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Implications for Privacy Laws

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This paper will consider the emergence of both official and unofficial registers which aim to identify sex offenders and their efficacy as a tool for prevention. It will outline the case for careful consideration of the civil liberties and privacy rights not only of suspected and convicted sex offenders and those listed on such registers, but also of their families and associates. The risk of unfair, and even unlawful discrimination or persecution are compounded by the uncertain and inconsistent definitions of paedophilia. The application of existing and proposed privacy, anti-discrimination and spent convictions laws to both official and unofficial registers will be discussed.

A Serious Problem

As we are all too well aware, the issue of child protection, with a specific focus on child sexual abuse, has been firmly placed on the agenda and quite rightly so. Undeniably, sexual offences, particularly those committed against society's most vulnerable, are abhorrent and are deserving of society's condemnation. Children are amongst the most vulnerable members of our society and require protection. Accordingly, it is both a challenge for, and the responsibility of, policy makers at all levels within our community to develop effective responses to ensure that offences such as these do not occur. That there is a demonstrated need for a conference such as this is a sad indication that paedophilia is a serious problem for our society; it does, however, signal a readiness to take positive steps in assessing in a mature way how we, as a community should respond.

In considering ways of addressing the problem, it is vital that we approach the issue with a sense of balance which can sometimes be difficult, given the emotions that are evoked at the horror of sexual offences. The prevention of child abuse is a problematic issue, requiring difficult judgments to be made in assessing the risk posed by certain individuals to children. Clearly the interest in protecting children is the paramount concern. As a society we cannot afford to make rash policy decisions based on hysteria, without focussing on whether the solutions we are proposing to the problem are proportionate and effective and without consideration of other consequences. Policy responses must also give careful consideration to *all* interests involved. We need to ask some important questions — are the methods we are taking going to be effective; will they reduce the incidence of child abuse; do they achieve the aims of prevention? Any approach to the problem needs to deal honestly with these questions.

The Public's Right to Know?

My comments have been primarily stimulated by the emergence of a particular style of response to the issue, which is to publicly identify those who have a history of an offence of this nature. This view takes as its rationale that the community should arm itself with this information, that everyone has a right to know that an offender is living in their community and that with this

knowledge, the community is therefore better able to afford protection to children.

This response is not specific to the Australian environment. Around the world, similar community initiated approaches to the issue are being embraced and even endorsed through the legislature. In the United States we have seen the genesis of what has been referred to as “an unusually ferocious piece of legislation born of parental emotion” (*Sydney Morning Herald*, 4 February 1997). This legislation, dubbed Megan’s Law in memory of the victim of a paedophile offender, requires the public notification of the identity and address of any convicted sex offender who is living in the community, for life, so that communities may know the threat and take steps to defend themselves. A federal Megan’s Law was signed by US President Clinton requiring each State to write its own and it appears that most States now have such a law.

This response has come from an understandable sense of helplessness and fear in the community for the protection of children, and an anger and outrage at the perceived lack of action by governments and the criminal justice system on this issue. These emotions and concerns are quite understandable and there is clearly an urgent need to address what appear to be major failures in the way authorities have made use (or not) of existing information available to them. But whether the public notice response — as we have seen in Australia in the form of a widely available unofficial index of convicted and suspected sex offenders (Coddington, D. 1997, *The Australian Paedophile and Sex Offender Index*) — is appropriate, is another question.

In seeking to minimise the risk of children being abused there is clearly a need for relevant authorities to know whether someone has a prior conviction for a relevant offence. All privacy laws recognise the need to balance public interests. The public interest in the enforcement of the criminal law and in public safety is universally recognised as one such public interest which outweighs to a certain degree an individual’s right to privacy. This balance is also expressly addressed in Commonwealth and State legislation which allow a person to “live down” an old minor conviction by lawfully withholding

such information (known as spent conviction schemes). However, all these schemes acknowledge that there are some circumstances where this right is not justified and where information about a prior conviction should be made known. Specifically, all such schemes in Australia require that where an individual is seeking a position which would place them in the care or supervision of minors, all convictions for offences of a sexual nature or offences of violence must be disclosed.

The point is that information should be handled appropriately and with a view to ensuring that it is used to achieve effective solutions to the problem. Regardless of whether information is on the public record or not, it should be used and disclosed in ways which are proportionate to the need. Sensitive information such as criminal conviction history is always at risk of being misused with serious implications for those who are the subject of such information. The appropriate use of information can mean the difference between effective, targeted and justified scrutiny of those who may pose a serious risk to children, and unfair scrutiny, persecution and discrimination.

Rights of offenders

The question which is at the centre of the debate is — should convicted and suspected sex offenders have any civil liberties and rights to privacy?

The answer, in a civilised society, must surely be yes. The rights of those offenders who have served court imposed sentences, while they are certainly diminished, are not extinguished completely. Many within the community would disagree. They argue unequivocally that in committing their offences, these types of offenders have infringed on the freedoms and rights of their victims and in so doing, have forfeited any rights enjoyed by other members of the community. This view sits uncomfortably with concepts which are fundamental to our system of justice and our commitment to

human rights. We have democratically established institutions which attempt to achieve the delicate balance between crime and punishment, restitution and rehabilitation. In a number of ways, unofficial registers such as *The Australian Paedophile and Sex Offender Index* fundamentally challenge these notions. So, to a lesser extent, would some of the more draconian proposals for official registers and vetting systems.

The Australian Paedophile and Sex Offender Index, in particular, undermines the principle of rehabilitation which is an important objective of our justice system. We have established a system where a judgment about an appropriate sentence is made after deliberation by an experienced public official and often after consideration of evidence by a fully informed jury made up of members of the community. Once any sentence imposed has been completed, our justice system says that a person should have the opportunity to reintegrate back into the community. Information about the offence is still on the public record and is available to be taken into account in sentencing decisions should the person reoffend. This information is also available through official systems where criminal history checks are conducted in circumstances where such information is deemed relevant, for example, where persons are being employed in positions of trust with children.

The availability of information about convicted offenders more widely within the community can operate to extend the punishment already received by the offender. The result being that a person who has served his/her sentence is doubly punished and can be subjected potentially to a lifetime of persecution, victimisation and possible violence.

Public release of the identities and whereabouts of convicted offenders also places their families at risk of being stigmatised and persecuted and effectively punished for a crime purely by association. In some cases, this prospect may also deter victims from coming forward if the perpetrator is within the family.

Existing Commitments

Australia has signified through its commitment to international conventions that unfair discrimination on the basis of criminal record in employment and occupation is an infringement of

all Australians' human rights. The federal *Human Rights and Equal Opportunity Commission Act 1986* puts into effect Australia's commitment to ILO Convention No.111, the Discrimination (Employment and Occupation) Convention 1958. However, these rights are also balanced by Australia's commitment to the Convention for the Rights of the Child, 1990, which notes that all actions and decisions concerning children need to take into account the best interests of the child (Article 3, Convention on the Rights of the Child, ratified by Australia in December 1990).

The concept of rehabilitation and the notion of reintegration has been signalled by governments as being important to our concept of justice, not least through the spent conviction schemes referred to earlier.

Many people with a criminal record subsequently establish themselves as respectable members of the community. While I defer to experts as to comparative rates of recidivism, I cannot believe that there are not many examples of successful rehabilitation of sex offenders. Spent conviction schemes are designed to give people a chance to live down a minor criminal conviction. The concept of spent conviction laws is linked to a value which has considerable influence in our society: that people who do wrong should be given a second chance because they have the capacity to reform their ways.

A further justification for establishing spent conviction schemes is the fair administration of justice. The law prescribes a punishment to be imposed for the commission of an offence and once that has been served the offender has paid his or her "dues" to society. When society is satisfied that the person is not likely to re-offend, it should relieve that person of the stigmatising effect of his or her criminal conviction. Otherwise, the punishment in

effect extends beyond that imposed by the court and the system does not meet its fundamental objective of making the punishment just.

Of course, any judgment about the likelihood of an individual re-offending carries an element of risk. There will, inevitably, be tragic incidents arising from official misjudgments — such as that apparently made in the New Jersey case which led to the first Megan’s Law. But as in so many areas of public policy, risk cannot be entirely eliminated without unacceptably draconian measures.

Spent conviction legislation should not be seen as a sign that governments are “going soft” on criminals but as a method of ensuring that the punishment suffered by an individual with criminal convictions is fair and just and in accordance with the law. As mentioned earlier, these schemes recognise that the existence of any prior sexual offence or any offence against a child, is relevant and should be made known but only in specific circumstances such as where the individual is seeking positions which involve the care or supervision of minors. In circumstances other than these, information about minor convictions is protected. It is important to note that convictions for most serious offences are not protected by spent convictions schemes. The threshold varies between jurisdictions but most convictions for serious sexual offences or offences against children would not receive any protection and offenders would continue to have to disclose such convictions in any context.

It should be noted that the Privacy Commissioner has a statutory function under the Commonwealth Spent Conviction Scheme which includes handling complaints about breaches and advising the Attorney-General about exemptions (Part VIIC *Crimes Act 1914*, Cth).

The wide availability of information about previous offences may also be prejudicial to a fair trial. Our justice system has determined that the guilt or innocence of an individual should be determined by the merits of the case. Any history of prior offending is deemed relevant at the sentencing stage. 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.

Definitional Issues

The risk of unfair, or even unlawful discrimination or persecution are compounded by the uncertain and inconsistent definitions of paedophilia. What range of acts are considered to fall within this definition? At what age should certain acts be considered to be an offence against a young person? These questions are further confused by the inconsistency between jurisdictions in the age of consent and a differing age of consent for consenting heterosexual activity compared with consenting homosexual activity. The lack of clarity on these definitional questions can lead to an inappropriate inclusion of activity within the definition of paedophilia and subsequent labelling and stigmatisation of individuals. These problematic questions have remained unresolved for some time in official responses. They are even less likely to be taken into account in unofficial registers or in popular grassroots reactions.

Effectiveness and Dangers

Apart from the abovementioned civil liberties and privacy concerns raised by unofficial registers such as *The Australian Paedophile and Sex Offender Index*, we need to ask how effective these efforts are in achieving the goal of prevention. The book only lists those offenders whose names were not suppressed by the courts and while steps were taken to check court records to the highest appellate level to establish the final decision of the courts in relation to conviction and sentence, there still remain questions of completeness and accuracy. There are also individuals included who are unnamed due to the unavailability of appeal details, but they are still identified by age, occupation and location. There are serious implications of such limited information for

both the community and for individuals. Where, for example, an entry lists a particular offence by, say, a taxi driver, aged 45 who lives in suburb X, this could lead to community paranoia and stereotyping of particular occupations. There is also the potential for mistaken identity, particularly where there are several people with the same or similar names living in the same geographic area.

Other concerns are that the effect of such publication may be to force paedophiles underground, to change their identities and their location. Such publications could be also used by paedophiles themselves as a source of contacts, thereby facilitating the very thing it is trying to prevent. Another danger is that approaches such as these can encourage a vigilante mentality and action, encouraging members of the community to take the law into their own hands. It is not enough to assume as the author does that the community will act responsibly with this information and draw appropriate conclusions. History, regrettably, suggests otherwise.

These community approaches also raise questions of “where to from here?” How long before we see other books appear which seek to publicly identify other classes of people who may be perceived to pose a threat such as drug addicts, bankrupts, murderers, thieves or homosexuals? Some of these classes may not have committed any unlawful activity.

A Preferred Approach

Privacy advocates agree that information about the conviction history of sex offenders is relevant in minimising the risk of child abuse, and is important in making assessments about the risk posed by certain individuals to children. Yet I caution about the dangers of accepting approaches which do not take into account *all* the interests involved.

It is generally better to let such a sensitive balance to be struck by the authorities after careful thought. There is clearly a need for appropriate tracking of persons who have been convicted of offences against children and this will necessarily involve some form of register. Translating this to a scheme that is workable and fair is a difficult challenge. The development of official registers will give an opportunity for resolving some of the issues to do with specific

definitions, assuring the currency of information, and ensuring that those who have access do so only on the basis of a need to know, where the information is relevant to the specific circumstance.

Official Registers

Currently there are moves underway to implement a national register of suspected and convicted paedophiles. This register is being developed by the Australian Bureau of Criminal Intelligence following in-principle approval from Australasian Police Ministers Council last year. While I have argued against the emergence of unofficial registers and support the handling of information about these offences by institutions which are accountable, I note that official registers are still not free from concern. The notion of a register of allegations is of particular concern given that it opens the door for decisions to be made based on unsubstantiated claims. I understand that a threshold approach is being considered by the ABCI to ensure that information of this kind is only released where it meets criteria which strongly points to the a propensity to offend. I have been given to understand too that appeals mechanisms will be put in place giving individuals rights to challenge their inclusion in a register.

Conclusion

There are difficult issues to be resolved in relation to official registers of sexual offenders, but at least a thoughtful approach such as that currently being taken to the proposal for a national index should ensure appropriate use of information with consideration for all interests. The result should be the aim we all share — the more effective protection of children.