidence in the interests of justice concluding the evidence was fresh, credible and cogent and was relevant to Mr Dayaratne's ongoing rehabilitative efforts and his current level of risk.[31] Dr Rogers advised in her addendum that Mr Dayaratne had commenced maintenance sessions with her on 24 February 2018 and intended to participate in a SAFE treatment programme. Dr Rogers considered it "likely" Mr Dayaratne's risk of sexual reoffending "may be reduced" through these further rehabilitative initiatives. Lang J was not persuaded by this evidence that the registration order was inappropriate or should be set aside.

[31] Mr Dayaratne again applies to adduce further updating evidence from Dr Rogers being a second addendum to her principal report, this one being dated 22 January 2019. The application to adduce this evidence is not opposed by the Crown and we are prepared to grant it for the same reasons Lang J received updating evidence for the appeal in the High Court. In her most recent addendum, Dr Rogers advises that Mr Dayaratne has now engaged in 11 maintenance sessions with her and has commenced a SAFE treatment programme. She considers Mr Dayaratne's dynamic risk factors have improved and he now "likely poses a low risk" of viewing or possessing child pornography in future.

[32] Mr Munro submits the threshold risk in s 9(2) is not met in view of Dr Rogers' present assessment that Mr Dayaratne's risk of sexual reoffending is likely to be low. In any event, Mr Munro argues the discretion in step two weighs against a registration order because Mr Dayaratne will have completed the SAFE treatment programme prior to the expiry of his post-release conditions. Mr Munro contends that placement on the register will not assist Mr Dayaratne's rehabilitation or reintegration into

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[31] High Court judgment, above n 2, at [47]–[48].

the community and will serve only to stigmatise a low-risk offender. Mr Munro submits the limitations imposed under the Act through registration cannot be justified given Mr Dayaratne's low risk of reoffending.

[33] Ms Brook acknowledges Mr Dayaratne's risk profile has improved but she submits he still meets the required threshold. She says Mr Dayaratne's progress should be regarded as fragile and the utility of registration in supporting that progress continues to justify registration, even if the balance could now be viewed as more finely poised.

Our assessment

Seriousness of the qualifying offences

[34] Mr Dayaratne's offending included his online sexual exploitation of extremely young and vulnerable children. The very large quantity of material found on his computer indicates the index offending occurred over a significant period, consistent with his advice to the probation officer that his online sexual activity had "captured" him for many years. We are satisfied the offending was properly assessed by the Courts below as being moderately serious and justified a starting point of two and a half years' imprisonment. Mr Munro does not contest this assessment.

Period of time that has elapsed since the offences were committed

[35] We consider the length of time that has elapsed since the offences were committed is a neutral factor. This is not a case of historical offending where it can be said the circumstances and established behavioural patterns have changed markedly. In our view, the time lapse does not bear materially on the risk assessment in this case.

Age of the offender

[36] Mr Dayaratne was aged 26 at the time the search warrant was executed. This is not a case involving isolated youthful sexual experimentation, rather it was symptomatic of a pattern of behaviour that had become habitual and entrenched through Mr Dayaratne's adolescent years and into adulthood. Nevertheless, we accept

Mr Dayaratne has good prospects for rehabilitation and has demonstrated commitment to addressing the underlying causes of his offending. He is to be commended for the significant efforts he has made in this respect.

Age of victims

[37] There is a significant disparity between Mr Dayaratne's age and those of his victims, many of whom were very young and extremely vulnerable. Some were mere infants. The sexual exploitation of these children is a particularly concerning feature of this case. Such exploitation causes incalculable misery to the most vulnerable members of society and continues only because people like Mr Dayaratne support it.

Written risk assessments

[38] It seems clear from Dr Rogers' reports that Mr Dayaratne's deviant sexual propensities are of long duration. They can be traced back to his emotional disconnection from family and peers after he immigrated with his family to New Zealand when he was aged six. Mr Dayaratne reported being bullied which led to him suffering from low mood and suicidal ideation from age nine exacerbated by unwanted sexual experiences with an older child. He says he turned to the internet and joined chat rooms to distance himself from negative emotions. Mr Dayaratne reports first becoming involved in online sexual activity when he was aged 12 after he was approached online by older men requesting videos of him engaging in sexual acts. He reports enjoying the attention he received from making videos of a sexual nature and this became closely tied to his self-esteem and feelings of worth. Mr Dayaratne developed poor sexual boundaries and a sexualised persona. Over time he began to normalise videos depicting underage sexual contact with adults and developed more overt sexualised behaviours. Dr Rogers considers Mr Dayaratne lacked insight into his abuse and developed cognitive distortions reinforced by sexual gratification, attention, acceptance by his online community and feelings of being "wanted".

[39] In her principal report Dr Rogers summarised the circumstances in which similar reoffending may occur as follows:

> It may be precipitated by feelings of disconnection and low self-worth, for example following perceived rejection from peers or due to a relationship breakdown. In response, Mr Dayaratne may engage in poor coping strategies of suppression, increased isolation from others, and engagement in frequent casual sex. Within this context, he may turn to the internet to alleviate loneliness and for the purposes of meeting prospective adult sexual partners. Any further sexual offending is also likely to occur if Mr Dayaratne returns to using chat rooms which facilitate sharing of, or discussion of underage sex, or within the context of adult sexual contact where he may exhibit poor boundaries by engaging in scat pornography for attention and increasing his self-worth.

[40] Although Mr Dayaratne has clearly made progress with his rehabilitation, there is nothing in either of the subsequent addenda to suggest these features of Mr Dayaratne's risk profile have been eliminated through his recent treatment or resolved to the extent they can now be disregarded as no longer relevant. Further, Dr Rogers' present assessment that Mr Dayaratne "likely poses a low risk" of viewing or possessing child pornography in the future is in part based on Mr Dayaratne's self-reported lack of urge to look at child pornography.

[41] In our view, the District Court's assessment of threshold risk is unimpeachable based on the information then available. While we accept Mr Dayaratne's dynamic risk factors have improved as a result of his recent engagement with treatment, Dr Rogers considers further treatment is necessary as Mr Dayaratne himself acknowledges. The rehabilitative process has not been completed and will require ongoing commitment by Mr Dayaratne to achieve enduring benefits. In the meantime, the potential triggers for his regression remain. We are not persuaded by the updating addenda that it can now safely be concluded that Mr Dayaratne's commendable rehabilitative efforts have been so successful that he no longer poses a risk to the sexual safety of children.

[42] Taking account of the matters set out in s 9(3) of the Act including the seriousness of the offending and its extended duration, we agree with the assessments made in the Courts below that Mr Dayaratne poses a continuing risk to the sexual safety of children that justifies the registration order and the attendant reporting obligations. In our view, the ongoing protective benefits of such an order clearly weigh in favour of registration in this case. The appeal must accordingly be dismissed.

Result

[43] The application to adduce further evidence is granted.

[44] The appeal is dismissed.

Solicitors:
Johnston Prichard Fee Ltd, Auckland for Appellant
Crown Law Office, Wellington for Respondent