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**‘Megan’s law’ and other forms
of sex-offender registration**

by

Rachel Simpson

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Rachel Simpson

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CONTENTS

EXECUTIVE SUMMARY

1.0	INTRODUCTION	1
2.0	OPTIONS FOR REGISTRATION	2
2.1	Official registration schemes	2
2.2	Unofficial registration schemes	3
3.0	FACTORS TO CONSIDER WHEN ESTABLISHING A REGISTRATION AND NOTIFICATION SCHEME	4
4.0	ADVANTAGES AND DISADVANTAGES OF REGISTRATION AND NOTIFICATION SCHEMES	9
4.1	Arguments for / benefits of registration and notification	9
4.2	Arguments against / criticisms of registration and notification	10
5.0	REGISTRATION AND NOTIFICATION IN OTHER JURISDICTIONS ...	12
5.1	Victoria	12
5.2	United States of America	14
5.3	United Kingdom	16
5.4	Canada	18
6.0	CONCLUSION	19

EXECUTIVE SUMMARY

'**Megan's Law**' refers to the series of laws introduced in New Jersey following the murder of seven year-old Megan Kanka who was kidnapped, raped and murdered by her neighbour, a twice convicted sex offender who had committed a similar crime only months before. The term 'Megan's Law' has become an umbrella term for all community notification laws or laws which authorise the release to the public of identifying information about convicted sex-offenders. Since the release on parole of John Lewthwaite, who was convicted in 1974 of the horrific murder of five year-old Nicole Hanns, there have been increasing calls for a 'Megan's Law' to be introduced in NSW.

'Megan's Law' schemes comprise registration and notification. The options for **registration** are discussed in pages 2 to 4. Registration may be *official*, such as the Australian Bureau of Criminal Intelligence national database on child sex offenders, or *unofficial* such as the book published by Deborah Coddington in 1997, *The Australian Paedophile and Sex Offender Register Index*. Unofficial registers are considered potentially misleading and damaging by the Royal Commission into the New South Wales Police Service (the Royal Commission).

When establishing a registration and notification scheme, a number of **factors must be considered**. In relation to registration these factors are: definitional issues (for example what definition of child sex-offender should be employed - the psychiatric or criminal definition); coverage and scope of information collected; and retrospectivity. In relation to notification, the factors are: degree of notification (broad community notification, notification to individuals or organisations at risk or restricted access to registration information), and scope, form and content of notification - who is responsible for the notification, what information the notification should contain and who should receive the notification. These factors are discussed in pages 4 to 9.

Arguments for and against registration and notification are discussed in pages 9 to 12. **Arguments for** registration/notification include the public's right to know, the deterrent effect on an offender of knowing he or she is being monitored, and the benefit to victims of knowing their abuser is being monitored. **Arguments against** registration/notification include the inconsistency of such laws with society's goal of protecting individual liberties, the false sense of security such schemes can foster, encouraging a vigilante mentality towards offenders, inadvertent disclosure of the identity of victims, the cost of such schemes which may be better used in prevention and/or rehabilitation programs and the ease with which such schemes can be defeated by the non-cooperation of the offender.

A registration scheme was recommended by the **Victorian** Parliament's Crime Prevention Committee in 1995. The features of this scheme are discussed in pages 12 to 14. At this stage, these recommendations have not been implemented. The operation of Megan's Law schemes in the **United States** is discussed in pages 14 to 26. The **United Kingdom** approach is discussed in pages 17 to 18, and **Canada's** system in pages 18 to 19.

The recommendations of the **Royal Commission** in relation to the establishment of a registration/notification scheme - the introduction of a compulsory registration scheme for convicted child sex offenders and a controlled discretion by the Police Service to issue warnings to relevant government departments agencies and community groups - are noted in pages 19 to 20.

1.0 INTRODUCTION

In late July 1994, seven year old Megan Kanka was kidnapped, raped and murdered by her neighbour, a twice-convicted sex offender who had committed a similar crime only months before. In response to public outcry, the New Jersey legislature passed a series of laws known collectively as 'Megan's Law' which created "a registration and notification procedure to alert law enforcement, schools, community organisations and neighbours to the presence of a sex offender who the authorities believe may pose a risk to the community".¹ Since the release of John Lewthwaite, there have been increasing calls to introduce a 'Megan's Law' in NSW.² Lewthwaite was convicted in 1974 for the murder of Nicole Hanns and sentenced to life imprisonment. The crime was horrific - the five year old girl was stabbed 17 times after Lewthwaite had failed to find her nine year old brother who he planned to abduct. Lewthwaite's life sentence was redetermined to a fixed term of 20 years following the 1990 'truth in sentencing' laws. Consequently, he became eligible for parole in 1994, and was released in June 1999. In the lead up to the March 1999 election, the Premier announced plans to introduce legislation requiring convicted child sex-offenders to inform police if they change their name, address, place of employment or vehicle registration. The information would be available to the Police and the NSW Child Protection Enforcement Agency (the CPEA), and is based on the belief that knowledge of the whereabouts of convicted sex-offenders better enables police and the CPEA to prevent child sex abuse.³

The use of 'Megan's law' as an umbrella term can be misleading. The Washington Institute for Public Policy classes all community notification laws, or laws authorising the public release of identifying information about registered sex-offenders as 'Megan's Law'. However, the Institute also noted that "state laws regarding notification vary in form and function", and divides community notification laws into three categories: those requiring broad community notification; those requiring notification to individuals and organisations at risk, and those which allow access to registration information through the county sheriff or police department.⁴ The use of the term 'Megan's Law' (or its NSW incarnation 'Nicole's Law') may also limit the discussion about registration and notification to child sex-offenders when others convicted of violent sexual offences, or non-sexual violent offences, may also justify registration and notification programs. The Premier ruled out a 'Megan's Law' type

¹ 'A message from the Attorney-General', *A Citizen's Guide to Megan's Law*, New Jersey Department of Law and Public Safety, <http://www.state.nj.us/LPS/megan.htm>, downloaded 9 October 1999.

² For example: H Brown, 'Nicole's Law: the case for', *The Sydney Morning Herald*, 30 June 1999, p. 19; 'Offender to victim', *The Newcastle Herald*, 26 June 1999, p. 8, and R Morris, 'Plea to keep track of child murderers' *The Daily Telegraph*, 24 June 1999, p. 2.

³ B Carr MP, Premier, 'New laws to protect children from sex-offenders', *News Release*, 5 March 1999. In the statement, the Minister for Police also acknowledged the need for a national paedophile register since 'paedophiles do not respect state boundaries'.

⁴ Washington State Institute for Public Policy, *Megan's Law: a review of State and Federal Legislation*, October 1997, pp. 5-6.

scheme requiring police to notify residents within a certain radius of a paedophile living in their neighbourhood.⁵

2.0 OPTIONS FOR REGISTRATION

Sex-offender registration schemes may be *formal* (official) or *informal* (unofficial).

2.1 Official registration schemes

The national database on child sex-offenders established by the Australian Bureau of Criminal Investigation (ABCI) is an example of an *official* registration scheme. This database, which includes names of suspected offenders, is currently available only to Australian law enforcement agencies. In recent times proposals have been made to extend the scope and coverage of this database, to include the names of all child sex-offenders, suspects, intra-familial offenders and those noted for possessing child pornography, as well as extending those to whom it would be made available. While only police units responsible for investigating and prosecuting child sex-offenders would have direct access to the database, it has been suggested that authorised third parties may have relevant information released to them.

In March 1997 State and Territory Education Ministers agreed in principle to the establishment of a National Register of persons unsuitable for teaching because of convictions or dismissal for sexual misconduct.⁶ It would include information about people who had a criminal record of a sexual offence against a child, a person subject to allegations who had been placed either on a list 'not to be employed' or on a medically retired list. Under another category, states would be warned about teachers who remain employed, but have had a warning or penalty imposed following allegations of improper conduct of a sexual nature between the teacher and a student. This register would enable every teacher applying for a job in another State or Territory to face background checks. A mechanism would also be developed to permit non-government schools to check potential new teachers against records held in other States. Regulations under the NSW Teaching Services Act were amended in April 1997 to permit records of unproven allegations to be kept confidentially by the Department of School Education's case management unit.⁷

In the United Kingdom, the Department of Education and Employment maintains a list of barred persons, known as List 99. The Secretary of State for Education and Employment has the power to bar a person for a variety of reasons, ranging from misconduct to medical grounds, from employment by a local education authority, school or further education establishment as a teacher or in any other capacity that would involve regular contact with

⁵ L Doherty, 'Where freed pedophiles live: new laws will tell', *The Sydney Morning Herald*, 25 June 1999, p. 3.

⁶ Royal Commission into the New South Wales Police Force, *Final Report*, volume V: The Paedophile Inquiry, August 1997, para 18.136.

⁷ Hon J Aquilina, *NSWPD* (proof), 15 April 1997, p 30.

children or young people up to the age of 18. As such, List 99 is not a list of sex-offenders nor is everyone on the list perceived to be a danger to children. Anyone convicted after 31 October 1995 of a sexual offence against a child under 16 is barred automatically. Employers within the education service must check to ensure that they do not appoint someone who is barred. The Department of Health operates on an advisory basis a consultancy service whereby local authorities and private and voluntary agencies can check the suitability of people they wish to employ in a child care post.⁸

2.2 Unofficial registration schemes

Examples of informal registers are the books published by Deborah Coddington, first in New Zealand and then in Australia: *The Australian Paedophile and Sex Offender Register Index*, 1997. The books contain lists of those convicted of sex offences against children, giving details such as their name, address at time of the offence, current whereabouts, occupation, the nature of the offence, and their sentence. Some photographs are included. The information was collected largely from newspaper reports, with some material provided by certain court registries, although the NSW Royal Commission into the New South Wales Police Service (the Royal Commission) noted in volume five of its final report that in NSW the courts and the Office of the Director of Public Prosecutions refused the author access to official records.⁹ Consequently, the information contained therein is limited to that which is in the public domain, and is not representative of all convicted sex-offenders. The author argues in defence of her book that all information in the book is in the public domain, and that the ‘public’s right to know’ supersedes the offender’s need for privacy.¹⁰

The main problems with informal registration schemes, in addition to problems with registration schemes in general are:¹¹

- the chance of error, particularly mistaken identity, because of limited access to accurate records;
- selective inclusion in the publication, due to the fact that many cases are determined in closed court, or that some names are suppressed while others are not. Offenders who escape court through pre-trial diversion programmes will also not be included;
- entries which are not specific as to the actual facts of the offence, and which may include many items which are relatively trivial, or which form the bare statement of the offence may present a misleading picture of the actual conduct involved;
- wrongful inclusion due, for example, to a conviction having been overturned

⁸ Information taken from the *Sex-offenders Bill*, Research Paper 97/11, by Mary Baber of the House of Commons Library, p 29.

⁹ Royal Commission, n 6, para. 18.91.

¹⁰ D Coddington, *The Australian Paedophile and Sex Offender Index*, 1997, pp. 6-7.

¹¹ Royal Commission, n 6, para 18.93.

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- or judgment set aside or quashed since publication of the book;
 - the likelihood that the term 'paedophile' will continue to be used without any clear definition being given;
 - giving other paedophiles access to information which they may use as a source of contacts;
 - setting a precedent for collecting information and making it publicly available on classes of people who may be perceived as posing a threat to the community such as those convicted of stealing or drug offences, and
 - while an incorrect entry may lead to an action for defamation, such proceedings are beyond the reach of most persons, and are uncertain in their outcome, and injury sustained is unlikely to be adequately compensated by an award of damages.

The Royal Commission concluded that

the publication of private registers or indexes should be firmly discouraged, as potentially misleading and damaging. Official encouragement or assistance for their compilation is inappropriate. Specific banning legislation is not, however, possible, since the information republished is already in the public domain.¹²

3.0 FACTORS TO CONSIDER WHEN ESTABLISHING A REGISTRATION AND NOTIFICATION SCHEME

Definitional issues are some of the most important when establishing a **registration** scheme. These issues were discussed in detail in Briefing Paper No 12/97 *Registration of Paedophiles* by Marie Swain and will be summarised here. Coverage is a related issue - should only child sex-offenders be included in the register, or should the scope be widened to include other sex-offenders, or other, non-sexual, violent offenders? The information about the offender collected and maintained in the register must be determined, as must the means by which the register will be kept up to date. The issue of retrospectivity needs to be addressed, and penalties for failing to comply with registration requirements must be determined.

- ***Definitional issues***

Should the clinical definition of paedophilia be the sole determinant of registration? If so, how will those defined as paedophiles be identified? If the term 'paedophile' is defined for the purposes of registration to mean those who commit sexual offences against children under the statutory age of consent, consideration needs to be given to differences which may exist between States and Territories, or between consenting homosexual and heterosexual sex. The importance of recognising these differences is that people may be labelled as

¹²

ibid, para 18.97.

criminal for committing what in one jurisdiction is described as an unlawful act, which may have been legally permissible elsewhere. For example, in Western Australia the age of consent for homosexual sex is 21, whereas in New South Wales it is 18. Does this mean a man found guilty of having sex with a 19 year old in Western Australia, who is currently living in New South Wales should be entered onto a national database for child sexual offenders?

The American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders* 4th edition (known as DSM IV) definition of a paedophile covers those who have an attraction towards, and fantasies about children, but who may not translate these feelings into action. By contrast the provisions under the Crimes Act dealing with child sexual offences applies to behaviour and actions, whether attempted or realized. Does the register include only those defined psychiatrically as 'paedophiles' or those defined by the criminal law as 'child-sexual offenders'?

- ***Coverage and scope of information collected***

The Royal Commission posed the question whether a register should be restricted to convictions or also include intelligence about offenders. The limitations of a register confined to convictions is that its law enforcement utility would be restricted, and its incompleteness might lull users into a false sense of security. Provided safeguards are put in place to protect privacy and reduce the risk of harm to those who might be the subject of false allegations, such as integrity in intelligence gathering and tight controls on the security of the information (for example restricting access to law enforcement agencies), the Royal Commission favoured an 'intelligence register' over a 'convictions register'.¹³

The categories of offender that should be included in the register is another question. Should all categories of child sex-offenders, whether intra-familial or extra-familial, be included? It could be argued that intra-familial offenders do not pose a general threat outside their family and therefore to include them in the register would be pointless. Should the register be restricted to adults, or should juveniles also be included? What about those suspected of being a paedophile or a child sex offender? An example is those people against whom no conviction is recorded. There may be others who as a result of plea-bargaining who have a conviction for a lesser offence recorded against them. Are these people to be included? If the purpose of a register is community protection, it could be argued that those convicted of other violent crimes should also be registered. Violent murders or non-sexual assault are examples.

Should the onus be on individual offenders to 'register' with law enforcement agencies or will the monitoring and collection of data be done routinely by a central agency such as the ABCI. Many of the American statutes place the onus on the offender to register with local

¹³ Ibid, paras 18.143 - 18.146. Note that in relation to employment screening the Royal Commission recommended a different approach. See further *The Commission for Children and Young People Bill 1998 and other child protection initiatives* by Rachel Simpson, Briefing Paper No 14/98, pp 23-30.

police within a certain time of moving into a community.

- ***Retrospectivity***

Given the nature of child sex offending it is common to find multiple offences committed over a lifetime.¹⁴ Should the register include only those currently in gaol, or those on parole, or before the courts in relation to child sex offences? Imposing the requirement retrospectively would create an obligation in respect of a past conviction for a sex offence which did not exist at the time of conviction. As a general principle, it is presumed that except in relation to procedural matters, changes in the law should not take effect retrospectively. However, this principle may be rebutted and in exceptional circumstances retrospective application of particular statutes may be permitted.

With respect to **notification**, the degree of notification is an important consideration. To whom should the information be made available - the general community, those individuals or organisations identified as at risk, or should it be restricted to law enforcement agencies (in this case, there is effectively no 'notification' scheme operating since the information contained in registries is not disseminated beyond those responsible for them). The other alternative is that the information be available only on application. The second consideration is the scope and content of the notification itself. Who is responsible for the notification, and how extensive should it be geographically? What information about the offender should be included in the notification?

- ***Degree of notification***

The Washington State Institute for Public Policy divided the US notification laws into three categories, based on the level of notification. They are indicative of the options available for notification schemes generally. There does not appear to be a preferred category, with the number of states falling into each category approximately equal. The categories are:

1. **Broad community notification**

States in this category authorise broad dissemination of relevant information to the public regarding designated sex-offenders.¹⁵ The process for determining which offenders should be subject to notification differs from state to state. As a result, a

¹⁴ A May 1997 study by the Washington State Institute for Public Policy found that 12% of sex-offenders in that state were arrested on similar charges within seven years. A 15 year study in California found a 20% rearrest rate, and a University of California study likened the recidivism rate of sex-offenders to young drunk drivers - about 26% are convicted again within 2 years: J Shepard, 'Double punishment?', *American Journalism Review*, November 1997, p. 40.

¹⁵ Alabama, Arizona, California, Delaware, Florida, Louisiana, Massachusetts, Minnesota, Montana, Nevada, New Jersey, Ohio, Oregon, Rhode Island, Tennessee, Texas, Washington and Wyoming: Washington State Institute for Public Policy, n 4, p. 5. Note that at the time of writing that report, 47 states had notification laws. By October 1999, 50 states had introduced such laws.

small minority of states (Alabama, Louisiana and Texas) issue notifications for all sex-offenders convicted of certain offences. There is no exercise of discretion by public officials in determining who should be subject to notification requirements. The remaining states in this category notify the public regarding those released sex-offenders who are determined to pose a high risk of reoffending. The method for assessing an offender’s future risk differs from state to state. However, most states (70%) have enacted guidelines into law regarding how and when notification should occur.¹⁶

2. Notification to individuals and organisations at risk

States falling into this category release information based on a need to protect an individual or vulnerable organisation from a specific sex offender.¹⁷ Local law enforcement officers generally determine which individuals are at risk. ‘At risk’ organisations usually include child care facilities, religious organisations and public and private schools. Again, the method for determining the risk differs among the states.

3. Access to registration information

This category is the most restricted of the three: states in this category allow access to sex offender information by citizens or community organisations through their county sheriff or local police department.¹⁸ Most often, local law enforcement officials maintain a registry of sex-offenders residing within their jurisdiction. Some are open to public inspection, while others are open only to citizens at risk from a specific offender (this is usually determined by proximity to an offender’s residence). Still others are open only to community organisations such as schools, licensed child care facilities and religious organisations. Some states allow access to a statewide registration database while others restrict access to local databases.

- ***Scope, form and content of notification***

In most US states, local law enforcement officials are responsible for the notification. However, in one state, Louisiana, the offender is required to place an advertisement in a local newspaper and mail the notification to neighbours and the superintendent of the school district in which the offender intends to reside. In others, criminal justice agencies (eg Department of Corrections, Criminal Justice Institute or Probation and Parole officer) are responsible for the notification.

The geographic vicinity of the notification is also a factor which must be determined.

¹⁶ Ibid, p. i.

¹⁷ Arkansas, Connecticut, Georgia, Illinois, Iowa, Maine, Maryland, New Hampshire, New York, Oklahoma, Pennsylvania, West Virginia and Wisconsin.

¹⁸ Alaska, Colorado, Hawaii, Idaho, Kansas, Michigan, Mississippi, Missouri, North Carolina, North Dakota, South Carolina, South Dakota, Utah, Vermont and Virginia.

Population density impacts on the extent of the notification - in major cities, for example, residents within 500m of an offender's residence may be notified whereas in more sparsely populated areas the extent of the notification will increase.

The information about the offender to be included in the notification is important. The options include;

- the offender's name and any aliases used;
- a physical description (height, weight, eye colour, gender, race etc) with or without a photograph;
- the offender's date of birth;
- the offender's current address and place of employment;
- the offender's vehicle description and registration;
- a criminal history of the offender, or a statement of the sex crime for which the offender has been registered, which may include a synopsis of the mode of operation used when committing the offence;
- the geographic area in which the crime was committed;
- any parole and probation conditions to which the offender is subject;
- whether the offender was a minor or adult at the time the offence was committed;
- age and sex of any victim(s);
- location and telephone number of the probation and parole officer responsible for supervising the offender, and
- whether or not the offender has been categorised a sexually violent offender or a habitual offender

Information such as DNA sample, fingerprints and social security (in the Australian context, tax file or Medicare) number may also be collected by the Registry, but there is a general consensus that such information should not be disseminated to the public.¹⁹

¹⁹

Information taken from tables attached to the Washington State Institute for Public Policy document, n 4, pp. 35-68 summarising the various US State regimes

4.0 ADVANTAGES AND DISADVANTAGES OF REGISTRATION AND NOTIFICATION SCHEMES

The rationale for requiring registration by those found to have committed sexual offences, be they against adults or children, as expressed in one United States statute, is as follows:

- (i) sex-offenders pose a high risk of re-offending after release from custody;
- (ii) protecting the public from sex-offenders is a primary governmental interest;
- (iii) the privacy interests of persons convicted of sex offences are less important than the government’s interest in public safety; and
- (iv) release of certain information about sex-offenders to public agencies and the general public will assist in protecting the public safety.²⁰

4.1 Arguments for / benefits of registration and notification²¹

The stated advantages of a registration/community notification system relate to:

- ***The public's right to know*** that an offender is living in their community, so that they can take precautionary measures. Access to a register or release of information by law enforcement or other authorised agencies would assist citizens in achieving this end.
- The use to which the register could be put as a ***law enforcement tool*** in tracking possible offenders, particularly if associated with compulsory DNA profiling. If a sex offence is committed and no suspect is located, the register could be used to identify potential suspects who live in the area, or who have a pattern of similar crimes.
- ***The deterrent effect*** attaching to knowledge by an offender that he is being monitored. Once registered, offenders know they are being monitored, and thus will be discouraged from re-offending. It has also been suggested that a registration requirement may deter potential first-time sex-offenders. The arguments for such an approach are: that in a number of cases the system itself is to blame for the lack of success in securing convictions in this area rather than the innocence of the accused; and that in order to detect patterns of behaviour, details of all allegations against a particular person need to be kept.
- The sense of security or satisfaction acquired by ***victims*** in knowing that their abuser is being monitored.

²⁰ Alaska Statute §12.63.010.

²¹ The information in this section is taken from the Royal Commission, n 6, para 18.89 and *Registration of Paedophiles* by Marie Swain, Briefing Paper No 12/97, Part 4.

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- The *opportunity for intervention* which arises where an offender fails to comply with registration laws. For example, if a convicted sex offender is observed loitering around a playground, and when stopped by the police is found not to have registered, the offender can be charged and prosecuted for failure to register. Law enforcement representatives often argue that registration laws, thus, prevent crimes because the police can intervene before a potential victim is harmed.

4.2 Arguments against / criticisms of registration and notification ²²

Registration and notification schemes are often the result of compelling political pressures. Despite the 'well-meaning nature' of the legislation establishing the schemes, the Royal Commission and others have identified a number of objections. Many relate to notification requirements rather than the notion of registration:

- Registration programs are inconsistent with the goals of a society committed to protecting *individual liberties* and are seen as a violation of offenders' rights. Released sex-offenders have paid their debt to society and should not be subjected to further punishment.²³
- Registration may impose, in effect, a *double punishment* on the offender which does not apply to other categories of offender whose crime may be no less horrific.
- By forcing sex-offenders to register, society sends a *message to offenders* that they are not to be trusted, that they are bad and dangerous people. Such a message can work against efforts to rehabilitate offenders and inadvertently encourage antisocial behaviour. The offender can use the law to rationalize further crimes: 'if society thinks I'm a permanent threat, I guess I am and there's nothing I can do to stop myself'. It is also claimed that registration laws may encourage sex-offenders to evade the attention of law enforcement by going underground. Some sex-offenders will choose not to comply with the law, changing their identity and concealing their whereabouts, making the investigation of sexual assaults more difficult. This, it is argued, will not only make it more difficult for police to keep track of them but also put them beyond the reach of professionals such as counsellors and psychologists who may be able to help them. If offenders are hounded from place to place they are less likely to remain in a stable and supportive environment, decreasing prospects of rehabilitation.

²² The information in this section is taken from the Royal Commission, n 6, para 18.90 and *Registration of Paedophiles* by Marie Swain, Briefing Paper No 12/97, Part 4.

²³ Note that while Australia has signified its adherence to the general principle that unfair discrimination on the basis of criminal record in employment and occupation is an infringement of human rights, these rights need to be balanced against Australia's obligations under the *Convention for the Rights of the Child* 1990, which places paramount importance on the best interests of the child being considered when actions and decisions concerning children are taken.

-
- The objectives of the system can be easily defeated by the *non-cooperation of the offender*, who may either refuse to register or provide a false name and address. One problem which diminishes the effectiveness of any scheme is a lack of compliance. In the United States the extent to which offenders comply with registration requirements varies greatly from 30% of offenders in one state to 80% in others. One reason cited for the variation is the lack of clear procedures that make offenders aware of the notification requirements and the duty on them to register.²⁴
 - Registration creates a *false sense of security*. Citizens may rely too heavily on the register, not realizing that the majority of sex-offenders never appear on registration lists.
 - Registration of sex-offenders implies that these offenders are the *most dangerous*, whereas other types of offenders present similar or greater risks.
 - Registration may encourage a *vigilante mentality*. Where the registration list is public, citizens may threaten and take action against offenders. The harassment may also be extended to family members of offenders.²⁵
 - If made public, a list of registered sex-offenders may inadvertently disclose the *identity of victims*. In cases of intra-familial sex offences, a list of offenders identifies some victims by family, if not by name. Such a violation of privacy may compound a victim's trauma.
 - A list of all convicted sex-offenders, including names, addresses and other information, is *expensive to create and maintain*. Public funds may be better spent on such areas as treatment of incarcerated sex-offenders, intensive supervision of a small group of the most serious sex-offenders or to provide assistance to victims of sexual abuse.
 - Such schemes tend to *stereotype* all offenders within a broad category, and fail to take account of the important distinctions which do exist, for example between the fixated offender and the familial offender, in terms of risk of recidivism and risk to the community at large.
 - Within a *non-uniform national system*, offenders will be encouraged to move to

²⁴ Home Office Police Research Group, *Keeping track? Observations on sex offender registers in the UN*, Crime Detection and Prevention Paper No 83 by B Heberton and T Thomas.

²⁵ The reaction to Lewthwaite's release in June 1999 provides an example: local residents effectively placed him under siege in the Waterloo house to which he was released, throwing rocks and eggs and putting a garden hose through the front door letterbox. Within 2 days of being released on parole he was moved to an undisclosed location by the Department of Corrective Services: A Dennis, 'Lewthwaite moved as protests lead to growing fears for his safety', *The Sydney Morning Herald*, 24 June 1999, p. 3; P Trute & R Morris, 'Where now', *The Daily Telegraph*, 24 June 1999, p. 1.

states with less draconian legislation, or may go underground where they are less noticeable. Offenders can easily defeat the system by living in one jurisdiction and reoffending in another where they are not known.

- The wide availability of information about previous offences may be *prejudicial* to a fair trial. It is a fundamental principle that a fair trial would be prejudiced by widespread knowledge flowing through to jurors of any previous crimes committed by the accused.
- A consequence of registration, notification and resulting shaming may be a *reduction in guilty pleas* and a reluctance to report familial abuse.
- The fear of the consequences of discovery at the time of the initial offence may drive the perpetrator to drastic solutions to *cover up* the offence.
- The American experience has shown that where registers are available for public inspection there is an impact on *property values*. The presence of a sex offender can drive down house prices in a neighbourhood and estate agents have introduced contractual requirements which demand that tenants must declare if they have been told of any sex-offenders living in the area.²⁶

5.0 REGISTRATION AND NOTIFICATION IN OTHER JURISDICTIONS

5.1 Victoria

In March 1995 the Crime Prevention Committee of the Victorian Parliament published the first report from its inquiry into sexual offences against children and adults: *Combating Child Sexual Assault: An Integrated Approach*.²⁷ In it, the Committee stated

Given the high recidivism rate of sex-offenders and their propensity to continue to offend over their lifetime, the State must take whatever steps necessary to reduce the incidence of sexual assault and protect the community...

and continued

The real threat sex-offenders and paedophiles pose to the community will require the State to apply effective long term monitoring strategies.

Consequently, the Committee recommended a system for registration and monitoring of

²⁶ 'Constant vigil ensures molesters never escape their past', *The Times*, 19 December 1996.

²⁷ Victorian Parliament Crime Prevention Committee, *Combating Child Sexual Assault: An Integrated Model: First Report upon the Inquiry into Sexual Offences Against Children and Adults*, 1995.

such offenders, with the following features:²⁸

1. Lifetime registration for all adult offenders convicted of an indictable sexual offence;
2. Requirement that adolescents against whom a summary sexual offence is proven be registered for a period of five years;
3. Requirement that adolescents convicted of an indictable sexual offence be registered until they are 21 years of age, providing they have not reoffended;
4. Requirement that a Sex Offender Registry Review Panel be established to review the registration status of adolescent sexual offenders;
5. Requirement that registration should include sex-offenders released from custody and offenders serving their sentence in the community;
6. Requirement for the sex offender to appear in person at the Registry;
7. Requirement for offenders to be notified of the requirement to register by the courts;
8. Information registered should include name, date of birth, address of residence, source of employment, physical description, set of fingerprints, DNA sample and photograph;
9. Government Departments including Corrections and Courts are to advise the Victorian Sex Offender Registry when persons are convicted of a sex offence and when they are released from prison;
10. Requirement of written notification to the Registry of change of address or source of employment within 10 days of move;
11. Requirement that any person moving into the State of Victoria who has been convicted interstate of a sexual offence, to register within 10 days of arrival and be subject to the same registration requirements as Victorian residents;
12. Requirement that failure to register or provide false information will be an indictable offence;
13. Requirement of regular verification of the sex offender's address and source of employment by Victoria Police. Such inquiries are to be made discreetly where possible, and
14. Requirement that the sex offender must register within 10 days of being released or commencing his or her community based sentence.

²⁸ Ibid, pp. 260-262.

The Committee envisaged that the Victorian Police Service would be the primary user of the registration system. It does not appear from the Report that widespread notification is to be a feature of the scheme.²⁹

This recommendation has not, as yet, been implemented. In its response to the Committee's recommendations, the Victorian Government stated its support of the development of national crimes intelligence data bases, and its belief that "information related to crimes will be more useful than information related only to offenders".³⁰

5.2 United States of America

Fifty US states require sex-offenders to register, and there is also Federal legislation to that effect. New Jersey was the first State to pass laws following Megan Kanka's murder, however some states had similar laws operating prior to that date. California was the first State to enact a sex offender registration law, in 1947. The law required convicted sex-offenders to notify local law enforcement agencies of their whereabouts. Sex-offenders are required to register within five days of their release, and when they change their name or address. Additionally, sex-offenders are required to register annually within five working days of their birthday. Since 1995, sex-offenders convicted of felonies who fail to register can be charged with a further felony, which may result in a 'third strike' conviction.³¹ The Federal 'Megan's Law' passed in August 1994 urged states to create registries of offenders convicted of crimes against children or sexually violent offences - states had three years in which to create a register before facing a ten percent reduction in their federal crime control grant.³² The law **allowed** States to inform a community when a convicted sex offender moved into the area. In 1997 Congress passed a tougher law **requiring** states to notify communities when a sex offender moves in. How much public warning would be necessary would depend on the danger posed by the offender. Again, the States faced loss of federal funding if they failed to comply with the measures.³³ In August 1996, President Clinton directed the federal Bureau of Investigation (the FBI) to establish a national database of registered sex-offenders, which will allow the FBI to track the movement of such offenders from state to state.³⁴

²⁹ Ibid, p. 262.

³⁰ *Government Response to the First Report of the Parliamentary Crime Prevention Committee Inquiry into Sexual Offences Against Children and Adults, May 1995*, November 1995, supplied by the Parliamentary Committee.

³¹ 'Fifty years of sex offender registration', <http://caag.state.ca.us/megan/fifty.htm>

³² Washington State Institute for Public Policy, *Sex offender registration, a review of State laws*, July 1996, <http://www.wa.gov/swipp/reports/regstrn.html>

³³ 'Clinton signs tougher "Megan's Law"', <http://www-cgi.cnm.com/ALLPOLITICS/1996/news/9606/17/clinton.sign/index.shtm>

³⁴ *Pam Lychner Sexual Offender Tracking and Identification Act 1996*. The Act gave the FBI three years to implement the national register. It also provided that any state that had not complied with the requirement to set up a state registry must provide the FBI with information about convicted sex-offenders, including addressees, fingerprints and photographs:

In most States the requirement to register applies to convicted offenders; in some it also applies to individuals found to have committed a sexual offence but who were judged not guilty, such as those found not guilty by reason of insanity; in one State, Minnesota, the requirement has been extended to those charged with sexual offences. There is also considerable variation between States on which types of offender to include in a register: some States register all adult offenders; some only adult offenders whose victims were under 18, others only adult offenders convicted a second or subsequent time and whose victim is under 18.

Despite these differences, a number of broad similarities do exist, however, between the various registration schemes:³⁵

- maintenance of the register is generally overseen by a State agency;
- local law enforcement is generally responsible for collecting information and forwarding it to the administering State agency;
- typical information contained in the register includes: offender's name, address, fingerprints, photograph, date of birth, social security number, criminal record, place of employment, vehicle registration and in some States, DNA profiles;
- offenders in different States have varying time frames for registration, ranging from 'immediately' to 30 days. The duration of the registration requirement varies from 5 years to life, and is typically 10 years or longer.
- most States rely upon offenders to notify authorities of new addresses, typically within 10 days; and

Sex offender notification laws in the US have been challenged as unconstitutional under the headings of invasion of privacy and cruel and unusual punishment. For example, parts of the New Jersey 'Megan's Law' were struck down by a federal judge on the basis that the notification requirement amounted to a form of punishment and could not be added to penalties already in place before the law was passed in 1994. Requiring a convicted felon to notify his neighbours upon release, wrote the judge, would constitute a 'lifetime albatross' and would 'ruin an ex-con's ability to return to a normal, private, law-abiding life in the community'.³⁶ The case is still working its way through the appeals process.

As most State registration laws have been enacted only recently, there has been little chance

Washington State Institute for Public Policy, *Sex Offender Registration: National Requirements and State Registries*, December 1996.

³⁵ Heberton B and Thomas T, 'Tracking Sex-offenders', *The Howard Journal*, Vol 35 No 2, May 1996, pp. 97-112.

³⁶ T Carlson, 'Thy neighbour's rap sheet: how do you know whether a killer lives next door?', *Policy Review*, Spring 1995, p. 50 ff.

for evaluation. However, California and Washington State have produced written evaluations. A 1988 study by the California Department of Justice found that adult sex-offenders released from prison in 1973 and 1981 had compliance rates of 54% and 72%, respectively. In 1991, Washington's compliance rate was 76%. As of July 1996, 81% of sex-offenders required to register had done so. This compliance rate was much higher than predicted. It is further argued that high rates of voluntary compliance are not essential for registration laws to have law enforcement benefits. When a complete list of released sex-offenders, who should have registered, is routinely produced by the State prison system, law enforcement agencies have the choice of actively pursuing those not in compliance, or reserving non-compliance charges for offenders whose behaviour draws the attention of law enforcement. In several Washington State counties, local authorities conduct background checks on all released sex-offenders and use the information, regardless of compliance, as an investigative tool.

The 1988 California study also examined recidivism rates of released sex-offenders, and the extent to which registration actually assists in the investigation of sex crimes. A 15 year follow up study was conducted of sex-offenders first arrested in 1973. Nearly half (49%) of this group were re-arrested for some type of offence between 1973 and 1988, and 20% were re-arrested for a sex offence. Those whose first conviction was rape had the highest recidivism rate. Based on the responses of 420 criminal justice agencies, the California study found that a large proportion of criminal justice investigators believed the registration system was effective in locating released or paroled sex-offenders and apprehending suspected sex-offenders. Approximately 50% of the respondents believed that registration deterred offenders from committing new sex crimes.

A Washington study conducted between March 1990 and December 1993 compared a group of sex-offenders who were subject to notification laws, with a similar group of sex-offenders who were released prior to the implementation of such laws.³⁷ The study found that the notification group (19%) had a lower rate of recidivism than the comparison group (22%). This difference was not seen to be statistically significant. Moreover, there were no significant differences in the rates of general recidivism between the groups. The results of this study seemed to suggest that 'community notification appears to have no effect upon the recidivism rates of sexual offenders and, therefore, does not enhance public protection.'³⁸

5.3 United Kingdom

The United Kingdom's *Sex-offenders Act* commenced operation on September 1, 1997. Under this Act certain offenders (including those convicted of rape, indecent assault and incest by a man) are required to remain registered with local police for various lengths of

³⁷ Washington State Institute for Public Policy, *Community Notification: a study of offender characteristics and recidivism*, 1995, <http://www.wa.gov.au/wsipp/reports/chrrec.html/>

³⁸ Ibid.

time (five years for non-custodial sentences, seven years for sentences up to six months, 10 years for sentences up to 30 months and life for longer sentences). Under the Act, police are authorised, after a case by case analysis, to notify the governing authorities of schools, child-care facilities and playgroups, communities, employers and individual members of the community where there is a justifiable need to do so. Any public disclosures would, however, 'be exceptions to [the] general policy of confidentiality' and every case would require assessment that the potential harm would outweigh the privacy interests of the offenders and victims.³⁹

The *Sex-offenders Act 1997* requires certain sex-offenders (not restricted to child sex-offenders) to provide information (such as name, home address, date of birth and so on) to the police within fourteen days of having been convicted, found guilty but insane or under a disability (such as to make a person unfit to be tried), or having been cautioned in respect of an offence to which they have admitted. They are also obliged to notify the police of any changes in these details within fourteen days of the change. Failure to do so is an offence subject to a fine or imprisonment of up to six months.

There have been criticisms raised about extending the registration requirement to people cautioned by police constables rather than being convicted or otherwise dealt with by the courts. The main objections are: cautions are not public information; they may be offered in informal situations where individuals consent to them without the benefit of legal advice or representation; they are intended to act as a warning; if an offence is serious enough to warrant notification the use of cautions in such a situation is inappropriate; attaching a sentencing and punitive function to cautions may undermine their potential as a useful sanction, leading to fewer cautions being accepted and greater recourse to the courts.

The sentence or order imposed on a sex offender will affect the period for which notification requirements will remain in force. The more serious the offence, the longer the period. For example, anyone sentenced to a gaol term of more than 30 months will be required to provide notification details indefinitely, whereas for a person sentenced to imprisonment for more than 6 months but less than 30 months, the notification period will be 7 years. For offenders under the age of 18, all the periods specified are halved.

The provisions for sex offender registration are distinct from procedures for checking a person's criminal record set out in Part V of the Police Act 1997. Under these provisions, for a fee, individuals will be able to obtain information about their criminal records, and in specified circumstances and with the consent of the individual this information will also be provided, to bodies registered with the Criminal Records Agency. Three types of certificates can be issued: (i) a *criminal conviction certificate*, issued only to individuals, will state whether they have convictions recorded in central police records, which are not spent under the *Rehabilitation of Offenders Act 1974* (ROA); (ii) a *criminal record certificate*, which will be available for occupations which are not exceptions to the ROA. A joint application will be made by the individual and organisation which is seeking the check. Information will be provided from central police records about spent and un-spent convictions and about

³⁹ Research Paper 97/11, n 8.

cautions; (iii) *an enhanced criminal record certificate*, will be restricted to those working on a regular, unsupervised basis with children; for certain licensing purposes; and, prior to appointment, judges and magistrates. It will include the information contained in a criminal record certificate, plus information from local police records. Where relevant, non-conviction information might be supplied. Unauthorised disclosure of information will be an offence, and access to information by the wider community is not permitted. The registration proposals are also distinct from those permitting public access to the register of sex-offenders or otherwise notifying the public of the presence of convicted sex-offenders in the community.

5.4 Canada

Calls for a national sex offender registry have been heard in Canada also, although no official federal registration and notification program has been established. Most provinces have established child abuse registries and indexes, although there have been difficulties due to the wide variation in standards and procedures from one province to another which makes systemic sharing of information impossible. A Report prepared by the Federal, Provincial and Territorial Working Group on High Risk Offenders concluded that a new, national paedophile or sex offender registry *would not* significantly improve upon the status quo in the achievement of the objectives of the protection of children and other vulnerable groups from sexual predators. Instead, the report recommended building on: the existing infrastructure of the Police national data system of criminal history information; active screening of volunteers and others in positions of trust based, in part, on criminal record checks; and public notification schemes that exist in almost all jurisdictions in Canada.⁴⁰ Under the Federal *Corrections and Conditional Release Act*, the country's correctional service is to notify local police forces before an inmate is released on an unescorted temporary absence, parole or statutory release. Where the correctional service has reasonable grounds to believe that an inmate who is about to be released at the expiration of a sentence will, on release, pose a threat to any person, the service is to take all reasonable steps to give the police all information under its control that is relevant to that perceived threat. In addition, a victim may request that the following information about an offender be disclosed:

- the offender's name;
- the offence for which the offender was convicted and the court which convicted the offender;
- the date of commencement and length of the sentence being served by the offender, and
- eligibility dates and review dates applicable to the offender in respect of temporary

⁴⁰ Federal, Provincial and Territorial Working Group on High Risk Offenders, *Information Systems on Sex-offenders Against Children and Other Vulnerable Groups*, October 1998, p. 4; p. 19.

absences and parole.⁴¹

Additional information may also be disclosed to the victim at the discretion of the Commissioner for Correctional Services:

- the offender's age;
- the location of the prison where the offender is serving his or her sentence;
- the date, if any, that the offender is to be released on temporary absence, work release, parole or statutory release, and any conditions attached to such release;
- the destination of the offender on any release, and whether the offender will be in the vicinity of the victim while travelling to that destination, and
- whether the offender is in custody, and if not, the reason for that decision.⁴²

6.0 CONCLUSION

The Royal Commission recommended the following in relation to sex offender registration and notification:⁴³

Consideration be given to the introduction of a system for the compulsory registration with the Police Service of all convicted child sex-offenders, to be accompanied by requirements for:

- the notification of changes of name and addresses; and for
- verification of the register

following consultation with the Police Service, ODPP (Office of the Director of Public Prosecutions), Corrective Services, the Privacy Committee and other interested parties.

and

Empowerment of the Police Service to give a warning to relevant government departments, agencies and community groups relating to the presence of a person convicted or seriously suspected of child sexual assault offences, subject to guidelines to be established in consultation with the Privacy Committee, where reasonable grounds exist for the fear that such person may place a child or children in the immediate neighbourhood of the

⁴¹ Section 25.

⁴² Section 26.

⁴³ Royal Commission, n 6, pp. 1248-9.

offender in serious risk of sexual abuse.

The Royal Commission believed that the balance of the public interest would favour the release of warnings of this kind by the Police Service. The release of warnings would be determined on a case by case basis, and only in response to a genuine threat. The Commission favoured the above approach over a 'Megan's Law' approach as adopted in the United States where widespread notification is the norm.