When Public Protection becomes Punishment? The UK Use of Civil Measures to Contain Sex Offender

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Abstract

The last ten years has witnessed an increased use of the civil law in the UK to contain and incapacitate the sex offender. These measures have been introduced to improve community safety and public protection, as the criminal law seeks to punish and condemn.

This paper explores the contention that the civil and criminal law are in danger of becoming confused and the line between the two becoming blurred. At worst the civil law is in danger of becoming a form of criminal punishment in its own right and those charged with implementing it, in danger of getting their roles confused. What starts out as a civil regulatory or administrative arrangement for public safety becomes increasingly obstructive, has gate-ways to criminal proceedings and is implemented in a punitive fashion.

Key words: sex offender, civil and criminal law, public protection

In the UK a series of civil measures have been constructed in the last six years to improve public protection:

- 1997 the sex offender register (Sex Offenders Act 1997 Part 1);
- 1998 Sex Offender Orders (Crime and Disorder Act 1998 ss2-4);
- 2000 Restraining Orders (Criminal Justice and Court Services Act 2000);
- Notification Orders (Sexual Offences Act 2003 ss97-103);
- Sexual Offences Prevention Orders (Sexual Offences Act 2003 ss104-113; this Order combines the earlier Sex Offender Order and Restraining Order);
- Foreign Travel Orders (Sexual Offences Act 2003 ss114-122);
- Risk of Sexual Harm Orders (Sexual Offences Act 2003 ss123-129).

Non-compliance with any of these Orders leads to prosecution in the criminal courts.

This paper takes the UK sex offender register (as applied in England and Wales) as a case study of a civil measure developed and refined (strengthened) without reference to any substantive evaluations or research; it tries to elaborate on the Home Office comment that there could come a point at which the Act could no longer be seen as an administrative requirement (see below).

The UK Sex Offender Register

Evolution

The proposal for a UK sex offender register was first made in 1996; the idea was that anyone convicted of a designated sexual offence would be required for a given period of time to notify the police every time they changed their name or address. Failure to comply would be an offence itself. This meant that at any one time the police would hold a more accurate database of where these offenders were, and this in turn would:

> help (the police) identify suspects once a crime had been committed **possibly** help them to prevent such crimes (and) **might** also act as a deterrent to potential re-offenders.
>
> (Home Office 1996: para. 43. emphasis added)

The emphasis of the words possibly and might is to indicate the tentative nature of what such a register might achieve. In truth there had been no pilot schemes or indeed any research to suggest that a sex offender register could make a community safer. In the USA all states had been required to have a sex offender register by federal legislation passed in 1994, but even here:

> in reviewing the available published literature (in the USA) on evaluation of registration as an investigative and preventive tool, one is struck by the dearth of good research studies.
>
> (Hebenton and Thomas, 1997: 34)

Critics of the UK register pointed out the lack of any empirical evidence that a register would make any difference here:

> no evidence is given, however, to support any of the supposed benefits (of a register), nor is there any suggestion of how the proposed register would achieve the claimed objectives.
>
> (Liberty, 1996: para. 27)

The Sex Offenders Act 1997

The Sex Offender Bill received its Royal Assent on 21st March 1997 as one of the Conservative administration s last Acts. The May 1997 general election passed the Act to New Labour for implementation, and the register came into being on the 1st September 1997 in less than triumphant terms:

> there is no magic wand so we will be open to new ideas and initiatives I want to see how the sex offenders register operates and if changes are necessary then I will look at how it can be developed and improved.
>
> (Home Office, 1997(a))

As with US registration schemes offenders had to notify the police of changes to their name or address either in person or in writing. Offenders had to continue to notify changes for varying periods of time, dependent on the severity and length of their original sentence.

Strengthening the Sex Offender Register

Strengthening began in the Autumn of 2000 following the abduction and murder of Sarah Payne and a high level of media coverage:

> following the tragic death of Sarah Payne widespread public concern was expressed about the dangers posed by sex offenders. In response the Government introduced, in Autumn 2000, a number of amendments to the then Criminal Justice and Courts Services Bill to **strengthen** the Sex Offenders Act.
>
> (Home Office 2002(a): 34, Annex 1; emphasis added)

Changes were contained in Schedule 5 of the Criminal Justice and Court Services Act 2000 which also amended the 1997 Act to require notification if registrants went abroad for more than eight days; the Act also, introduced restraining orders (to keep registrants from contacting victims etc.)

Evaluation of the Register

In the summer of 2000 at the height of the media s coverage the Sarah Payne abduction, the Home Office published (August 2000) its first evaluation of the register called *Where are They Now?* (Plotnikoff and Woolfson, 2000).

In general terms the evaluation found that the register had resulted in improved data quality and in improved multi-agency work. A compliance rate of 94% was revealed. The amount of police resources taken up in maintaining the register was greater than had been anticipated and the workload involved in verification and compliance exercises was growing rather than diminishing. As to whether or not the register was making communities safer,:

> forces had no agreed way of quantifying the contribution of sex offender monitoring to improving community safety no single measure of effectiveness emerged from this study as suitable for performance measurement.
>
> (ibid: 50)

The report made a number of recommendations to the Home Office, the Association of Chief Police Officers (ACPO), police forces and the prison service concerning the operation of the register and allied matters.

The government then essentially left practitioners to take what they wanted from the evaluation and proceeded to strengthen the register more on the basis of what they thought was necessary (see table 1).

Table 1: Outline of Legislation Pertaining to Sex Offender Registry

The Consultation Paper (1996):

- Initial notification and subsequent changes to be notified within 21 days;
- 32 qualifying offences;
- Sanction for non-compliance Level 3 Fine and/or a month (max) in custody;
- Initial notification and subsequent changes reduced to within 14 days.

The Bill (1996):

- Sanctions for non-compliance Level 3 Fine and/or a month (max.) in custody;
- Initial notification and subsequent changes to be notified within 14 days in person at any police station or in writing;
- 12 qualifying offences + cautions.

The Act (1997):

- 12 qualifying offences + cautions
- Sanctions for non-compliance raised to Level 5 (£5000) and/or six months (max.) in custody.
- Initial notification reduced to be within 3 days and to be in person only writing-in no longer available;

The Act 2001:

- Subsequent changes still within 14 days;
- All notifications must be at a named police station; previously they could be at any;
- Police get new powers to photograph and fingerprint registrants at their initial notification meeting;
- Notification of intended foreign travel introduced;
- Courts get powers to add Restraining Orders;
- Sanctions for non-compliance raised to allow 5 years (max.) in custody;
- 12 qualifying offences + cautions.

The Sexual Offences Act 2003:

- Initial notification remains to be within 3 days;
- Subsequent notifications reduced to 3 days; this also must now be in person at a named police station and not in writing;
- Periodic notification introduced i.e. annual verification notifications, in person at a named police station and not in writing;
- 35 qualifying offences (includes old and new law); the Secretary of State also gets the power to increase the number of offences by Statutory Instrument;
- Notification of foreign travel;
- Restraining Orders;
- Foreign Travel Orders;
- Sanctions for non-compliance on summary conviction now 6 months custody (max.) or a fine not exceeding the statutory max. or both; on conviction on indictment now 5 years custody (max.): + Detention and Training Order (custody) for young sex offenders (under 18);
- Notification of National Insurance number.

In the future, new registrants were to report to the police within three days and not fourteen. The idea of reducing the time limit to three days had been supported by 93% of people polled for the News of the World (Naming and Shaming Poll , *News of the World*/MORI, 20 Aug., 2000), even though the evaluation showed the police and other agencies had difficulty in meeting the 14 day deadline and that sometimes (the police) first heard about a registration requirement from the offender himself (Plotnikoff and Woolfson, 2000: 21).

Additionally, first-time reporting had to be in person and not by mail or e-mail. The evaluation had revealed that 75% of offenders reported in person under the existing requirements (ibid: 26).

The police were given new powers to photograph and fingerprint offenders on first registration. The evaluation found some police forces were already doing this presumably on some sort of voluntary basis (ibid: 35).

The sanction for non-compliance was raised from a maximum six months imprisonment to a possible five years. This change reflected the further findings of the *News of the World* poll that some 84% of the public wanted tougher sanctions for non-compliance with the register (Naming and Shaming Poll , *News of the World*/MORI, 20 Aug. 2000) and seemed to overlook the evaluation, which found a compliance rate of 94% and found that rate to have risen steadily since registration began (Plotnikoff and Woolfson, 2000: 6).

Reviewing the Sex Offender Register and the White Paper

In July 2001 the Home Office published a further consultation paper outlining the areas it wished to look at; from the outset the aim of the review was unequivocally:

> To **strengthen** the operation and effectiveness of the Sex Offenders Act 1997 in contributing to protecting the public from sex offenders (Home Office/Scottish Office, 2001: 3; emphasis added)

The consultation paper now reported a compliance rate of 97% and described that rate as steadily improving (ibid: 12). A foreword by the Home Secretary talked of strengthening the steps already taken to protect the public from these offenders and despite the only real evaluation being equivocal (see above), commended the register as a valuable tool in helping protect the public (ibid: 1).

The consultation paper reaffirmed that the register is a (civil) measure aimed at helping to protect the community from sex offenders, not an additional penalty for the offender (Home Office/Scottish Office, 2001: 11). Despite this reassurance some of the proposals to tighten and strengthen the register and its requirements could easily be mistaken for punishment and this is where the authors went further to state their fears that:

> were the registration requirement to become more onerous, there could come a point at which the Act could no longer be seen as an administrative requirement.
>
> (ibid: 13)

It was to be over a year before these responses and the government s further thinking were to be made known in the White Paper Protecting the Public (Home Office 2002(a)). Six chapters covered all aspects of sexual offending but Chapter One was specifically entitled (again) Strengthening the Sex Offenders Register .

The changes were included into the 2003 Sexual Offences Act (see Table 1 for details).

Conclusions

The usefulness of a sex offender register remains unproven. Researchers have found (police) forces had no agreed way of quantifying the contribution of sex offender monitoring to improving community safety (Plotnikoff and Woolfson, 2000: 50) Popular support and governmental support for the register, however, remains high; one Home Secretary has described it as a valuable tool in helping protect the public (Home Office/Scottish Executive, 2001: 1).

The introduction of the register in 1997 was somewhat tentative. This paper argues that since then successive efforts to strengthen the register by making its requirements ever more onerous have been in response to popular demand led by tabloid newspapers rather than any considered evaluation of the efficacy of the register. What evaluation there has been has been overlooked. The UK government has been happy to continue strengthening the sex offender register as it is, and to such a degree that it may be on a borderline between its existing status, as a civil measure, and becoming a punishment in its own right. As piece of civil law it has been relatively easy for the government to keep strengthening the register. It offers a form of social control that is unconstrained by concepts of due process or proportionality .

In the current climate of popular punitivism the government appears to have been swept down the path of constantly strengthening the sex offender register as a populist measure that plays well with the electorate.

The case of the register illustrates the dilemma for governments, that risk to children is a kernel of truth that all parents face and there is no compromise doing nothing is not an option. The press recognise this and governments respond as they will. What is needed by way of remedy are the re-introduction of some principles of constraint that should apply to such civil measures as a register to make it proportionate and appropriate to its primary role of reducing risk and making communities safer.

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