Legislative mechanisms for regulating the conduct of persons convicted of child sexual offences post-incarceration

This paper propose a critical analysis of a small group of legislative mechanisms designed to monitor child sexual offenders post-incarceration, namely, the *Child Protection (Offender Reporting) Act 2004* (Qld), the *Child Protection (Offender Prohibition Order) Act 2008* (Qld), the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) and California's Megan's Law. The focus of this paper will be on considering whether any of these mechanisms offend accepted principles of human rights and civil liberties to which all free citizens, including ex-offenders, should be entitled.

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Abstract

Offences against children ignite strong emotions within the community, especially when child sexual offenders are released from incarceration. In some jurisdictions, these ex-offenders face the burden of legislative schemes which continue to regulate them post-incarceration. Examples of such schemes to be considered in this paper include the regulatory schemes established by the *Child Protection (Offender Reporting) Act 2004* (Qld), the *Child Protection (Offender Prohibition Order) Act 2008* (Qld), the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) and California's Megan's Law. Protection of the community is often a paramount consideration and for this very purpose, child sexual offender conduct is monitored post-incarceration.

From regular reporting requirements, prohibitions on conduct including where an offender can visit or work, the potential for ex-offenders to be further detained once their criminal sentence has been completed and potential lifetime public registration should a child sexual offender fall within the scope of the Californian version of Megan's Law, regulation of child sexual offenders is in place. Although these mechanisms are enacted with the aim of community protection in mind, the following paper will outline the inherent balance between the need for community protection and the need of ex-offenders to retain human and civil rights post incarceration to determine if any of the above mentioned forms of regulation are in fact, objectionable.

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Introduction

Sexual offences against children ignite strong emotions within the community. Upon their release, the community often fears offender recidivism; and ex-offenders themselves may experience infringements on their privacy, harassment and threatened/actual violence when released from incarceration. Despite the lack of compelling scientific evidence concerning the propensity of child sexual offender recidivism, legislators are of the view that community protection from potential recidivism is a compelling consideration that requires legislative action. With this in mind, various legislative schemes have been developed to regulate child sexual offenders post-incarceration. This paper will undertake an analysis of a small sample of these schemes. The focus of this paper will be on considering whether these schemes strike an appropriate balance between a legitimate concern to ensure adequate protection of the community from re-offending by persons convicted of child sexual offences and an equally legitimate concern for the human rights and civil liberties of ex-offenders.

The paper will discuss four regulatory schemes. Firstly, the paper will discuss the ways in which child sexual offenders are regulated firstly under the *Child Protection (Offender Reporting) Act 2004* (Qld) (CPORA), with information stored on the Australian National Child Offender Registry (ANCOR), and secondly under the *Child Protection (Offender Prohibition Order) Act 2008* (Qld) (CPOPOA). If they fall within the scope of these Acts, child sexual offenders post-incarceration, may be required to adhere to either regular reporting requirements under the CPORA or to prohibition orders under the CPOPOA which proscribe, for this particular group of ex-offenders, a range of behaviours which are not, of themselves, unlawful. These Acts both affect prisoners who have served their period of incarceration; therefore, they have an impact on persons who would otherwise be deemed free citizens. Thirdly, the paper will discuss the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) (DPSOA). The DPSOA allows for either the continued detention or supervised release of child sex offenders if the offender in question is deemed to pose a serious danger to the community in the event that he/she is released. An order for continued detention or supervised release under the DPSOA can be made when a person convicted of a child sexual offence, despite having served their period of incarceration, is considered still to pose such a risk to the community of re-offending that they ought not to be

released at all, or only released conditionally. As with the CPORA and the CPOPOA, the DPSOA applies to ex-offenders who, having served their full sentence, are entitled to be released as free citizens. Lastly, this paper will discuss the regulation of child sexual offenders post-incarceration under 'Megan's Law.' Following the 1994 abduction, rape and murder of seven Megan Kanka, by a previously convicted child sexual offender living in her neighbourhood, laws allowing the creation of publically accessible registers of information about persons convicted of child sexual offences post-incarceration were passed in a number of American jurisdictions. Focusing specifically on California's version of Megan's Law, this paper will outline who the Act applies to, the nature of information about these persons which may be recorded and the period of time for which such persons must remain recorded on the register. As with the three previously mentioned regulatory schemes, California's Megan's Law applies to ex-offenders who have served their sentence and should therefore be properly understood as free citizens. In considering each of these three regulatory mechanisms, the focus of this paper will be on assessing whether these schemes ought properly be considered to offend against the civil liberties and human rights to which all persons, including those convicted of child sexual offences who have served their sentences, should be entitled.

1. Regulating child sexual offenders post-incarceration under the *Child Protection (Offender Reporting) Act 2004* (Qld) and the Australian National Child Offender Registry (ANCOR)

In Australia, there are no mandatory public registration laws that require child sex offenders to become publically identified post-incarceration.[1] Child sex offenders post-incarceration are, nevertheless, regulated by other mechanisms.

Over the years, considerable effort has been expended in Australia in determining how best to manage offenders who have, in the past, been convicted of serious violent and/or sexual offences

[1] Australian Institute of Criminology, 'Is Notification of Sex Offenders in Local Communities Effective?', (June 2007) *Alcrime Reduction Matters No.58,* Australian Government, Canberra.

against children.[2] In July 2003, all Australian States and Territories supported the development of nationally consistent legislation[3] and in Queensland, this resulted in the passing of the *Child Protection (Offender Reporting) Act 2004* (Qld) (the CPORA). The CPORA allows the Supreme court to order offenders to report certain specified information about themselves to police authorities after their release from prison to keep police informed of the whereabouts of those who have committed sexual and/or violent offences against children. Information obtained under the CPORA is stored on the Australian National Child Offender Registry (ANCOR).

ANCOR is a web-based system designed to assist police nation-wide to register, case-manage and share mandatory information about, those child sexual offenders required, post-incarceration, to register under the CPORA.[4] ANCOR records information obtained by police authorities under the reporting requirements of the CPORA and stores such information on a database for access by police authorities nationwide. Information contained on ANCOR is not publically accessible.[5] Indeed, the CPORA even prohibits the release of information contained on ANCOR via freedom of information applications.[6] The legislative intention is for information stored on ANCOR to be used only for law enforcement purposes and to be accessible only by persons specifically authorised by the Commissioner of Police.

The CPORA requires 'reportable offenders'[7] to report to police authorities specified personal details.[8] A 'reportable offender' is a person who has committed either a class 1 or class 2 offence.[9] For the most part, convicted child sexual offenders who can be subject to the reporting requirements under the CPORA will have committed a class 1 offence, which will include offences of unlawful sodomy, unlawful carnal knowledge of a child under 16, maintaining a

[2] Queensland Government, *Child Protection Offender Register* (2005), Queensland Police, retrieved from <http://www.police.qld.gov.au/Resources/Internet/programs/personalSafety/documents/A4Flyer.pdf> 12th December, 2010.
[3] Ibid.
[4] Australian Institute of Criminology, above n 1.
[5] Queensland Government above n 2.
[6] Ibid.
[7] Reportable offenders are referred to as those who have committed a 'reportable offence' as per the CPORA.
[8] *Child Protection (Offender Reporting) Act 2004* (Qld); s. 3(2).
[9] A class 1 offence involves offences against certain provisions of the Criminal Code (Qld) pertaining to sexual misconduct or treatment of children. Such offences may include rape, unlawful sodomy and incest. A class 2 offence includes offences of a less serious nature than Class 1 offences and may include, for example, attempted rape, attempted unlawful sodomy and attempted incest. *Child Protection (Offender Reporting) Act 2004* (Qld); s.9, Schedule 1 and 2.

sexual relationship with a child, rape, attempted rape and other unlawful acts prohibited by the *Criminal Code Act 1899* (Qld).[10]

Under the CPORA, child sexual offenders to whom the CPORA applies are required to report to police authorities, initially within 28 days of being released from incarceration or released on parole.[11] Under section 16 of the CPORA personal details, including the following, must be reported to police authorities:

a) the offender's name, alias and/or names previously/currently known by;
b) the period the offender was known by each of these names;
c) the offender's date of birth;
d) the address of each of the premises at which the offender resides whether permanently or temporarily;
e) the names of the localities in which the offender can be found;
f) the names and ages of children who generally reside in the same household as that in which the offender generally resides, or with whom the offender has regular unsupervised contact;
g) details of the offender's affiliation with any club/organisation that has child membership or child participation in its activities;
h) the make/model/colour/registration number of any motor vehicle owned or driven by the offender;
i) details of any tattoos or permanent distinguishing marks that the offender currently/previously had;
j) whether the offender has ever been found guilty in any foreign jurisdiction of a reportable offence;
k) details of any travel to be undertaken, whether interstate or internationally; and

[10] *Child Protection (Offender Reporting) Act 2004* (Qld); Schedule 1 and 2.
[11] *Child Protection (Offender Reporting) Act 2004* (Qld); s.14. The CPORA applies both to individuals who are on parole and individuals who have served the totality of their sentence. Because it is only this latter group who can make the claim that they are, in fact, free citizens, entitled to the same rights and liberties as any other citizen, it is only this latter group which is the concern of this essay.

l) if the offender is employed, the nature of employment, name of employer, address of employment.[12]

As evidenced by the above, offender reporting orders can require quite extensive reporting. The length of the reporting period varies from 8 years (if the ex-offender has been convicted of a single class 2 offence) to 15 years (if the ex-offender has been found guilty of a class 1 offence). If the ex-offender has been convicted of a reportable offence committed whilst under reporting requirements they may be required to report for the remainder of their life.[13] The reported information is to be kept current, with any changes relating to the above reporting factors having to be reported within 14 days of such change.[14] The stated rationale behind this reporting system is that it keeps police informed of the current whereabouts and other personal details of previously convicted child sexual offenders to facilitate the investigation and prosecution of any future offences that they may commit.[15] Any failure to comply with the above reporting requirements can result in fines or a maximum of two years additional imprisonment if the failure to comply is without good reason.[16]

1.1- What are the effects, if any, of this Act or the associated ANCOR on child sexual offenders post-incarceration?

According to Judy Spence, Minister for Queensland Police and Corrective Services, "the protection of our children is paramount and we [the Queensland Government] will continue to do everything we can to ensure their safety from predators."[17] It is because of the paramount consideration of community protection, particularly children, from the potential harms of previously convicted child sexual offenders, that legislation such as the

[12] *Child Protection (Offender Reporting) Act 2004* (Qld); s.16.
[13] *Child Protection (Offender Reporting) Act 2004* (Qld); s.36(1).
[14] *Child Protection (Offender Reporting) Act 2004* (Qld); s.19
[15] *Child Protection (Offender Reporting) Act 2004* (Qld); s.3(1).
[16] *Child Protection (Offender Reporting) Act 2004* (Qld); s.38. (Also, in the years 2005-2007, approximately 146 offenders were found to have failed to report required information under their reporting orders, resulting in12 of these persons being sent back to prison for periods of up to six months and in over $88,080 being issued in fines. See Queensland Government media release, 'Government Tough on Sex Offenders: Spence', September 18 2007).
[17] Ibid.

CPORA, and the associated ANCOR, are asserted to be justified. The CPORA and ANCOR do however place an additional burden, in the form of regular reporting requirements, on child sex offenders post-incarceration. This burden is in addition to the sentence already served by such offenders, and is imposed on individuals who, apart from the CPORA, would be free citizens entitled to the same rights and obligations as any other citizen. So how, then, are the CPORA and the associated ANCOR justifiable?

The answer to this is found in the balancing of two competing interests. On one hand is the need to protect the community from the potential harm of previously convicted child sexual offenders, and on the other is the need to uphold the human rights and civil liberties to which child sexual offenders are entitled, now that their incarceration period is completed and they are, in essence, free citizens indistinguishable from anyone else. The imposition of reporting burdens on offenders post-incarceration could be seen as infringing, to some degree, on the fundamental maxim of the law that a person may not be punished twice for the same crime.[18] The imposition of an 8 year or 15 year or even life-long reporting requirement on previously convicted child sexual offenders could be perceived as double punishment, because of the burden this places on otherwise free citizens. In this sense, the offender has served his/her prison time for the original crime committed but, nevertheless, faces the additional burden of reporting specified personal information after his/her incarceration has ended.

According to Jeremy Bentham, a classical utilitarian, punishment "ought only be admitted in as far as it promises to exclude some greater evil".[19] In this sense, it could be seen that Bentham would support the onerous reporting obligations on child sexual offenders post-incarceration only if they worked effectively to exclude some greater evil, that being the possibility of recidivism. The empirical assumption behind the reporting requirements provided for under the CPORA is that they, in fact, work proactively to deter the re-occurrence of child sexual offences. A related assumption – that reporting requirements in

[18] Keyzer, P and Blay, S, *Double Punishment Under Queensland Law*, (2006), International Society for the Reform of Criminal Law, retrieved from <www.isrcl.org/Papers/2006/Keyzer%20&%20Blay.pdf> 10th December 2010.
[19] Bentham, J (2005) 'The Rationale of Punishment', Elibron Classics Series, p.23.

fact enhance law–enforcement activities, both in Queensland and nationally – is evidenced in Catryna Bilyk's assertion that ANCOR makes it easier for police across the nation to keep track offenders.[20]

In response to the above assumption that the reporting requirements are a necessary step to proactively deter sex offender recidivism, research indicates that the recidivism rate of child sexual offenders is actually quite low in comparison to other forms of crime.[21] In a major American study published in the early 1990's, research indicated that of all the persons convicted across 11 American prisons, the recidivism rate for rape, whether committed against an adult or child, was 7.7%.[22] In a clear contrast to this, across the same prison population, the recidivism rate for burglary and drug offences were 31.9% and 21.8%.[23] This study was supported in 2002 with similar findings that of 9691 men released from 15 state prisons across America, only 3.5% of these were reconvicted for a child related sexual offence.[24] The second assumption by Catryna Bilyk, that the CPORA and ANCOR enhance law enforcement activities, is also criticised. It is argued that ex-offenders, being entitled to the same rights as ordinary citizens now that they are free citizens, should not be further scrutinized post-incarceration. In support of this, as mentioned above, child sex offenders have one of the lowest rates of recidivism in comparison to other crimes. Therefore it is suggested that perhaps monitoring efforts should be more focused on crimes with higher recidivism, such as burglary and drug offences.

Ultimately, the CPORA and associated ANCOR is a tool that effectively allows for the regulation and potential reporting onus on otherwise free citizens following their release from prison. The CPORA is founded on the incorrect assumption that child sex offenders

[20] Open Australia, *Topic: Crimes Legislation Amendment (Sexual Offences Against Children) Act 2010*, Senate Debates, Wednesday 12th May 2010, retrieved from <http://www.openaustralia.org/senate/?id=2010-05-12.63.1> 4th December, 2010.
[21] Simon, L. (2000) 'An Examination of the Assumptions of Specialisation, Mental Disorder and Dangerousness of Sex Offenders', Journal of Behavioural Science, Vol 1 number 25 at 275-308.
[22] Bureau of Justice Statistics (1989) 'Special Report: Recidivism of Released Prisoners', Office of Justice Programs, retrieved from <http://bjs.ojp.usdoj.gov/> 12th December, 2010.
[23] Ibid.
[24] Langen, P. *Sex Offender Recidivism* (2003) ', retrieved from Bureau of Statistics, Office of Justice Programs, <http://ojp.usdoj.gov/bjs/pub/pdf/rsorp.94.pdf> 12th December, 2010.

are highly likely to reoffend post-incarceration and is framed on the premise of proactive deterrence. As evidenced above however, recidivism rates for child sexual offenders is low in comparison to other forms of crime, and for this very reason, the regulation of ex-offenders under the CPORA is objectionable.

2. Regulating child sexual offenders post-incarceration under the *Child Protection (Offender Prohibition Order) Act 2008* (Qld)

In 2008 the *Child Protection (Offender Prohibition Order) Act 2008* (Qld) (CPOPOA) was introduced. The CPOPOA is intended to provide for the protection of the lives and sexual safety of children.[25] Generally speaking, the CPOPOA achieves its purpose by providing for the making of orders prohibiting particular sexual offenders ('relevant sexual offenders' as defined in the CPOPOA) from engaging in conduct (specifically 'concerning conduct' as defined in the CPOPOA) which poses a risk to the lives or sexual safety of children after they are released from prison.[26]

Under section 6 of the CPOPOA, the police Commissioner may apply to a Supreme court for an offender prohibition order in relation to a person if the Commissioner believes, on reasonable grounds, that the person is a 'relevant sexual offender' and has recently engaged in 'concerning conduct.'[27] 'Relevant sexual offender' refers to any person who has been previously convicted of and sentenced for 'reportable offences', namely, either a class 1 or class 2 offence.[28] 'Concerning conduct' is conduct that poses a risk to lives or sexual safety of one or more children or of children generally.[29] Examples of such conduct, as set out in the CPOPOA, include loitering at or near a park fitted with playground equipment regularly used by children, seeking employment or volunteer work that will involve coming into contact with children, residing near a child care centre or residing or boarding in a household with children under 16 years.[30]

[25] *Child Protection (Offender Prohibition Order) Act 2008* (Qld).
[26] *Child Protection (Offender Prohibition Order) Act 2008* (Qld); s.3(2).
[27] *Child Protection (Offender Prohibition Order) Act 2008* (Qld); s.6.
[28] These offences include any acts of unlawful sodomy, unlawful carnal knowledge of a child under 16, maintaining a sexual relationship with a child, rape, attempted rape and other unlawful acts prohibited by the *Criminal Code Act 1899* (Qld)- *Child Protection (Offender Reporting) Act 2004* (Qld); s.9, Schedule 1 and 2.
[29] *Child Protection (Offender Prohibition Order) Act 2008* (Qld); s.6(3).
[30] *Child Protection (Offender Prohibition Order) Act 2008* (Qld); s.6(3).

Once a relevant sexual offender has been found to have engaged in concerning conduct, the court may order that that person become subject to an offender prohibition order (an order) under the CPOPOA. In deciding whether to make such an order, the court may take several factors into consideration.[31] Importantly, it is not necessary for the court to be able to identify a risk to a particular child, particular children, of a particular class of child before imposing an offender prohibition order.

2.1- What does a prohibition order prohibit?

Prohibition orders prohibit particular conduct of 'relevant sexual offenders' who have recently engaged in 'concerning conduct.' Such an order might prohibit an ex-offender from:

a) associating or having contact with certain people (such as other 'relevant sexual offenders');
b) being at stated locations between certain times (for example, being within 200 meters of a school between 7 am and 7 pm on school days);
c) residing in particular places (for example, residing within 200 meters of a child care centre or residing with children under 16);
d) engaging in particular behaviour (for example, taking photographs of children whilst at the beach) ; and
e) being engaged in particular types of employment (for example, door to door sales or work in a school cafeteria).[32]

The court is not constrained by the limitations on an ex-offender's conduct stipulated in the CPOPOA and can order any additional prohibitions that the court sees fit in the circumstances,[33]

[31] Such factors may include the seriousness of the ex-offender's reportable offence against a child, the period since the reportable offence was committed, the age of the ex-offender and victim at time offence was committed, the difference in age between the ex-offender and victim of the offence, the ex-offender's present age, the seriousness of the ex-offender's criminal history, the effect of the order sought on the ex-offender in comparison with the level of risk of the ex-offender committing a reportable offence against a child, and any other factor. An example of 'any other factor' is the consideration of the respondent's reintegration into the community. (See *Child Protection (Offender Prohibition Order) Act 2008* (Qld); s.9).
[32] *Child Protection (Offender Prohibition Order) Act 2008* (Qld); s. 11(1).
[33] *Child Protection (Offender Prohibition Order) Act 2008* (Qld); s. 11(2).

including prohibiting a relevant sexual offender from being in a certain place even if he/she has a right to be there.[34] A prohibition order remains effective for a period of 5 years for an adult ex-offender.[35] Breaches of a prohibition order can result in a maximum of two years punishment if there is no reasonable excuse for the breach.[36]

2.2- What are the effects, if any, of the CPOPOA on child sex offenders post-incarceration?

The CPOPOA effectively prohibits ex-offenders from going to, working in or residing in certain places; even places in which they have a lawful right to be, post-incarceration. The CPOPOA, although aiming to promote community protection, can impose significant restrictions on child sexual offenders post-incarceration. Whether or not the CPOPOA could be seen as infringing on the 'legal maxim that no one be punished twice for the same offence' depends on whether these prohibitions constitute double punishment.[37]

The CPOPOA affects persons who have completed their imprisonment and who are, in fact, free citizens. The CPOPOA specifically prohibits ex-offenders from physically going to, working in or residing in certain places, regardless of their lawful right to be there.[38] In effect, if a previously convicted child sexual offender (relevant offender) has served his/her prison sentence and is then found to be visiting a playground, working at a place where children may attend and/or living with a child under 16 years (concerning conduct), then that offender could be made the subject of a prohibition order under the CPOPOA. The CPOPOA is therefore triggered by conduct that is not, in itself, criminal, imposing what could be seen as additional punishment on ex-offenders who should be entitled to their full rights as free citizens.

As a party to the *International Covenant on Civil and Political Rights 1966* (ICCPR), Australia has committed itself to comply with ICCPR provisions and to give effect to treaty obligations in

[34] *Child Protection (Offender Prohibition Order) Act 2008* (Qld); s. 11(3).
[35] These orders can be extended on application by the Commissioner before the expiry of the first order. *Child Protection (Offender Prohibition Order) Act 2008* (Qld); s.12(1) and (3).
[36] Reasonable excuses for a breach of an order may include, for example, that the offender was not present in court when the order was placed, was not aware of its existence or terms and was not informed by police of its existence and terms- *Child Protection (Offender Prohibition Order) Act 2008* (Qld); s.38.
[37] Keyzer and Blay above n 18.
[38] *Child Protection (Offender Prohibition Order) Act 2008* (Qld); s.11(1).

domestic law.[39] Such provisions of the ICCPR include the right to be free from cruel and unusual punishment.[40] What exactly constitutes 'cruel and unusual' punishment has been the subject of much international debate, with no precise international definition being offered by the ICCPR itself. Cruel and unusual punishment could, however, be defined as the imposition of a punitive measure that is grossly disproportionate to the crime committed, and as involving irrational harshness and/or degrading treatment.[41]

Prohibition orders under the CPOPOA validly fall within the scope of cruel and unusual punishment as defined above for several reasons. Prohibition orders are a punitive measure that impact on otherwise free citizens. This satisfies the element of proportionality as persons subject to prohibition orders have already served their periods of imprisonment for their crimes committed. Prohibition orders are irrationally harsh, not only because of the previously mentioned factor, but because these orders prohibit otherwise lawful conduct. Prohibition orders inflict degrading treatment on ex-offenders because they prohibit, for up to 5 years post-incarceration, lawful conduct of persons who have served their terms of imprisonment and who should be 'free'. The CPOPOA can be defined as a punitive measure that goes beyond the original punishment of incarceration that these ex-offenders have already endured. It is therefore the opinion of this paper that the CPOPOA is in breach of the ICCPR as it allows for the violation of established human rights norms articulated in the ICCPR.

3. Regulating child sexual offenders under the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld).

In 2003, the Queensland Parliament enacted the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) (DPSOA) which was assented to on the 6th June 2003.[42] The DPSOA provides for either the continued detention or supervised release[43] of particular prisoners to both ensure

[39] Australian Human Rights Commission, 'Australia's Human Rights Obligations', 13 May 2004, <http://www.hreoc.gov.au/human_rights/children_detention_report/report/chap04.htm> (August 14th 2010); at 4.2.
[40] *International Covenant on Civil and Political Rights*, opened for signature 16th December 1966, General Assembly resolution 2200A (XXI), (entered into force 23rd March 1976); Article 7 and 12.
[41] Wittes, B. *What is Cruel and Unusual?* (2006), Policy review No. 134; p.7, retrieved from < http://homepages.gac.edu/~arosenth/395/Wittes_Cruel_and_Unusual.pdf> 11th December 2010.
[42] *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld).
[43] *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld); s.13(5).

adequate community protection and provide for the continued control, care or treatment of these prisoners to facilitate their rehabilitation.[44] Under the DPSOA, the Attorney-General (AG) may apply to the Supreme court for an order, specifically, either a continued detention or supervised release order, in relation to a prisoner[45] serving the last six months of their period of imprisonment.[46]

The threshold for an order made under the DPSOA is whether or not the court is satisfied by cogent evidence to a high degree of probability that the prisoner is a serious danger to the community; with the onus being on the A-G to prove this.[47] A finding of serious danger to the community means that there would be an unacceptable risk that the prisoner would commit a serious sexual offence if released from custody or released from custody without a supervision order in place.[48] In order to determine 'serious danger', the court can have regard to various factors;[49] however, the overall paramount consideration of the court is the need to ensure adequate protection of the community.[50]

If a continued detention order is imposed, it commences at the end of the prisoner's imprisonment period and continues until rescinded by the court.[51] These orders can be reviewed annually and at yearly intervals after each review.[52] A supervision order also commences at the end of the prisoner's imprisonment period but only continues for the period stated in the order unless amended, as necessary or desirable, for any reason, including for community protection.[53] Supervision orders impose conditions that the prisoner must adhere to when released from incarceration. Such conditions may include regularly reporting to a Queensland Corrective

[44] *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld); s.3.
[45] In this context, 'prisoner' means a prisoner detained in custody who is serving a period of imprisonment for a serious sexual offence; being a sexual offence involving violence or committed against a child. See *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld); s.6 and Schedule.
[46] *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld); s.5(2).
[47] *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld); s.13(3).
[48] *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld); s.13(2).
[49] Such factors can include consideration of psychiatric evidence, propensity evidence, the ex-offender's cooperation in rehabilitation programs and the perceived risk of the ex-offender committing another serious sexual offence if released back into the community, or released without a supervision order in place. See *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld); s. 13(4).
[50] *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld); s.13(6).
[51] *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld); s.14(1).
[52] *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld); s. 27.
[53] *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld); s.19.

Services (QCS) officer, receiving random visits from a QCS officer, having to regularly update any change of name, address, employment or residence at least 2 days prior to any change occurring, restrictions on leaving or staying outside Queensland without permission from a QCS officer or 'any other order'[54] the court sees fit to ensure community protection.[55] If the prisoner contravenes, or is likely to contravene, a supervision order whilst it is active, police or correctional services officers may apply to the Magistrate's Court for a summons or warrant, and if the prisoner is determined to be in contravention of a supervision order, a continued detention order may be ordered by the Supreme Court to be effective until the completion of the period of time stipulated in the continued detention order or until the time at which the supervision order would have expired.[56] A breach of a supervision order can result, therefore, in an ex-offender becoming, once again, a prisoner.[57]

3.1- What then are the effects, if any, of the DPSOA on child sexual offenders post incarceration?

Because of the introduction of post-sentence 'protective' orders under the DPSOA, Queensland judges are now faced with a new style of decision-making that confronts the traditional understanding that a person cannot be imprisoned unless he/she has been found guilty of an offence according to law.[58] In essence, the DPSOA asks judges to consider community protection as paramount and potentially allows for the indefinite detention of persons who would have otherwise finished their terms of imprisonment "based entirely on their likelihood of future offending".[59]

The ultimate purpose of the DPSOA is asserted to be the protection of the community with the rehabilitation of the offender being a secondary purpose.[60] The DPSOA does not expressly

[54] Specifically offered as an example of 'any other order' by the DPSOA, is the potential for additional restrictions such as a prohibition on being within 200m of a school or on knowingly residing with a convicted child sex offender. See *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld); s.16(2).
[55] *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld); s.16(1).
[56] *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld); s.20.
[57] *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld); s.14(2).
[58] Smith, G. (2008) 'Post Sentence Protection Legislation', Deakin Law Review, Vol 13 No 1, 131-179; p.134.
[59] Ibid.
[60] *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld); s.13(6) and s.3(b).

require that the interests of offenders be taken into consideration at any time during the proceedings.[61] Before an order is imposed, the offender in question must be proven by cogent evidence to a high degree of probability to pose a serious danger to the community; should the court be satisfied that there are reasonable grounds for believing the prisoner poses such a danger, it may make a risk assessment order.[62] Such an order authorises the examination of the prisoner by two psychiatrists,[63] and each must submit a report indicating their "assessment of the level of risk that the prisoner will commit another serious sexual offence – i) if released from custody or ii) if released from custody without a supervision order being made"[64] and stating the psychiatrist's reasoning.[65]

The DPSOA controversially assumes that psychiatrists have the ability to predict the likelihood of future offending. In *Fardon v Attorney-General*, which considered the constitutionality of the DPSOA, Gleeson CJ dismissed concerns over the accuracy of this assumption, stating, 'No doubt, predictions of future danger may be unreliable, but as the case in *Veen* shows, they may also be right'.[66] Kirby J however, used the DPSOA's dependence upon such 'notoriously unreliable'[67] predictions of criminal dangerousness as a basis for holding that the "DPSOA requires the court to perform a function repugnant to the judicial process".[68] According to Kirby J, the prediction of future behaviours is reminiscent of laws passed by the Nazi Government in which the estimated character of a person was punished rather than the proven facts of a crime.[69] In a statement which echoes Kirby J's skepticism about the reliability of psychiatric assessments of the risk of re-offending, Murdo J in the case of *Attorney General for the State of Queensland v Sutherland*[70] stated that:

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[61] Smith above n 58 at p.139.
[62] *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld); s.8(2)(a)
[63] *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld); s.9.
[64] *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld); s.11(2)(a)
[65] *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld); s.11(2)(b)
[66] *Fardon v Attorney-General* (Qld) (2004) 223 CLR 575, at 589.
[67] *Fardon v Attorney-General* (Qld) (2004) 223 CLR 575 at 639.
[68] Smith, G above n 58 at p.140.
[69] *Fardon v Attorney General* (Qld) (2004) 210 CLR 50 as per Kirby J, as cited in O'Leary, J.,'Understanding the Dennis Ferguson Debate: Part 2', (2009) The National Legal Eagle, Berkeley Electronic Press, Volume 15, Issue 2; p. 4.
[70] *Attorney General for the State of Queensland v Sutherland* [2006] QSC at 30.

> the assessment of what level of risk is unacceptable, or alternatively put, what order is necessary to ensure adequate protection of the community, is not a matter for psychiatric opinion. It is a matter for judicial determination, requiring a value judgment as to what risk should be accepted against the serious alternative of the deprivation of a person's liberty.[71]

Whether or not the imposition of a continued detention or supervision order constitutes 'double punishment' will depend on whether DPSOA orders are in fact punitive. The proper characterization of the orders permitted by the DPSOA came under question in the case of *Fardon v Attorney-General*[72] which was a challenge to the DPSOA's constitutional validity. In this case, although Gleeson J acknowledged that the DPSOA raises "substantial questions of civil liberty,"[73] he nevertheless formulated the majority judgment, which argued that the object of the DPSOA was to protect the community not to punish the prisoner.[74] Because the purpose of a continuing detention order under the DPSOA was 'protective' and not 'punitive' the DPSOA did not, in the view of the majority, confer upon the Supreme Court a power that was inconsistent with the exercise of Federal judicial power under Chapter III of the Constitution. Kirby J, in his dissenting judgment pointed out what he took to be an obvious flaw in the majority's reasoning on whether continuing detention under the DPSOA is, in fact, punitive and asked whether Australians have 'debased liberty so far that deprivation of liberty, for yearly intervals, confined in a prison cell, is now regarded as immaterial or insignificant.'[75] It is the view of this paper, consistent with Kirby J's dissent, that the DPSOA is deeply problematic from a human rights perspective. It is disingenuous to describe a continuing detention order as anything other than punitive, and it therefore follows that the DPSOA amounts to a system of double punishment and is objectionable.

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[71] *Attorney General for the State of Queensland v Sutherland* [2006] QSC at 30 (Unreported, McMurdo J, 27 September 2006).
[72] Fardon v Attorney-General (Qld) (2004) 223 CLR 575.
[73] Fardon v Attorney-General (Qld) (2004) 223 CLR 575 at 586.
[74] Fardon v Attorney-General (Qld) (2004) 223 CLR 575 at 596-597 (McHugh J); 694 (Callinan & Heydon JJ).
[75] Fardon v Attorney-General (Qld) (2004) 223 CLR 575 at 596-597 (McHugh J); 653-655 (Callinan & Heydon JJ).

4. Regulating child sexual offenders post-incarceration under California's version of Megan's Law

In 1994, Megan Kanka, a 7 year old living in New Jersey, was abducted, sexually assaulted and murdered.[76] Unbeknownst to Megan and her family, the perpetrator, a man living in her neighbourhood, had been previously convicted of a sexual offence against a child.[77] In reaction to this, in 1996, the United States Congress adopted 'Megan's Law'.[78] This law amended US Federal Law, namely the *Violent Crime Control and Law Enforcement Act 1994* (VCCLEA), to require the release of information about the identity of sex offenders to the public with the aim of protecting the public from 'sexually violent predators'.[79] Although schemes of this nature do not currently operate in Australia, considering the potential impacts on ex-child sexual offenders of the regulatory schemes outlined above, it is not farfetched to contemplate the adoption of such a scheme in Australia.[80] Therefore, it is useful, even in an Australian context, to give consideration to the regulatory schemes enabled by Megan's Law.

Under Megan's Law, section 170101(d) of VCCLEA was amended to allow for the release of certain information regarding 'violent sexual predators' to the public[81] and for the creation of State Registration Programs that record, in a publically accessible way, information about 'violent sexual predators' which, according to the laws of that State, may be recorded.[82] Under this amendment to the VCCLEA, a person who is convicted of either a criminal offence against a

[76] United States Congress, H.R.5138, 111th Congress, 2nd session, House of Representatives 26th April, 2010; section 2(a).
[77] United States Congress, H.R.5138, 111th Congress, 2nd session, House of Representatives 26th April, 2010; section 2(a).
[78] United States Congress, H.R.5138, 111th Congress, 2nd session, House of Representatives 26th April, 2010; section 2(a).
[79] Violent Crime Control and Law Enforcement Act 1994, United States Congress; s.170101(3) – sexually violent offenders meaning any criminal offence involving sexual violence and/or against children.
[80] Indeed certain community-based lobby groups have made just such a suggestion; see for example Movement Against Kindred Offenders and Bravehearts. See Mako at http://www.mako.org.au/temp_act.html and Bravehearts at Bravehearts Inc., '*Community Notification of Sex Offenders: Protecting Children Through Prevention and Therapy*' (2006) retrieved from < http://www.bravehearts.org.au/docs/pos_paper_community_notification.pdf> (19th October 2010).
[81] Identity of victims not to be disclosed under this Act.
[82] United States Congress, H.R.3355, 103rd Congress; section 170101(d)(3).

victim who is a minor[83] or who is convicted of a sexually violent offence against a victim who is a minor[84] is required to register a current address with his/her State law enforcement agency.[85] Under the amendment to the VCCLEA, persons convicted of either of the above categories of offences are required to register with a State law enforcement agency, who then has a duty to pass this information on to the Federal Bureau of Investigation until a period of ten years has passed since the person was released from prison or placed on parole or on probation.[86]

Following the amendment to the VCCLEA, different American States began to develop their own versions of Megan's Law. Megan's Law therefore became a catch-all name used to refer to the various State Registration Programs enabled under the amended VCCLEA. For the purpose of this paper, and with the aim of clarity, this paper will focus only on the Californian system of Megan's Law and its effects, if any, on the civil liberties and human rights of child sexual offenders.

In California's version of Megan's Law, Assembly Bill number 1562 effectively amended section 290 of the California Penal Code to allow for the public registration of sexually violent predators. Subsequent to Assembly Bill 1562, section 290(2)(A) of the California Penal Code now requires sexually violent predators to register, for the rest of their life while residing in California, with:

a) the chief of police in the city in which he/she is domiciled; or
b) the sheriff of the county if in an unincorporated area; or
c) the chief of police of a campus if residing on any Californian University premises.[87]

[83] A criminal offence against a victim who is a minor means any criminal offence that consists of a) kidnapping of a minor; or b) false imprisonment of a minor; or c) criminal sexual conduct towards a minor; or d) solicitation of a minor to engage in sexual conduct; or e) use of a minor in sexual performance; or f) solicitation of a minor to engage in prostitution; or g) any other conduct that is by nature, a sexual offence against a minor. See United States Congress, H.R.3355, 103rd Congress; section (a)(3)(A)(i-vii).
[84] A sexually violent offence against a victim who is a minor refers to any criminal offence that consists of aggravated sexual abuse or assault defined under the United States Criminal Code 1878 section 2241 and 2242.
[85] United States Congress, H.R.3355, 103rd Congress; section 170101(a)(1)(A).
[86] United States Congress, H.R.3355, 103rd Congress; section (b)(6)(A).
[87] Californian Legislature, Assembly Bill 1562, February 24th 1995; section 1. Persons required to register under s 290(2)(A) must register within 14 days of coming into any city, county or university campus in which they temporarily reside or are domiciled. They are also required annually, within 10 days of their birthday, to update their registration details: Californian Legislature, Assembly Bill 1562, February 24th 1995; section 1.

Those persons required to register under section 290(2)(A) of the Californian Penal Code include any person who, since July 1, 1944, has been or is convicted in any court in the state of California of a violation, including:

a) kidnapping; (ss.207);[88] or
b) attempts to commit assaults of another with intent to commit rape, sodomy or oral copulation (s.220);[89] or
c) touching of an intimate part of another person, if the touching is against the will of the person touched, and is for the specific purpose of sexual arousal, sexual gratification, or sexual abuse (ss.243.4(1),(2),(3), (4) and (6));[90] or
d) rape involving the use of violence (s. 261 and 262);[91] or
e) attempts to encourage prostitution (s. 266 and 267);[92] or
f) any other lewd or lascivious act upon or with the body of a child who is under the age of 14 years.[93]

4.1- What then are the effects, if any, of Megan's Law on the child sexual offenders post-incarceration?

A consistent theme across the various schemes for the regulation of child sexual offenders post-incarceration mentioned so far, community protection is perceived by legislators to be a paramount consideration and seems to outweigh (or even make redundant) consideration of the human rights and civil liberties of child sexual offenders post-incarceration. Whether or not the public registration of ex-offenders under Megan's Law ought to be considered objectionable from a human rights and civil liberties perspective depends on whether public registration, in itself, is properly characterized as punishment. Megan's Law has been challenged in the US as

[88] *Californian Penal Code*; section 207.
[89] *Californian Penal Code*; section 220.
[90] *Californian Penal Code*; section 243.4.
[91] *Californian Penal Code*; section 261 and 262.
[92] *Californian Penal Code*; section 266 or 267.
[93] *Californian Penal Code*; section 288.

being unconstitutional in that it amounts to cruel and unusual punishment.[94] Under Megan's Law, the public notification requirement has been seen to amount to a form of cruel and unusual punishment because Megan's Law adds to the penalty already served by ex-offenders.[95]

According to the John Howard Society, an organisation taking its name directly from a man committed to protecting the humanity of prisoners, public registration of ex-offenders imposes further punitive sanctions against persons who have paid their debt to society; concluding that these laws could constitute cruel and unusual punishment.[96] Megan's Law has also been criticised on the basis that requiring an ex-offender to notify his neighbours of his record of convictions would 'ruin an ex-con's ability to return to a normal, private, law-abiding life in the community'[97] which seems to point to a concern that Megan's Law infringes on ex-offenders' rights to liberty and privacy.

Whether public registration amounts to invasion of privacy, cruel and unusual punishment and/or deprivation of liberty depends on the ease with which the public can obtain such information. The Californian Department of Justice (CDJ), in an attempt to simplify community access to Megan's Law information, initially developed the "900 Line", a telephone number that enables American citizens to call and request information on neighbours or other persons of concern to them.[98] If the caller states they are above the age of 18 (and there seems to be no serious effort to verify this independently) and can provide one characteristic of the specific ex-offender they are concerned about, then a CD-ROM will be sent to the caller containing the ex-offender's name, address, phone number, criminal history, accomplices, scars/tattoos, local places which he/she attends and date of birth.[99] If that wasn't convenient enough, the CDJ soon developed a Megan's

[94] Simpson, R. *Megans Law and Other Forms of Sex-Offender Registration,* NSW Parliamentary Library Research Service, Briefing Paper No 22/99, 1999; p.15. (also see *United States Constitution,* amendment VIII, ratified 15th December 1971).
[95] Ibid.
[96] John Howard Society, (1997) 'Community Notification Laws', John Howard Society of Alberta, retrieved from <http://www.johnhoward.ab.ca/pub/pdf/C19.pdf> 12th December; p.6.
[97] T Carlson, 'Thy neighbour's rap sheet: how do you know whether a killer lives next door?', 36 Policy Review, Spring 1995; p. 50.
[98] Violent Crime Information Centre, 'California's Megan's Law' July 2000, California Department of Justice <http://ag.ca.gov/megan/pdf/ca_megans.pdf> (10th August 2010) at p.8.
[99] Ibid.

Law website,[100] that made the process of obtaining information even easier. By simply clicking in a box to indicate that one is above 18 years of age, access to the website is automatically granted and upon typing in a postcode or suburb name, the same above information on ex-offenders contained in the CD-ROMs will present itself on the screen.

Information on the personal details of ex-offenders is therefore made easily accessible under Megan's Law. How this information is used by the public is the next critical question in determining if public registration equates to punishment of ex-offenders. According to Rachel Simpson, NSW Legislative Council Member, Megan's Law enables nothing but widespread vigilantism.[101] In a 1996 study of child sexual offenders released from incarceration in Washington, 3.5% of these persons reported experiencing harassment and threats following their release.[102] In support of this, Raul Meza, a convicted child sexual offender, was chased from six towns following his release from prison due to harassment he experienced.[103] Roger Bourgeois, convicted of similar offences as Raul, also recalls being awoken at night to the screams of community members "wishing he would die".[104] More locally, convicted Australian child sexual offender, Dennis Ferguson, was chased from his home in Ipswich by mobs of angry citizens and media following his release.[105] Ferguson required police assistance to return and be safely escorted inside his home and soon successfully filed for criminal victims' compensation because of the treatment he experienced on the day of his release.[106]

Following the definition previously mentioned in this paper, Megan's Law justifiably falls within the scope of cruel and unusual punishment and is argued to offend the civil liberties and human rights of ex-offenders. Megan's law is a harsh punitive measure that impacts on otherwise free citizens and subjects relevant persons to additional punishment (through public registration and exposure to vigilantism), invasions of liberty (through the release of personal factors relating to the individual and his/her crimes) and exposes them to potential vigilantism following their

[100] California Department of Justice, (2009) 'Megan's Law', retrieved from <http://www.meganslaw.ca.gov/> 8th December, 2010.
[101] Simpson, above n 94 at p.11.
[102] John Howard Society above n 96.
[103] Ibid.
[104] Ibid.
[105] Ferguson v Watterson (Qld) [2008] QDC 224 at 3.
[106] Ferguson v Watterson (Qld) [2008] QDC 224 at 3. (also see *Criminal Offence Victims Act 1995* (Qld)).

release (exposing them to potential harassment, threats or worse). For these reasons, it is the view of this paper that Megan's law is therefore objectionable as offending the civil liberties and human rights of child sexual offenders post-incarceration.

Conclusion

Whether facing the burden of reporting requirements under the CPORA, being prohibited from working, residing or being in certain locations by the CPOPOA or being publically registered by California's Megan's Law, the conduct of child sexual offenders is regulated post incarceration. It is the view of this paper that the three legislative mechanisms for regulating ex-offender conduct, the CPORA, CPOPOA and the DPSOA, allow for the imposition of burdens (reporting, prohibition or registration requirements) on ex-offenders and impact in addition to the time already served in incarceration. For the reasons explained above, it is the view of this paper that these schemes are objectionable on the basis that they offend the civil liberties and human rights these ex-offenders are entitled to as free citizens.

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