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Civil Liberties and Sex Offender Notification Laws

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Laws specifying that individuals, groups and communities should be notified when sex offenders are living in their areas are now widespread in the USA. Indeed, forty-five American states have enacted community notification legislation, with even more states having laws that require released sex offenders to register with the local police.¹ There is now considerable public debate and pressure to introduce such laws into Australia. The purpose of this article is to examine these notification laws and to evaluate their effectiveness. The article then discusses some of the direct and indirect consequences of notification laws, particularly as they relate to human rights issues.

Megan's Law

Most community notification or registration laws in the United States were passed immediately following high profile violent sexual acts against children in the early 1990s. There was the sexual mutilation of a seven-year-old boy in Washington; the abduction of an eleven-year-old boy in Minnesota; and in New Jersey their state's legislation was passed three months after seven-year-old Megan Kanta was sexually assaulted and murdered by a neighbour who had a history of sexual offending against children.² It was her death and the public outrage that followed which inspired the name Megan's Law to these kinds of community notification legislation.

Notification laws come in two quite different forms. The first is registration which means that sex offenders are expected to report to the police or other criminal justice agencies so that their movements can be monitored. There is less concern about these registers because the information in them is not made public, although human rights issues still arise.³

The other type of notification comes in a variety of forms such as news releases, postings on the internet, community meetings, alerting specific organisations (like scout groups) giving information about sex offenders who have been released from prison and returned to the community. The ways that these laws are applied differ from one state to another. The length of the notification process, for example, can range from five years to life, with the majority having periods of around ten years. There is also variation in the

way that states categorise offenders as low, medium or high risk, and the notification requirements vary according to these ratings.⁴

There are further variations about who has access to the information or who is notified; whether access is given only on request; whether notification is mandatory; what appeal processes are available to offenders; and what kind of information is released. In some jurisdictions, for example, names and addresses are supplied; others give full details of the person including photographs; while others just provide general locations at the suburb or local street level.⁵

In Australia there has been considerable effort, particularly through the mass media, to push for the introduction of these laws. At the federal level, Prime Minister John Howard has 'pledged a national blitz' on 'child molesters' by incorporating such details into the DNA database as part of CrimTrac.⁶ So, while community notification laws are not yet enacted in Australian jurisdictions, it is clear that there is the same groundswell of community, official and political opinion as occurred in the USA. In New South Wales, for example, the *Child Protection (Offenders Registration) Act 2000* calls for the commissioner of police to set up and maintain a register of offenders who have been found guilty of offences against children (including Class 1 and 2 offences such as murder, sexual assault and indecent acts).

However, there have already been other forms of sex offender notification occurring in Australia. Deborah Coddington, a journalist and mother, published an index of convicted sex offenders drawn from newspaper reports which included personal details, addresses and even photographs of many of the people listed. Groups like the Movement Against Kindred Offenders (MAKO) and For Love of Children (FLOC) have prepared similar lists to be placed on the internet. Indeed, MAKO claims to have notified 42 communities about addresses of 'known paedophiles' via letterbox drops of pamphlets that detail previous convictions and current addresses.⁷ But it is not clear whether these private notification actions are any more effective than the legal kind.

Effectiveness of Notification Laws

When evaluating these laws it is important to note first that they are used exclusively with sex offenders and are often based on narrow images, created by the mass media, about who sex offenders are. Our media images tend to centre on the beliefs that sex offenders are different, cannot be cured, have high re-offending rates, are psychological and physical menaces, and that they prey on the vulnerable members of our community. These media images tend to ignore the fact that the most frequently occurring sex offences happen within family settings.⁸

For example, if we look at sex offences against children, the studies generally show that adults closely related to the victims are most likely to be the offenders in well over half of these cases. One reliable study reports that there were about 5,000 substantiated child sex offence cases in Australia in 1994, with a ratio of 80:20 of known versus stranger perpetrators. Thus a large percentage of sexual offences are intra-familial, partner-related or perpetrated by a family friend. Yet the media reporting of sexual offending tends to reinforce the stereotypes of predatory strangers, rather than focusing on the more prevalent non-stranger incidents, and there is a tendency too, to report only the sensa-

tional and atypical cases of sexual abuse.⁹

So, a fundamental problem is that the push to introduce Megan's Law into Australia is fostered by these somewhat distorted media images and the public debate that results. Furthermore, the laws themselves are generally aimed at identifying non-related or stranger child sex offenders. While the figures in both the USA and Australia vary widely, the proportion of child sex offences committed by those known to the family could be as high as 90 percent, so that these laws would only ever address a small proportion of the intended targets.¹⁰

In addition, the laws are based on having a convicted and released offender who must first register with the police. Yet some studies show that possibly up to 80 percent of sex offenders have not been convicted previously and so these laws would not apply to them. The laws also require that offenders cooperate with justice authorities by providing current address details, and yet compliance rates have been shown to be low. For example, in Los Angeles 90 percent of 3,200 addresses on a register were found to be inaccurate; while 75 percent failed to register in California.¹¹

There have been few studies that directly evaluate the effectiveness of Megan's Law and that address the problems outlined above. However, one (retrospective) study in Massachusetts examined a sample of 136 serious sex offenders.¹² First, this study found that only 27 percent of this group had previous convictions and would have been registered prior to their current offence. More importantly, 67 percent of the 27 percent were most likely to commit offences against those known to them (based on their present conviction). The study then looked at only the non-related or stranger cases, of which there were twelve. It found that in only four cases was there a strong prospect that the eventual victim would have been notified, and two cases where there was a moderate prospect. This study demonstrates the ineffectiveness of notification laws where out of 136 potentially targeted offenders, only four would have been likely to have been subjected to Megan's Law procedures.

It is therefore suggested, based on present research knowledge, that notification laws are not effective. They are aimed at a very limited pool of offender types - previously convicted stranger predators. They also suffer practical difficulties for they rely on accurate and up-to-date records and yet registers have been found to be woefully inaccurate. More importantly, they send a false message of security to the community - a message that tells us we are safe because we know who the likely sexual predators are. In addition, notification laws send a frustrating message to the community - a message that our governments and justice agencies are able to warn us about sex offenders who might be living in our area, but we are given no assistance to deal with the problem.¹³ This raises the question about what the community can do with the knowledge that a sex offender is living nearby.

Human Rights and Notification Laws

The most severe potential consequence of notification is the likelihood of physical harm or harassment to released offenders. There are numerous international examples of such vigilantism including murder, suicide, burning of houses and public rallies outside homes. In Australia, it is alleged that the former mayor and a local shopkeeper in

Wollongong were bashed and murdered by vigilantes following publicity about their supposed paedophile interests.¹⁴

And, in 1999, the release from prison of accused paedophile and convicted murderer, John Lewthwaite, highlighted the potential for harassment. Lewthwaite was reportedly held 'under siege' by residents in a Sydney suburb when they discovered that he was living with a counsellor in their neighbourhood. Fearful parents and neighbours 'screamed obscenities ... threw rocks and broken tiles, climbed on the window grilles, shaking the bars [and] ... blasted water from a garden hose through the letter box in the front door'.¹⁵

While it is true that notification laws are never intended to foster such vigilantism and most justice officials and politicians warn that vigilantism would not be tolerated, it is a possible unintended consequence of such laws. Although, one study conducted in Washington over a six-year period, found only 33 (or 3 percent) of registered sex offenders reported instances of harassment following community notification in the United States.¹⁶

Many supporters of notification actions would find no human rights problem with the harassment of convicted sex offenders for they see such people as 'evil monsters' who 'deserve all they get'.¹⁷ Yet it should be remembered that notification laws can result in harm to 'innocent' individuals who are mistakenly thought to be named child sex offenders - as has recently occurred in Britain - or can result in harm to the families of offenders. For example, vigilante attacks in the UK have been acknowledged and there was one case where a child died in a fire as a result of publicity and subsequent actions against a paedophile.¹⁸

Apart from direct acts of violence, there can be more insidious consequences of notification laws that make it more difficult for released sex offenders to resume their lives in the community. In particular, finding suitable housing, employment or treatment are key problems for probation or corrections staff who are responsible for reintegrating released offenders after they have served their prison sentences. Several cases have been documented where suitable housing is located but then media attention or public rallies mean that alternative accommodation has to be found.¹⁹

Notification laws are meant to be aimed at the prevention of further incidents of sexual abuse. Yet, as indicated above, notification can make it more difficult for offenders to seek treatment. Even without notification laws, sex offenders face great difficulties when they are returned to the community and notification processes are only likely to exacerbate the problems they encounter.²⁰ They intensify the isolation of released offenders and make them less motivated to comply with rehabilitation goals and can thereby defeat the purpose of notification laws - a reduction in the incidence of child sexual abuse.²¹

A further human rights issue to arise is that notification laws cut across our notion that a fair trial means that previous convictions are not known.²² There are likewise problems in publishing names because most jurisdictions allow for crimes with minor detention sentences to be expunged after a specified period.²³ Some jurisdictions (notably Kansas) have ruled that notification is 'cruel and unusual punishment' especially for offenders with little likelihood of re-offending; that access to registration information may not be proportionate to the seriousness of the offence; and that

the length of the notification (in this case 10 years) may be disproportionate to the crime committed.²⁴

Also, the concept of notifying communities that a released offender is living in their neighbourhood is contradictory to the principle that once an individual has served time, or completed their judicial requirements, they have paid their 'debt to society'. A number of commentators have pointed out that notification fosters a form of 'double jeopardy', because those punished by the criminal justice system are further being punished through this public exposure. The offender is kept under constant surveillance and is subject to additional punishments, and so notification laws have been criticised as being 'mass preventive detention'.²⁵

These laws can also breed problems of labelling. For example, the Director of Public Prosecutions in New South Wales, Nicholas Cowdery said that 'next they'll be asking them to wear an emblem on their coats'. Other commentators have drawn parallels with Nazi practices of marking certain groups with pink triangles or yellow stars. And more significantly, these laws run the risk of defeating the benefits of treatment programs for those offenders who have worked towards overcoming their sexual propensities, and can indeed force sex offenders to go 'underground'.²⁶

Conclusions

While Australian jurisdictions have been grappling with the notion of introducing Megan's Law and debating its human rights implications, a new form of notification has arisen in the United States. This new form has been termed 'judicial notification'. Here, convicted sex offenders have been sentenced by judges to erect signs outside their homes or to place newspaper advertisements warning other sex offenders that their photos and names would be published unless they sought help.²⁷ This kind of judicial notification might work for some offenders but most see such shaming as a form of 'lynch justice' where 'the chief evil in public humiliation sanctions is that they involve an ugly, and politically dangerous, complicity between the state and the crowd'.²⁸

And while Megan's Law appears to possess some intuitive appeal and is still being hotly debated in our country, it is instructive to note that there are other ways of dealing with sexual abuse in a community. The Hollow Water situation from Lake Winnipeg in Canada serves as one successful example. In this small indigenous community up to 80 percent of the locals had been victims of sexual abuse and up to 50 percent of the community had been perpetrators of that abuse. Through a community-based program all but five of the 48 cases were able to be successfully dealt with via mediation in community forums and a more restorative justice approach. This case study shows that reintegrative methods can be more successful than those that name and shame, even where serious cases of predatory sexual crimes are concerned.²⁹

While there has been a burgeoning of notification laws in the USA in recent years and now much discussion about its possible introduction in Australia, they are not without problems. There is a considerable amount of criminological or legal work exploring notification but much of it is in abstract terms rather than in presenting empirical research. Notification is likely to have at least three serious consequences: the identification of the victim with the potential to revictimise him or her; a resulting punishment frenzy among

a community; and distortion of any rational discussion about sex offending and child abuse. Furthermore, they are likely to nullify the rehabilitative effects of treatment programs, and are likely to escalate fear of crime, the incidence of false allegations and the potential for vigilante repercussions.

Discussion topics.

Do you think that released sex offenders should be subject to notification obligations as discussed above? If your answer is yes. What should be the nature of that notification.

Do we have an obligation to concern ourselves with the civil rights of sex offenders on their release? If so on what basis?

¹ Kabat (1998) 'Scarlet letter sex offender databases and community notification' *The American Criminal Law Review* 35(2), 333-70; Pincus (1998) 'Megan's Law and the protection of the child in the on-line age' *The American Criminal Law Review* 35(4), 1319-41

² Hinds (1997) 'Community Notification of Sex Offenders: The Attempted Expulsion of Evil from US Society in the 1990s' MA(Hons) Thesis, Griffith University, Brisbane

³ Kabat op cit; Petrosino and Petrosino (1999) 'The public safety potential of Megan's Law in Massachusetts' *Crime and Delinquency* 45(1), 140-58

⁴ Zevitz & Farkas (2000) 'The impact of sex-offender community notification on probation/parole in Wisconsin' *International Journal of Offender Therapy and Comparative Criminology* 44(1), 8-21; Kabat op cit; NCJA (1997) 'The right to privacy' *NCJA Bulletin* 17(12), 13-16

⁵ Kabat op cit

⁶ *Courier Mail* 17 September 1998

⁷ Coddington (1997) *The Australian Paedophile and Sex Offender Index* Deborah Coddington, Sydney; *Courier Mail* 1 & 2 February 2000

⁸ Petrosino & Petrosino op cit; James (1998) *Paedophilia: Policy and Prevention, Research and Public Policy Series No 12*, Australian Institute of Criminology, Canberra; Surette (1994) 'Predator criminals as media icons' in G. Barak (ed), *Media Process and the Social Construction of Crime* Garland Publishing, New York; Pincus op cit; Wilczynski & Sinclair (1999) 'Moral tales: representations of child abuse in the quality and tabloid media' *ANZ Journal of Criminology* 32(3), 262-83; Soothill & Walby (1991) *Sex Crime in the News* Routledge, London; Howe (1998) *Sexed Crimes in the News* Federation Press, Sydney

⁹ *Sydney Morning Herald* 11 May 1999; Watkins (1997) 'Theoretical Overview of the Psychopathology and Rehabilitation of Males Who Sexually Abuse Children' Independent Study Dissertation, QUT, Brisbane; Kenny (1997) 'Opinion, policy and practice in child sexual abuse: implications for detection and reporting' paper presented to the Australian Institute of Criminology Conference on Paedophilia: Policy and Prevention, University of Sydney, 14-15 April; Tomison (1995) 'Update on child sexual abuse' *Issues in Child Abuse Prevention*, 5; Howe op cit; Wilczynski & Sinclair op cit

¹⁰ Kabat op cit; Kenny op cit; Steinbock (1995) 'A policy perspective' *Criminal Justice Ethics* 14(2), 4-9

¹¹ Pincus op cit; Steinbock op cit; Wyre (1998) 'Sex abuse of children' *Radio National Transcripts*, ABC, Sydney, 30 August; Hinds op cit; Presser & Gunnison (1999) 'Strange bedfellows: is sex offender notification a form of community justice' *Crime and Delinquency* 45(3), 299-315

¹² Petrosino & Petrosino op cit

¹³ Pincus op cit

¹⁴ Kabat op cit; Walker (1997) 'Never forget, never forgive' *New Statesman* 10, 22-24; Casey (1998) 'Is Megan's law showing a darker side' *Alternatives to Incarceration* 4(5), 3-4; Wyre op cit

¹⁵ *The Australian* 23 June 1999

¹⁶ Casey op cit; Pincus op cit

¹⁷ Coddington op cit

¹⁸ Kabat op cit; ABC (1998) *Radio National Transcripts*, ABC, Sydney

¹⁹ Zevitz & Farkas op cit

²⁰ Wilson (1998) 'Sexual offences and offenders' presentation to the Sexual Health Society of Queensland, Brisbane, 22 April; *The Australian* 19 February 1997; Clausen (1996) 'Sentences of shame' *Time* 3 June, 42; Kabat op cit

²¹ Hinds op cit; Nicholson (1997) 'Defence of alleged paedophiles: why do we need to bother?' paper presented to the Australian Institute of Criminology

Conference on Paedophilia: Policy and Prevention, University of Sydney, 14-15 April

²² The Australian 22 February 1997

²³ Hinds op cit

²⁴ NCJA op cit

²⁵ The Australian 18 February 1997; Pincus op cit

²⁶ The Australian 18 February 1997; Kabat op cit; Walker op cit

²⁷ Garvey (1998) 'Can shaming punishments educate' *The University of Chicago Law Review* 65(3), 733-94; Karp (1998) 'The judicial and judicious: use of shame penalties' *Crime and Delinquency* 44(2), 277-94

²⁸ Whitman (1998) 'What is wrong with inflicting shame sanctions' *The Yale Law Journal* 107(4), 1055-92

²⁹ Nicholson op cit

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