MEGAN'S LAW – DOES IT HAVE A PLACE IN THE AUSTRALIAN JURESPRUDENCE?

Arguments for and against the public naming of offenders

Andrew Boe & Paula Morreau[1]

Most discussions about criminal justice issues are reduced to being simplistic, polemic, populist and ill informed, often controlled by the media or politicians. This is a phenomenon that we as a community should resist, especially when the topic being canvassed involves children both as victims and offenders. In that respect our objective here is to add our perspective as criminal law defence practitioners to the discussion that has taken place to this point. It seems that to some extent in Queensland and elsewhere in Australia, this discussion is *"like shutting the gate after the horse has bolted"*. The first aspect of the Megan's Law[2] package, viz. notification, is already part of the law in the various States in relation to sexual offenders.[3] Indeed, it preceded the developments in the US. The issue has greater currency however, given that the present Queensland government is proposing to enact similar provisions (i.e. naming) in relation to child offenders with draft legislation already drawn and to be distributed for selected comment in June/July 2001.[4]

The challenge for the legal profession and the general community at this point then, is making sure that we carefully consider what further, if any, adoption of Megan's Law measures should be undertaken in light of accessible information. It also raises the general issue of how law reform should be undertaken. In April 2001 *Proctor*,[5] the current

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1 The primary author is a criminal lawyer in private practice in Brisbane, Australia. P Morreau, BA/LLB (Hons)(QUT) has made a significant research and editorial contribution to this paper. The paper was first presented at a Queensland University of Technology, School of Justice Studies Seminar Series in June 2001.

2 The adoption of these measures started in the US with "Megan's Law." On July 29, 1994, Megan Kanka, a seven year old child, was abducted, raped, and murdered near her home. The man who confessed to Megan's murder lived in a house across the street from the Kanka family and had twice been convicted of sex offences involving young girls. Megan, her parents, local police, and the members of the community were unaware of the accused murderer's history; nor did they know that he shared his house with two other men who had been convicted of sex offences. By October 31, 1994, New Jersey had enacted the Registration and Community Notification Laws, Pub. L. 1994, Chs. 128, 133 (codified at N.J.S.A. 2C:7-1 to 7-11) as part of a ten-bill package collectively referred to as "Megan's Law." This legislation required registration by those who had committed certain designated crimes involving sexual assault and provided for the dissemination of information about those required to register. Other states followed suit with their own versions of Megan's Law and Congress passed a statute requiring a state program of registration and notification as a condition of receiving certain federal funds. By May of 1996, forty-nine states had adopted sex offender registration laws and thirty-two states maintained some form of community notification program.

3 See sections 19 & 20 of the *Criminal law Amendment Act 1945* which were enacted in 1989.

4 The source of this information is an informal one, coming from a telephone conversation between the author and an employee at the office of the Minister for Families etc, the Honourable Judy Spence MLA on 12 June 2001. A written confirmation of this has been received.

5 The monthly magazine of the Queensland law Society

Queensland Attorney-General forecast a consultative approach to law reform.

It has to be remembered that these arguably intrusive measures gained popularity as a weapon in the war against sexual offenders, particularly those who victimised children. Public airing of people's convictions for sexual offences was thought to be a protective strategy for the vulnerable. Thus, the starting point in any useful analysis must be whether it has fulfilled its purposes in that respect, before we contemplate its usage *against* child delinquents or any other class of offender.

Megan's Law – How well does it actually work?

It is particularly difficult to maintain an objective perspective when critiquing an issue related to sex offences. Most people are understandably emotional about the subject. Public commentators and perhaps the majority in our community find it difficult to understand, and therefore find abhorrent, sex offences, particularly those committed against children. If one has children of a vulnerable age, the thought of a child actually being subjected to that terror and scarring is poignantly awful. Dealing with sexual offenders is not a palatable area of criminal practice. Offenders are often alleged to have committed quite offensive conduct. Further to a general distaste for such offences, there would seem to be other biases at play. For example most alleged offenders ultimately pleads guilt. Consequently, it seems that most people accused of sexual offences are actually guilty.[6] For these reasons the possibility that there is value in such information being available to certain agencies in some circumstances cannot be summarily dismissed.

Nevertheless, we remain unconvinced that further public naming and shaming measures should be adopted in this country. Criminal lawyers probably have a heightened appreciation of civil libertarian considerations,[7] however, the most persuasive reason for our being against any proposed augmentation of naming and shaming powers is the apparent absence of any real utility in this, even in relation to sex offenders. This conclusion has been reached by focusing on what is sought to be achieved by such actions, whether in fact it will meet those justifications and expectations and what other ramifications there are likely to be.

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6 This is an extraordinarily broad generalisation based on anecdotal experience. We would exclude from it accusations of rape where consent is the issue involving parties who know each other. Different considerations come into play there. We are also told and must accept that our anecdotal experience is to some extent inconsistent with the experience of other colleagues in practice and with the across-the-board statistics. See for example, *Reported Sexual Offences in Queensland* by the Research and Prevention Division, Criminal Justice Commission, December 1999, at 38 which records that in all cases 1994-96:
"50.1% of all sexual offenders pleaded guilty, 35.9% not guilty and the remaining 13.9% were not required to plead due to a nolle prosequi being entered or other events;
28.3% of all people charged with rape pleaded guilty, 54% pleaded not guilty; and
70% of child sex offenders who go to trial are convicted."
It is possible that criminal trial litigation issues including the impact of legal aid considerations might bear on these statistics.

7 cf. the perhaps more popular view that sexual offenders upon conviction lose their rights to anonymity, protection from double punishment , the purge of past taint after the affluxion of time etc, or at the very least any such rights become secondary to the interests of children and other victims. In this article we do not propose to argue from a civil libertarian perspective in this paper, others being better equipped to do so and having done so.

There are a number of initial factors that bear on the issue as it pertains to sex offenders:

1. The primary consideration must of course be the protection of the vulnerable within the community.
2. There is a sliding scale of seriousness in relation to sexual offenders from those who commit a single aberrant act to a psychopathic, depraved and deeply disturbed paedophile with a clear likelihood if not certainty of re-offending.
3. It is inherently difficult to determine with any certainty, when a serious sexual offence has been committed, the likelihood or otherwise of recidivism.
4. The response to programs that address sexual offending behaviour is idiosyncratic.
5. If we are to err in the setting of parameters regarding likelihood or otherwise of re-offending or posing a threat to the community, it should be in favour of the individual accused.

The last proposition is perhaps the most contentious and should be considered the most fully at this stage of the community discussion.[8]

How a community should deal with the uncertainty of predicting human behaviour, particularly criminal misbehaviour, is inherently perplexing. Our response on this issue provides a 'litmus paper' test as to the liberality of our democracy, a point we often impliedly make when our representatives criticise other nations, especially Asian and Middle-Eastern countries, on these issues in international discussions. To avoid being hypocritical we must seek to correlate our protestations that we are a liberal, civilised democracy with how we actually answer the more difficult domestic social questions. Merely adopting what is happening in other "big brother" countries like the US and the UK without proper scrutiny is lazy and unlikely to be the right approach to address local conditions. A careful and mature negotiation of the local issues with collegiate discussion amongst the significant participants where competing views can be accommodated with civility is necessary for us to get it right. For example the age, race and cultural demographic of offenders and victims in Australia must by definition differ from those in other countries. What works, or is said to work elsewhere may not be appropriate or effective here.[9]

Our lack of certain support of the proposed changes arise from knowing, in having met many sex offenders in a professional arena, that often if not frequently, they themselves have been the victims of a similar attack when they were children. There is some research undertaken South Australian academic, Freda Briggs to support this view.[10] In most cases however the offenders recalled that their abusers were never charged even if the conduct was reported. In particular, it seems the older male offenders remember

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8 The remainder are either clinical, easier to acknowledge or have been amply discussed before.

9 Any commercial advertising executive or television producer/programmer could confirm this.

10 Dr Freda Briggs, Professor of Child Development at the University of South Australia with colleagues Mary Williams and Russell MF Hawkins wrote a paper entitled *"A comparison of the childhood and family experiences of convicted, incarcerated male child molesters and men who were sexually abused in childhood and have not committed offences against children"* for the Institute of Criminology, Canberra (1994). In reading an interview with Dr Briggs published on the internet, it appears she makes the conclusion that the prime common factor seems to be that almost all child sex offenders are themselves survivors of abuse, however, that not all victims become victimisers. Briggs states that international researchers show that the problem affects about a quarter to one fifth of male victims.

quite graphically having been abused by uncles and grandfathers etc. Seemingly, there was little community intervention then even though abuse was suspected and in some cases known. Wives of men who abused, and mothers of children abused, did less then than they might now. In that era it was felt that to report these matters to police was thought to bring shame on the whole family particularly the child. More men[11] probably went unpunished than there might now. Although only about 1/3 of victims presently report inappropriate sexual conduct to police, there has been a doubling of reported conduct in the period 1994 to 1996.[12]

One should wonder whether the social and community response manifested in the past,[13] in sweeping these allegations under the carpet, has contributed to the lack of psychological and psychiatric intervention that was perhaps necessary to address the harm and scarring of the present offenders when they were victims. It is tritely obvious that prevention[14] and rehabilitation of offenders are the most likely ways to best protect the community.

Recently, a respected senior Queensland Court of Appeal Justice, Davies JA and his associate,[15] sought to critique the assumption that imprisonment is an effective method of reducing crime. In their paper entitled: *"Do Current Sentencing Practices Work?"*, they addressed the four traditional purposes of sentencing[16], namely, incapacitation of the offender/protection of the community, deterrence, punishment/retribution and rehabilitation in light of how imprisonment achieved such goals. Such an analysis allows logical deconstruction to determine the consideration rather than emotive assumption. We propose to conduct a brief similar exercise here, on the topic at hand.

Incapacitation. It *is* possible that naming and shaming might incapacitate an offender in some circumstances.

Deterrence. It might be thought that because most of us would find shaming/naming horrific and unworkable, that a potential offender might also be deterred by it as a prospect *before* they commit their first offence. However, there are reasons to doubt whether any punishment, no matter how condign, operates as any real specific deterrence upon a sexual offender given the causes for so offending. Indeed studies show that the same can be said for any offender.[17]

Punishment. Despite some, if we may say, emotional justifications expressed in recent US cases to the contrary, shaming and naming is obviously intended and operates as an added punishment upon an offender. It cannot be doubted that the primary justification

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11 Most sexual offenders are men (98%): *Reported Sexual Offences in Queensland,* op cit, p. 11.

12 *Reported Sexual Offences in Queensland,* op cit, p.6. It is further stated in the report that *"this does not necessarily reflect a significant increase in the occurrence of sexual offending per se. Rather, the most likely explanation is a change in reporting patterns due to a number of organisational and societal changes and initiatives during this time."*

13 Say, 10-70 years ago.

14 In the sense of psychological and psychiatric assistance to those who have been abused.

15 Davies GL & Raymond KM *"Do Current Sentencing Practices Work?"* Criminal Law Journal, V.24 at p236.

16 See also *Penalties and Sentencing Act 1992* (Qld), s9(1)

17 *"Both statistical and other evidence and logic therefore show, contrary to popular belief encouraged by media and politicians, that the prospect of a gaol sentence if caught and convicted, or of a longer gaol sentence, is not an effective general deterrent or for the most part, an effective specific deterrent."* Davies, op cit. p 241

for these measures is a bid for greater protection, at least in relation to sex offenders, but to not see that it will in most cases operate as a punishment, is to ignore human frailty[18] and reality.[19]

Rehabilitation. In light of the frequently cyclic nature of the causes of offences of this type, in considering the question at hand – whether offenders should be forever publicly labelled as sex offenders or paedophiles – it is necessary to look at its impact on the rehabilitation of the offender. In our brief research we have found it difficult to find respectable and detailed analysis of this aspect of the issue. It should be further assessed whether publication is likely to have any *rehabilitative* effect or is it, like gaoling, merely a continued attempt at protection by constraint? From a layperson's point of view it seems that public shaming and labelling is unlikely to be the best means of providing the psychological or psychiatric intervention to seek to address the causal makeup of an offender. Indeed, rehabilitation assumes primary significance where the offender is juvenile.[20]

If we accept therefore, that the process of continual shaming of an offender will have a limited, if any, *deterrent* or *rehabilitative* effect, does the measure have any legitimate purpose to fulfil other than merely imposing *punishment?* It seems that the significant drive for labelling and shaming is to address the needs of some in the adult community who feel better by being intellectually austere on these issues. That might in itself be legitimate and it certainly seems to be so politically. However logic and common sense would suggest that our treatment of the issue should focus more on the actual protection of children, both the ones vulnerable to that threat and those who have already suffered abuse.

In seeking to protect our children we have to recognise that there are many, many sexual offences committed by first time offenders and they are usually people closely related to the children.[21] Over 62% of sexual offences occur in a dwelling.[22] Public naming or shaming is unlikely to make any difference to the protection of children from these dangers. Secondly the primary responsibility must rest with parents. It seems that if parents are vigilant in gathering information to further protect their children in their daily lives, that provides the greatest protection. This is particularly so when the largest single group of sexual offenders are familial to the victim.

If this approach is taken, the matters that the community should focus upon, in our view:

1. Take steps that are likely to increase reporting, policing and prosecution (identification is a better term) of sexual and other offenders;

2. Better educate children as to what to do to reduce risk and what to look out for;

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18 Vigilantism.

19 Discrimination in housing allocation, employment etc.

20 See section 4(f) *Juvenile Justice Act 1992* (Qld)

21 See *Reported Sexual Offences in Queensland*, op cit., page 13 : In 1998, 59.8% of offenders were known to their victims & 26.3 % were familial.

22 *Reported Sexual Offences in Queensland*, op cit., page 8. Dwelling house is defined to include: "unit house, caravan park, outbuilding etc." and it is unclear whether such offences occurred in the complainants' or the offenders' dwellings.

3. Better educate their carers as to how not to expose them to those environments in their child care arrangements especially overnight, and how they should respond when they suspect or receive information or indicia of abuse;

4. Better educate carers as to what to do if they hold valid suspicion that their spouses are potential perpetrators;

5. Undertake studies on:
   5.1. what is the best way to detect conduct;
   5.2. what are the root causes for this type of offending;
   5.3. what is the best way to treat children who have suffered abuse; and
   5.4. what is the best way to treat offenders to increase their rehabilitation and reduce the likelihood of them re-offending.

We would suggest that these measures[23] are more likely to better protect our children than the process of labelling and shaming, accepting that such a process might make some of us in the community feel better. Also it has to be remembered that to be falsely accused or convicted of such an offence would be unimaginably unjust and that this still not infrequently occurs. The criminal justice system often fails the indigent accused and there is no reason to suggest that this is not also the case in relation to the trial process concerning sexual offenders.

If we aspire to be democratic, just and informed and we want to be smart about the problems associated with sexual offending we should prioritise measures that will lead to the rehabilitation of the abused children and their perpetrators than merely being driven by the desire to exact punishment *per se*, feel good about it or attract votes from doing it. Governments should be driven to take the measures that make a real difference in the protection of our children.

If naming and shaming is to occur we favour an assessment being made at the time when the person is re-entering the community by someone seized of all the relevant information for determining the risk to the community in not doing it. It is difficult to see a person better qualified to do this than the judicial officer who imposed the initial punishment.[24] That person, provided with information as to the effect of incarceration upon the offender, the environment into which he/she will enter upon release, the insight if any gained from programmes in gaol, the objective view of health professionals and other related matters, can look at the question judicially. This allows review on the merits within an established and experienced procedural process.[25] For the reasons discussed above we would have thought that the circumstances where the community are

23 It has to be noted that there are some US internet sites, which already provide some of this information however, it is difficult to assess the quality of it and the cultural differences are manifest.

24 It does not have to be the same person. See a similar operation under *Penalties and Sentencing Act 1992* (Qld), section 188 (Re-opening of sentence).

25 Judicial decisions are more open to appellate review. Decisions by parole boards etc must proceed under administrative review process which is arguably less accessible to potential litigants. In the United States, it has been held: *"due process requires a standard of proof of clear and convincing evidence, with the burden of persuasion on the State for the purpose of determining the risk level of the offender, the geographic area within which notice is to occur and those to whom notice will be provided: E.B. v. Verniero, 119 F. 3d 1077 (3d Cir.1997)*

better protected by such measures are not infrequent, but still extremely rare. The threshold test to justify such a measure needs to a dispassionate and intelligent one as the impact on the person is significant.

As noted above Queensland currently has legislation that allows for the publication of convicted sex offenders' addresses to the police service. The *Criminal Law Amendment Act 1945* (Qld), section 19 allows the sentencing Court to order this publication within 48 hours of release from prison for a specific period if it *"is satisfied a substantial risk exists that the offender will thereafter commit any further offence of a sexual nature upon or in relation to a child under the age of sixteen years"* upon application by the Crown. Interestingly, the order is deemed to be a sentence for appellate purposes.[26] In *R v. C*[27] the Court of Appeal contemplated expert evidence being needed to apply this provision. Section 20 of the Act permits disclosure, upon application to the Queensland Community Corrections Board, of the offence on the offender's record to a police officer, corrective services officer or *"a person claiming a legitimate and sufficient interest in having the information."* The section also relinquishes any liability on anyone for that disclosure.[28]

The New Jersey Supreme Court considered in great detail the policies behind the implementation of Megan's Law in a case where the legislation was challenged constitutionally.[29] In finding that the laws were valid, Wilentz CJ, in writing for the majority, stated:

"The essence of our decision is that the Constitution does not prevent society from attempting to protect itself from convicted sex offenders, no matter when convicted, so long as the means of protection are reasonably designed for that purpose and only for that purpose, and not designed to punish; that the community notification provided for in these laws, given its remedial purpose, rationality, and limited scope, further assured by our opinion and judicial review, is not constitutionally vulnerable because of its inevitable impact on offenders; that despite the possible severity of that impact, sex offenders' loss of anonymity is no constitutional bar to society's attempt at self-defence. The Registration and Notification Laws are not retributive laws, but laws designed to give people a chance to protect themselves and their children. They do not represent the slightest departure from our State's or our country's fundamental belief that criminals, convicted and punished, have paid their debt to society and are not to be punished further. They represent only the conclusion that society has the right to know of their presence not in order to punish them, but in order to protect itself. The laws represent a conclusion by the Legislature that those convicted sex offenders who have successfully, or apparently successfully, been integrated into their communities, adjusted their lives so as to appear no more threatening than anyone else in the neighbourhood, are entitled not to be disturbed simply because of that prior offence and conviction; but a conclusion as well, that the characteristics of some of them, and the statistical information concerning them, make it clear that despite such integration, reoffense[30] is a realistic risk, and knowledge of their presence a realistic protection against it."

The US cases assume that Megan's Law measures will in fact better protect their children from sexual offenders. That could not be doubted in relation to a small class of offender.[31] However it is not safe to then conclude that all sexual offending will be

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26 Section 19(9)
27 (unreported) CA No 264 of 1999, 2 November 1999.
28 Section 20(7)
29 See *Doe v Poritz* 142 NJ 1at [3-5]
30 "reoffense" is [US English] for reoffending.
31 The psychopathic child murderer

reduced by such measures. The detriment to rehabilitation by being labelled and shamed and further punished has not been measured in the US cases or debate.[32] Megan's Law started with speed and raw emotion and has rushed the US analysis of the issue. Its impact has not been fully assessed. The US has different cultural values both on a mass level and in its racial make-up in its different States and there remains disagreement on the adoption of these measures. Australian cultural values are different again. Deciding to implement such laws requires full appreciation of the conflicting purposes behind it, the likely effects and non-effects. There is some doubt about whether this level of appreciation and understanding has been attained at this point in the discussion in this State.[33]

General Application of Megan's Law measures

From looking at the above, it can be shortly stated that, the special reasons associated with sex offenders may have justified examination of measures such as naming/labelling/shaming, but it has not been borne out that the objectives and purposes have been achieved or are likely to be achieved in this State. This should conclusively close the gate on whether such measures should be trialed on our children or other classes of offenders.

The interests of children, both offenders and victims, will be better protected if we take a more considered approach. Can I suggest as a start that the current measures in section 19 and 20 of the *Criminal law Amendment Act* should be carefully monitored before we move further, if we do at all either in relation to sex offenders or generally? The application of these sections may be having no positive effect yet costing public funds to administer and restricting or delaying rehabilitation.

The irony that this government will seek to enact similar legislation before enough is known of its utility *against* juvenile offenders should not be ignored. What is necessary at this stage is not the circulation of draft legislation mirroring overseas legislation but to draw legislation that:

1. identifies the purpose of the measure as one to provide greater protection to the community;

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32 Other than in the dissenting judgement of Justice Stein in *Doe v. Poritz* (supra) there is little consideration of rehabilitation. His Honour observed:
"Moreover, continued treatment of convicted sex offenders through State-supported voluntary counselling and rehabilitation programs arguably might be more effective than notification over the long term. In addition, the Legislature undoubtedly recognizes that the limited protection afforded by the Community Notification Law does not address the concern that a sex offender could commit an offense a substantial distance from that offender's community."

33 We have ascertained that the Criminal Justice Commission Research Division has not considered the issue. Nor have the International Commission of Jurists, the Bar Association, Law Society Committees or the Queensland Council for Civil Liberties considered the matter in any recent formal way. There was a Private Members Bill, *Criminal Law (Sex Offenders Bill* 1997, introduced in 1997 but it was not passed. The Attorney-General has no current discussion paper on the issue, although as noted above The Minister for Families etc has draft legislation out for consultation for introducing naming/ shaming penalties for children who offend.

2. reflects and addresses the known causes of the offending behaviour;

3. correctly focuses on how this offending behaviour can be reduced generally and individually; and

4. does not damage rehabilitation measures which are known to work.

The legal profession as well as the community generally will need to respond fulsomely to any measures that blithely adopt overseas approaches.

Andrew Boe
Paula Morreau

Lecture Room
School of Justice Studies
Queensland University of Technology
Brisbane
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