THE CONTROL CONTINUUM: ANALYSING THE SCOPE AND IMPACT OF POST-RELEASE MEASURES FOR OFFENDERS

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INTRODUCTION

For many years the system of crime and punishment has incorporated a concept that once an individual has served the punishment for his crime, his debt to society has been paid, and the criminal justice system has no further claim over him. This idea that the individual would then be "free" undoubtedly stemmed from a desire for punishment to be proportionate and finite. Ever since Cesare Beccaria argued so eloquently for proportionate punishment, the law has sought to hold this principle as a beacon of justice and humanity within the criminal justice system.[1] Due process values within the system dictate that an offender must be treated fairly and that punishment must be proportionate to the crime and the criminal who commits that crime.[2] In dealing with offenders the law has been mindful of a number of things. Prevention, deterrence, retribution and rehabilitation have become the primary purposes of punishment and it is within this capacity (of meting out punishment to accord with these rationales) that the principle of proportionality is most important.

There is another concept, however, that has progressively begun to operate in punitive policy, and that is the concept of risk. Our society has become increasingly risk-averse, and authorities are reluctant to permit an individual to be released without some form of post-release control and monitoring.[3] As part of a new

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[1] See Beccaria, *On Crimes and Punishment* (Leghorn, false imprint Haarlem, 1764); Young, *On Crimes and Punishment*, introduction (Indianapolis, 1986).

[2] See for example: Court of Criminal Appeal in *People (DPP) v. McCormack* [2000] 4 I.R. 356; Supreme Court in *People (DPP) v. M* [1994] 3 I.R. 306; O'Malley, *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006).

[3] See generally Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford University Press, 2001); Hebenton and Thomas, "Sexual Offenders in the Community: Reflections on Problems of

risk-aversion strategy, a number of provisions have been introduced in the past decade, that permit judges at sentencing stage to impose certain post-release conditions upon an offender, or alternatively permit subsequent applications to be made to a court for an order to control and restrain an ex-offender's behaviour in the community. This paper will examine the provisions that have been enacted upon sex offenders, drug trafficking offenders and other serious offenders, namely under the Sex Offenders Act, 2001, the Criminal Justice Act, 2006, and the Criminal Justice Act, 2007. Under these Acts ex-offenders can be subject to supervision, notification requirements and to a variety of other orders that act as a means of movement and behaviour control. Such orders are in addition to an ordinary sentence upon conviction, and represent a significant departure from the notion that once a sentence has been served the legal system has no further claim over an offender.

Although the rationale for post-release measures focuses largely upon the prevention of crime, one of the inevitable consequences for ex-offenders is that their sentence does not end after imprisonment. For many the effects of a conviction can last for life, and for others it can last for a substantial and often indefinite period of time into the future. Thus it seems that there is no such thing as a *de jure* sentence. This may be in contradiction to the important principle of proportionality. Retaining control of the individual post-release may have the unintended consequence of excluding and marginalising the individual, and ultimately make it more difficult for him to be rehabilitated and re-integrated into mainstream social life. The paper will be divided into a number of sections examining the various types of orders that exist under recent legislation, categorised in terms of the offenders upon whom they are imposed: namely sex offenders (SOA 2001), drug traffickers (CJA 2006), and serious offenders under the 2007 provisions. The author will explain where these provisions have come from, their purpose and effect, and will do so having regard to some

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Law, Community and Risk Management in the USA, England and Wales" (1996) 24 *International Journal of the Sociology of Law* 427.

broader criminological and penological issues such as control, risk, reintegration and public protection.

I. POST-RELEASE ORDERS: DEALING WITH SEX OFFENDERS

An awareness of sexual offending has built up in Ireland in recent times, and details of sexually-motivated crimes have been brought into the sphere of public consciousness.[4] A consensus on the need to establish an Irish sex offender register developed and widened into a post-release arrangement package that has also incorporated provisions on post-release supervision and sex offender orders, similar to that in the UK and elsewhere.

A. The Register

The establishment of a register in the UK initiated the idea of having a sex-offender register in this jurisdiction,[5] which was surprising because there was no evidence of any urgent "need" to establish such post-release arrangements at the time. The idea was not motivated by any high profile crime committed within the jurisdiction like that of Megan Kanka in the US or Sarah Payne in the UK, or by the release of any notorious sex offenders like that of Sidney Cooke in the UK. White argues that the fact that no such domestic examples existed may be a large factor in why emphasis was placed on the image of the foreign sex offender.[6] Allegations arose that foreign sex offenders were using Ireland as

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[4] The foreign media (such as Sky News and British papers) which are accessible by the Irish public, have reported high profile murders like that of Megan Kanka in the US and Sarah Payne in the UK, and stories of the release of convicted sex offenders in the UK and how they are being dealt with. *E.g.* "Bed-sit rapist becomes subject of first legal exclusion order" *Independent*, 24 December 1998; "500 paedophiles to be tracked by satellite tags" *Observer*, 21 December 2003; "Paynes ask Blunkett for 'Sarah's Law'" *Guardian*, 21 June 2002. See also McGuinness, *Report of the Kilkenny Incest Investigation* (Dublin: Stationery Office, 1993).

[5] Thomas, "Protecting the Public: Some Observations on the Sex Offenders Bill 2000" (2000) 10 I.C.L.J. 12, 12.

[6] White, "Controlling Sex Offenders: Raising Critical Questions about the Sex Offenders Bill 2000" (2001) 4 I.J.F.L. 8, 11. White argues that unnecessary and unhelpful attention has been placed upon the "foreign" sex offender in deciding the appropriate measure to take in dealing with sex offenders.

a "safe haven" to avoid registration in the UK,[7] and that a register should be introduced here to permit the Gardaí to track them. Although the truth behind such allegations was disputed, the idea of creating notification requirements and other orders for released offenders remained in circulation, supported strongly by child protection agencies.[8] Scepticism was expressed by some, who believed that "[a] register may help people sleep easier in their beds at night, in the mistaken conviction that 'someone is keeping an eye on the paedophiles' … a safety valve for adult anxiety rather than a safety measure for children".[9]

In 1998 the government published a discussion document entitled *The Law on Sexual Offences – A Discussion Paper*,[10] in which the registration and supervision of released sex offenders was posited as a positive proposal that would greatly contribute to protecting the public and reducing the risk of re-offending. Given that the Gardaí would manage and maintain the register, it was believed that it would improve the quality of information already in their possession, and would assist them in "keeping an eye on persons as part of their normal policing role".[11]

According to the then Minister for Justice Mr John O'Donoghue, the rationale for the register under the 2000 Bill mirrored that of introducing the UK register, *i.e.* that it *could* prevent crimes and *might* act as a deterrent.[12] In Dáil debates, the view was expressed that the provisions in the Bill would target those who "prey on the vulnerable", and would send the message that such individuals would be dealt with swiftly and

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[7] "Paedophiles go south to avoid sex register" *Sunday Times*, 7 December 1997.

[8] "Minister wants paedophile register similar to UK" *Irish Times*, 9 December 1997; "Sex offenders register sought" *Irish Times*, 31 December 1997.

[9] Editor of the *Irish Social Worker* in a letter to the *Irish Times*, 28 January 1998.

[10] Department of Justice, Equality and Law Reform, *The Law on Sexual Offences – A Discussion Paper* (Dublin, 1998).

[11] *The Law on Sexual Offences – A Discussion Paper* (previous note), para. 10.7.3.

[12] Department of Justice, Equality and Law Reform, Press Conference Speech by John O'Donoghue to announce the publication of the Sex Offenders Bill 2000, January 2000, Dublin.

uncompromisingly.[13] This emphasis upon the predatory sex offender may be partly why it was recommended in the Bill that its provisions would not apply to offenders not more than three years older than the victim/other party to the offence who was aged between 15 and 17 at the time of the offence.[14]

Although the term "register" is not actually used in the 2001 Act, Part 2 of the Act makes provision for notification requirements for released sex offenders. The obligation under this part is for an offender convicted in this jurisdiction or elsewhere[15] to notify the Gardaí of certain information, including name, address and date of birth, within seven days from the date of release.[16] After this, there is an obligation to notify the Gardaí of a change of address and/or name within a seven day period, and furthermore to notify any intention to stay outside the given address for a continuous period of seven days or more.[17] Where there was no intention to be outside the address for this period of time, the individual has a further seven days within which to notify the Gardaí. No such obligation arises where the individual returns before the expiration of seven days.[18]

The sexual offences which trigger the notification requirements are defined in section 3 and the Schedule to the Act,

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[13] See for example the speech of Mr Crawford, 520(1) Dáil Debates (Second Stage), June 2000.

[14] See speech of Ms Hanafin (then Minister for the Department of Justice Equality and Law Reform), 166 Seanad Éireann, 30 May 2001.

[15] Those convicted of a sex offence outside the State are subject to the requirements regardless of whether they were resident in the State the time. Provision is made however for a defence of honestly believing that one was not subject to the requirements because the offence was not one that would have merited the obligations if committed within the State.

[16] s. 10. A nominated Inspector in each Garda Division has responsibility for liaising with the central Garda Domestic Violence and Sexual Assault Unit (who keep the "register"), for the purpose of monitoring the application of the Sex Offenders Act, 2001. There are plans to change the triggering period from seven days to three days, see *e.g.* "Electronic tags for sex offenders considered" *RTÉ News*, 26 March 2009 (www.rte.ie/news/2009/0326/abuse.html). This is the triggering period applied in the UK under s. 84 of the Sexual Offences Act, 2003.

[17] The "qualifying period" means a period of seven days or two or more periods in 12 months which together amount to seven days.

[18] s. 10.

and include rape, sexual assault, incest and sexual offences against mentally impaired persons.[19] The obligations apply to all offenders convicted of a sexual offence within the meaning of the Act after the commencement of the Act, and to those convicted before if the sentence has not yet been passed or is still current and in force.[20] Persons convicted in other jurisdictions may also be subject to the requirements, if the act constituting the offence in the other jurisdiction would also be capable of constituting an offence under the 2001 Act.[21]

There is however an exception, as to the effect of the registration on offenders who are not more than three years older than their victim or the other party to the offence. Pursuant to section three and paragraphs 2, 5, 6, 18, 19 and 20 of the Schedule, it is not a sexual offence for the purpose of the Act if the victim or other party was 17 years or older at the time of the offence and the offender was not sentenced to a term of incarceration in respect of the offence. Pursuant to section three and paragraphs 8, 11, 12, 18, 19 and 20 of the Schedule, it is not an offence for the purpose of the Act if the victim or other party was aged between 15 and 17 at the time and the offender not more than three years older.

Section 8 of the Act sets out the time periods for which the notification requirements will apply and provide for an ascending (or descending) scale based upon the length of the original sentence imposed. At the two ends of the scale a non-custodial sentence for adult offenders attracts an obligation to notify for five years, while any term of imprisonment imposed that is greater than two years can create an obligation to notify for life.[22] The periods of notification listed in the section are halved where the offender is, at the time of sentencing, under the age of 18.

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[19] For the full list of offences see the Schedule to the Sex Offences Act, 2001.

[20] s. 7. This includes a person temporarily released under ss. 2-3 of the Criminal Justice Act, 1960 (s. 7(b)(ii)).

[21] s. 13.

[22] The periods in between are: 10 years notification if the original sentence was greater than six months but two years or less, seven years for a sentence of six months or less and five years for a fully suspended sentence (s. 8(3)).

Failure to comply with these registration requirements is an offence under section 12 of the Act, and the penalties provided for such are a maximum fine of €1900 and/or up to 12 months imprisonment on summary conviction. Significantly though, the obligations may be discharged in certain circumstances, and need not operate *de facto*. Where a person is subject to registration for an indefinite duration (where a potential lifetime obligation may be imposed), they may petition the Circuit Court after 10 years has passed to remove the obligation, which the court may do if the "interests of the common good would no longer be served" by the requirement's continuing.[23] This provides an essential balance to what might otherwise have been a disproportionately onerous obligation for many offenders.

Almost eight years on from the Sex Offenders Act, 2001, the Department of Justice published a Discussion Document in January 2009 to re-visit the management and monitoring of sex offenders after release.[24] A number of changes to registration are proposed in this document. These are as follows: to reduce the initial notification period from seven days to three, to include a recent photo of the offender when informing Gardaí of his impending release, to permit fingerprints and photographs to be taken as part of the notification requirements, for notification to be made in person and at least on an annual basis, and for a statutory basis for circumstances in which information on sex offenders can be disclosed.[25]

B. Community Notification

An issue that has been raised in conjunction with the sex offenders register is whether the public should or should not have access to the information contained on the register. In the US,

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[23] s. 11(1), 11(2) and 11(5) of the 2001 Act. This is an important aspect of the provision, and differs from the UK, where such an obligation is *de facto* life long. As a 10-year period must pass before such an application is made, it awaits to be seen how courts will deal with such applications in the future.

[24] The Document makes proposals to strengthen the multi-agency approach to managing risk, to introduce a standard risk assessment in line with that being implemented in Northern Ireland and Scotland, and to re-address the issue of after-care services for released offenders.

[25] *The Management of Sex Offenders: A Discussion Document* (Department of Justice, Equality, and Law Reform, January 2009), para. 4.7.12.

although the form varies from state to state, there is a public right of access under "Megan's Law".[26] In the UK there is no widespread public access, but rather controlled disclosure on a need-to-know basis.[27]

The 1998 Discussion Paper on sexual offences examined the issue of whether widespread access would be appropriate in this jurisdiction,[28] and felt that this was a serious policy issue that could give rise to harm, victimisation and vigilante behaviour. The authors believed that, in some limited circumstances, disclosure of information regarding a sexual offender might be necessary to protect children from those who continued to pose a threat, but stressed that finding a balance between doing this on the one hand, and protecting the rights of those who have paid their debt to society on the other, was extremely important.

The 2000 Bill made no reference to public access and the Minister for Justice, in his speech announcing the Bill, did not comment on the idea. He did however make it clear at the Committee Stage of the Bill that disclosure would be an administrative issue, decided by the Gardaí on the basis of risk.[29] Calls for an independent and tighter system of control of the release of the information on the register were sidelined, partly in the belief that disclosure would be used sparingly. A press release from the Department of Justice further stated that disclosure of information on registered sex offenders would only be made "in the most exceptional circumstances in order to prevent an immediate risk of crime or to alert members of the public to an apprehended danger and then only on a strict need to know

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[26] Named after seven year old Megan Kanka, who was sexually abused and murdered by a paedophile living on her street in New Jersey.

[27] For a detailed analysis of community disclosure in the UK see Power, "Disclosing information on sex offenders: the human rights implications" in Matravers (ed.), *Sex Offenders in the Community: Managing and Reducing the Risk* (Willan Publishing, 2003).

[28] Department of Justice, Equality and Law Reform, *The Law on Sexual Offences – A Discussion Paper* (Dublin, 1998), at paras. 10.6.1-10.6.9.

[29] Mr O'Donoghue at the Committee Stage of the Bill 2000. Mr O'Donoghue also stated that he thought the first move by the Gardaí would be to warn the offender and perhaps suggest a move to another area where children do not congregate.

basis".[30] This statement signals a somewhat cautious approach, perhaps in view of the dangers outlined by the 1998 Discussion Paper, and also perhaps in light of the UK experience where disclosure has often proved to be counter-productive.[31] Community notification may produce a deterrent effect, by raising the profile of the offender and thus increasing the likelihood of apprehension. Alternatively it may have the opposite effect, of pushing offenders underground where they are a greater threat to potential victims.[32]

Problems remained with the idea of controlled disclosure. For one, how such information should be used, and also whether it might place an undue burden or responsibility on the persons/ agencies who receive the information? In 2000, White commented that any policy of disclosure in Ireland would have to be drafted to provide adequate direction to the Gardaí and social services, in addition to advancing the goal of public protection without interfering improperly with the rights of offenders.[33] The Department of Justice press release echoed sentiments in the UK, by emphasising that a multi-agency approach would be necessary for controlled disclosure, and that the Gardaí, the probation and welfare services and the health boards would all be involved in the risk assessments upon which such disclosure would be premised. The Minster also declared the same intention in Dáil Debates.[34]

The Sex Offenders Act, 2001, does not expressly address the issue of public access to information under the sex offender register, but it seems that the same approach as that endorsed in the UK, that of controlled disclosure on the basis of risk, will be the means of disclosure in this jurisdiction also.

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[30] Department of Justice, Equality and Law Reform, "O'Donoghue publishes Bill to protect the public from sex offenders and to provide for separate legal representation for victims of rape" 12 January 2000, Press Release.

[31] See the case of *R v. Chief Constable of North Wales Police, ex p. Thorpe* (1998) *Times*, 23rd March.

[32] In the British case of *R v. Chief Constable of North Wales Police, ex p. Thorpe* (1998) *Times*, 23rd March, the two individuals at the centre of the case went to ground in the aftermath of the case.

[33] White "Controlling Sex Offenders: Raising Critical Questions about the Sex Offenders Bill 2000" (2001) 4 I.J.F.L. 8, 15.

[34] Second Reading Debate, 6 April 2000.

This issue was examined again in the 2009 Discussion Document, but the government remain opposed to the idea of widespread access to information on sex offenders.[35] In response to the Discussion Document, some child protection agencies have also called for the exchange of soft information, such as cautions between relevant agencies, in order to further promote the protection of children. It has been argued that this is needed as the provisions discussed above only apply to convicted sex offenders, and thus represent a small portion of the sex offender population.[36] Such a proposal would have to be carefully considered in view of the individual's constitutional right to privacy, particularly considering that they would not have been convicted of any crime.

C. The Sex Offender Order

The Sex Offender Order is a civil order that the Gardaí can apply for, if concerned about the behaviour of someone who has been convicted of sex offences in the past.[37] In Dáil debates, the Minister felt the order to be an "additional protection", and stated that one purpose of introducing it is "to ensure the inclusion in the register of past offenders who still pose a threat".[38] The intention of the order to target dangerous offenders was also emphasised by the five year minimum period for the order. Despite query as to why the court (according to the provision) should be able to impose a longer period if necessary but not a shorter period, it was felt that a five year minimum was proportionate, considering the offenders to whom this order would be applied.

Under Part 3 of the 2001 Act, the Gardaí can apply to the Circuit Court for a sex offender order where an individual has been acting in a manner that gives reasonable grounds for believing an order is necessary to protect the public. The order

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[35] *The Management of Sex Offenders: A Discussion Document*, at para. 4.6.1.

[36] See for example Barnardos, *Submission into Management of Sex Offenders – Discussion Document*, 30 April 2009.

[37] s. 15.

[38] Mr O'Donoghue, Committee Stage of the Sex offenders Bill 2000, 10 October 2000. Mr Callely speaking in the Dáil debates referred to the order as "an important safety net": 520(1) Dáil Debates June 2000.

can be imposed on any individual who has been convicted before or after the commencement of the Act, either within the State or outside the State (so long as the act would also constitute a sexual offence under the 2001 Act).[39] The Court may impose the order if it is considered necessary to protect the public from serious harm, which is defined as death or serious personal injury whether physical or psychological.[40] The Court is given very wide discretion regarding the terms of the order, but usually imposes a prohibition on the individual from acting in a suspicious manner, or require them to stay away from certain areas or individuals. There are some constitutional restraints however, particularly in the context of the right to privacy and liberty, which will limit the scope of judicial discretion if the terms are too vague or disproportionate.[41] The order lasts for a period of five years, or longer if the court considers it necessary,[42] and there is an obligation during this period to notify the Gardaí pursuant to Part 2 of the Act.[43] To some extent, the effect of the provision is that it applies the registration requirements retrospectively, in some limited circumstances. However, as such orders would (presumably) only be sought and granted where the past sex offender poses a substantial or high risk, their scope is more limited than the register. Of significance also is the fact that any order made can be subsequently discharged, on application, if the court is satisfied that the protection of the public no longer warrants continuing the order, or if the effect of continuing the order would be to cause an injustice.

As the order is considered civil in nature, the standard of proof required is that applicable to civil proceedings, *i.e.* on the

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[39] s. 16(2).

[40] s. 16(5). The identity of the individual is not usually revealed when such an order is made which, as White observed (note 6 above, at 12), means that the Gardai have full responsibility in enforcing the order without being able to rely on public vigilance. Proceedings under this part of the Act are heard *in camera* (s. 21(2)).

[41] White (note 6, above), at 11. Such orders do have significant implications for the rights of an ex-offender and have been subject to legal challenge elsewhere. See Power, "The Crime and Disorder Act 1998: (1) Sex offenders, privacy and the police" [1999] C.L.R. 3-16.

[42] s. 16(6).

[43] s. 16(7).

balance of probabilities.[44] This is so, even though contravention of an order made leads to criminal sanctions. Under section 22, the penalty under summary conviction is a fine of up to €1900 and/or imprisonment of up to 12 months. The penalty under indictment is more severe, with a maximum of five years capable of being imposed.

D. Post-release Supervision

In Ireland, prior to the 2001 Act, there was no means by which released offenders could be mandatorily supervised in the community after completion of their prison term, unless the original sentence imposed was one of life imprisonment. The 1998 Discussion Paper perceived two aims of supervising sex offenders in the community: "to help the offender maintain internal control over his offending behaviour and to provide external monitoring of his behaviour and activities".[45] This two-fold aim was also stated by the Minister to be the purpose of including this provision in the Act.[46]

Part 5 of the 2001 Act empowers a court to impose a period of supervision on sex offenders in the aftermath of their prison sentence. To a large extent, the purpose of the order is to protect the public from serious risk of harm, but the provision also expresses a commitment to rehabilitation, and therefore a balanced approach was clearly the intent of the order. It is the sentencing court that considers whether a period of post-release supervision is necessary for the offender. In considering the appropriate custodial sentence, the court may not be influenced by the element of supervision (so as to award a lesser custodial sentence), but the aggregate period of the custodial sentence and the period of supervision may not exceed the maximum term of imprisonment available for the particular sexual offence.[47] Pursuant to section 28, the Court, before a supervision order can be imposed, must consider four material elements:

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[44] s. 21(1).

[45] Department of Justice, Equality and Law Reform, *The Law on Sexual Offences – A Discussion Paper* (Dublin, 1998), at para. 10.8.1.

[46] Mr O'Donoghue, Committee Stage of the Sex Offenders Bill 2000, 10 October 2000.

[47] s. 29(2).

1. the need for a period of post-release supervision of the offender;
2. the need to protect the public from serious harm;
3. the need to prevent the commission of further sexual offences by the offender; and
4. the need for further rehabilitation of the offender.[48]

The Court has considerable discretion with regard to the terms of the order, and conditions included within the supervision period may require the individual to stay away from certain areas, and/or to receive treatment or counselling.[49] Since the Probation Service are responsible for enforcing compliance with the order, the Court may be influenced by their advice with regard to the form or terms of the order.[50] It is an offence, under section 33, to fail to comply with the conditions of an order made, the penalty being a maximum fine of €1900 and/or imprisonment of up to 12 months on summary conviction.

Significantly, however, any order made may be subsequently discharged by a court, on application by either the offender himself or a probation officer, where it would be in the interests of justice to do so and it is no longer required for the protection of the public.[51] Considering the conditions stated in section 28, it would seem that the scope of these orders are intended to be much more limited that the all-encompassing registration requirements under Part 2 of the Act, given that their target is apparently high-risk offenders.

The idea of using electronic monitoring to improve the supervision of released sex offenders has also been looked at in this jurisdiction. The 1998 discussion paper on sexual offending makes a brief reference to the concept that has become viable in other jurisdictions, and considered it might also improve to post-release supervision in Ireland. Although no provision was made for such a measure in the 2001 Act, the prospect of monitoring

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[48] s. 28. The court may hear any relevant evidence in this regard.

[49] s. 30.

[50] As many commentators have observed the provision places additional demands on the Probation Service in order to be effective. See Thomas, "Protecting the Public: Some Observations on the Sex Offenders Bill 2000" (2000) 10 I.C.L.J. 12, 15; White (above, note 6), at 12.

[51] s. 32.

high-risk sex offenders via an electronic device is currently being re-visited by the Department of Justice. A 2009 Discussion Document entitled *The Management of Sex Offenders* examined the viability of introducing electronic monitoring to improve the supervision of high-risk sex offenders for the critical six month period after their release.[52] The results of such electronic monitoring could be used to apply for a sex offender order. The Minister appointed a Project Board, led by the Probation Service, to look into the issue and reports from this Project Board are currently being considered by the Department of Justice.[53]

E. Obligation to Disclose in Employment Applications

The 2000 Bill introduced the idea of obligating all convicted sex offenders to disclose their convictions to prospective employers and proposed to make it an offence to default on this obligation. The Minister made clear that disclosure would not necessarily exclude the person from employment and that it would be "a matter for the prospective employer .. on being informed of the conviction, to decide if it is relevant to the work or position concerned".[54] Some did express concern that the scope of the provision was too narrow, and should cover access to vulnerable adults in addition to children.[55] Although this recommendation was not implemented, one extension that was made was to include protection for mentally impaired persons within the provision.

The proposal became law under Part 4 of the 2001 Act. The Act makes it an offence to apply for or accept employment which would give the sex offender unsupervised access to children or mentally impaired persons, without first so informing the employer. The individual must make such a disclosure at the time of applying for the position, or, if later, as soon as he

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[52] The Minister for Justice, Mr Dermot Ahern, announced the proposal, speaking at a Forum on the *Management of Sex Offenders, A Discussion Document*, Dublin, January 2009. See also "Electronic tags for sex offenders considered" *RTÉ News*, 26 March 2009 (available at http://www.rte.ie/news/2009/1326/abuse.html).

[53] See also "Sex offenders to be electronically tagged on release" *Herald*, 4 January 2010.

[54] Mr O'Donoghue, Vol. 538, Dáil Éireann, 22 June 2001.

[55] Mr Callely, 520(1) Dáil Debates (Second Stage) June 2000.

becomes aware that the position involves unsupervised access to children. The penalty for non-disclosure is a maximum fine of €1900 and/or imprisonment of up to 12 months on summary conviction, and a maximum fine of up to €12,697 and/or up to 5 years imprisonment on indictment.

Once the individual informs the employer, then it seems he has met his obligations under the Act, and the assumption then is that the application would fall. The employer in such situations is in a somewhat precarious position. Firstly, in the absence of disclosure, they have no way of determining if an applicant has past convictions for sexual offences unless the position is one covered by existing vetting procedures.[56] Secondly, the Act does not anticipate the prospect of an employer hiring an offender despite being aware of his past sexual convictions.[57] In the UK it is a criminal offence under the Criminal Justice and Court Services Act, 2000, knowingly to employ an applicant who is disqualified from working with children.[58] There is no such specification under Irish legislation, although there remains the possibility of the employer being liable in the event of any offending against children committed in the course of employment.

The obligation to notify operates *de facto* for life, and applies to those convicted of a sex offence within the meaning of the Act either before or after the commencement of the provisions. Thus this particular provision has retrospective effect. Moreover the obligation applies to all convicted sex offenders, and is not limited to those who pose a substantial risk, or have been convicted of a sex offence against children. The need for an all-encompassing obligation is questionable, for as White comments, "it would be a mistake to presume that all those convicted of an offence of a sexual nature will necessarily

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[56] Current vetting procedures (by the Gardaí) relate to recruitment of staff for children's residential centres or positions with health boards that will allow individuals' access to children or vulnerable adults. Private employers or voluntary organisations do not have access to these vetting procedures.

[57] Although see the comments by Mr O'Donoghue, 538 Dáil Debates, 22 June 2001.

[58] Criminal Justice and Court Services Act, 2000, s. 35 (2).

be a future threat to children and vulnerable adults".[59] The provision may arguably have a disproportionate effect upon offenders who pose little or no risk in the future. Moreover, there is little direction given as to what "access to children" encompasses. As noted in the UK, individuals who are 16 or 17 years of age might be children in law but might also be work colleagues of the offender. It is unclear how this type of situation is affected by the disclosure obligations. Furthermore, it is uncertain how effective the measure is in providing protection for children, given that the obligation is dependant upon compliance by the individual.[60] Thus, though creating a disclosure requirement may be a necessary measure, there is no guarantee that past sex offenders who pose a serious risk will not end up in employment with children.

F. Implementation and Effectiveness

Since the implementation of the 2001 Act, many released sex offenders have been made subject to the provisions of the Act, most notably with regard to registration. It was reported in 2009 that there were approximately 300 sex offenders in custody, and over 1,000 sex offenders obliged to notify the Gardaí pursuant to the Sex Offenders Act, 2001.[61] The National Crime Council had put this figure at 1,077 towards the end of 2007.[62] The Annual Report of An Garda Síochána 2008 reported that 1,075 sex offenders were being monitored post-registration during 2008, and that seven high-risk sex offenders who had arrived in the state were being monitored in addition to liaisons

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[59] White (above, note 6), at 8. See also Grubin, "Sex Offending against Children: Understanding the Risk" (*Police Research Series Papers*, Home Office, 1998).

[60] In the UK the more elaborate system of disclosure, employers' access to the Department of Health's Consultancy Service Index, and "disqualification orders," are integrated with existing vetting procedures, thus allowing employing organisations whose work involves access to children, to monitor whether convicted sex offenders are committing the offence of applying for that type of work. No such monitoring is provided for in the Irish provisions.

[61] Barnardos, *Submission into Management of Sex Offenders – Discussion Document*, 30 April, 2009.

[62] National Crime Council, available at http://www.crimecouncil.gov.ie/sex_offenders_register.html.

with external police forces.[63] Moreover, the National Crime Council reported that there were 113 sex offenders being supervised by the Probation Service pursuant to the provisions of the 2001 Act towards the end of 2007.[64] By March 2009, this figure was reported at 128.[65] The Probation Service in their 2008 Annual Report anticipated that approximately 20% of released sex offenders would be under their supervision,[66] but the authors of the 2009 Department of Justice *Discussion Document on the Management of Sex Offenders* put this number at 40%. It is not documented how many orders under Part 3 of the Act have been applied for since its inception. In a parliamentary debate in 2006, it was commented that only one such order had been obtained thus far.[67]

The Act has imposed considerable workload upon the agencies involved. The degree of organisation and co-operation necessary for a multi-agency approach cannot be overstated, and it has been noted in the context of the British register that the authorities had not anticipated the cumbersome workload that this would have for the agencies involved.[68] This is something that was not extensively considered or contemplated by the Minister for Justice in introducing the Sex Offenders Act, 2001. Many felt that the provisions in the Act would only work if the necessary support is provided for the agencies responsibly for compliance with the provisions (Gardaí, Probation Service etc), and that a long-term strategy should be formulated in this regarded.[69] Thus far it has been left to the individual agencies to implement

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[63] *Annual Report of An Garda Síochána*, 2008.
[64] National Crime Council.
[65] "Sex offender treatment to get overhaul" *Independent*, 27 March 2009.
[66] Probation and Welfare Service, Annual Report 2008.
[67] See debate between Mr O'Keeffe and the Taoiseach, 628(1) Dáil Debates, 22 November 2006.
[68] Hebenton and Thomas in a study of US registers recommended that a single agency should be established to deal with the overall management and control of sex offenders. Hebenton and Thomas, "Keeping Track? Observation on Sex Offender Registers in the US" (*Police Research Series Papers*, Home Office, 1997). White argues that this recommendation could ensure that risk is more coherently managed and that offenders' rights might be better protected. White, (above, note 6), at 16.
[69] *E.g.* Mr McGuinness, Mr Crawford and Mr Callely, 520(1) Dáil Debates (Second Stage) June 2000.

their own measures for compliance with the provisions. In the context of the British Probation Service, it was observed that due to the emphasis on assessing risk and public protection, the opportunity to make supervision an integrated and welfare-oriented approach to offending behaviour was missed out on.[70] In Ireland, while the Act places more burdens and responsibilities upon the different agencies, commitment to finding an integrated approach remains. The Probation Service have advanced their role in strategies such as the Homeless Agency's Multi-Agency Group in Homeless Sex Offenders, which strengthened their commitment to training and employment for ex-offenders and dealing with the issue of addiction.[71] Their work remains, to some extent at least, one of engaging, motivating and supporting ex-offenders. Nevertheless as the effectiveness of supervision depends largely upon the Probation Service enforcing breaches of the requirements, they are expected to "exercise a type of policing function that may have profound long-term consequences for the nature of the role performed by the Service".[72]

Prior to the enactment of the Sex Offenders Act, 2001, there was little discussion as to how exactly the register (in particular) was to be effective in terms of public safety. It was said it *could* provide for public safety and it *might* act as a deterrent but, as in the UK and US experience, little evidence has been offered that these goals are being achieved. Much emphasis was however, put upon the compliance rate as the basis for measuring the effectiveness of the register. The lack of evidence regarding the effectiveness of the register in terms of prevention or deterrence raises questions about the purpose of the post imprisonment obligation. If the effectiveness is measured purely in terms of compliance, in addition to the register being a valuable surveillance tool, is there a balance being maintained between public interests and those of the ex-offender? The requirement, seen as administrative only and not part of the

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[70] Allen, "Putting the Community Back into Community Sentences" (2000) *Criminal Justice Matters* 39; Thomas and Tuddenham, "The Supervision of Sex Offenders: Policies Influencing the Probation Role" (2002) 49 *Probation Journal* 10, 11 (available at www.sagepublications.com).

[71] Probation and Welfare Service, Annual Report 2008.

[72] White (above, note 6), at 14.

criminal penalty (see discussion below), imposes a significant obligation upon the ex-offender affecting his/her personal liberty, privacy and freedom of movement. Any restriction on such rights in the aftermath of imprisonment should be carefully balanced with the right of the public to be protected. Yet, despite continuous risk assessment, the automatic nature of the obligations means that many offenders are subject to notification requirements who may pose little or no risk of re-offending. The same could be said with regard to the disclosure obligations under Part 4 of the Act.

Sex offenders orders and supervision orders are different however, in that they do not arise automatically, and seem to be intended for serious or high-risk offenders. The scope of these orders is more limited than the obligations under Parts 2 and 4 of the Act, and thus achieving a balance may be easier in these areas.

II. POST-RELEASE PROVISIONS UNDER THE CRIMINAL JUSTICE ACT, 2007

The mounting pressure to define risk, and manage it accordingly, has led to the development of post-release measures that target a much broader category of offenders than sex offenders in the post-release stages. The emergence of the post-release provisions under the Criminal Justice Act 2007 came somewhat obscurely, without much discussion or debate as to the purpose or intended effect of the measures introduced. The provisions under the Criminal Justice Act, 2007, do seem to have been influenced to some extent by the Serious Crime Act, 2007, in the UK.[73] The Irish provisions cast a wider net than the Sex Offenders Act, 2001 (above), and apply to offenders who have been convicted of very serious crimes such as murder, firearms offences and drug trafficking offences. The maximum period for which the post-release orders under the Criminal

[73] The Serious Crime Act, 2007, s. 1, introduced the "serious crime prevention order", which can be imposed by a High Court or Crown Court if considered reasonably necessary to protect the public. In Ireland the draft provision under the Bill mirrored the UK provision, but was altered before enactment due to heavy criticism.

Justice Act, 2007, can be imposed is seven years, and thus the scope of the provisions is more limited than those under the 2001 Act.

A. The Monitoring Order

Section 26 of the Criminal Justice Act, 2007, empowers a court to impose two different orders as part of a sentence. The first of these is called a "monitoring order". Under section 26(2) of the Act, a monitoring order can be imposed upon an adult offender convicted on indictment of an offence under the Schedule two of the Act. The serious offences that can invoke an order include offences under the Non-Fatal Offences Against the Person Act, 1997, such as assault causing serious harm (section 4) and false imprisonment (section 15), aggravated burglary under the Criminal Justice (Theft and Fraud Offences) Act, 2001 (section 13), and blackmail and extortion under the Criminal Justice and Public Order Act, 1994 (section 17).[74]

The order can be imposed in addition to a custodial sentence, where the maximum penalty available for that offence has not been given. It comes into effect after the offender is released from prison. The maximum period for which the order can have effect is seven years, and the court has a wide discretion in this regard.[75] The order requires the individual to notify an Inspector of the Gardaí, in the district in which he is resident, of certain information as soon as practicable after the order comes into effect. The information that must be given includes name and address, as well as notifying in writing any proposed change of address or intention to be absent from that address for more than seven days. Such notification must take place *before* the move occurs.

Significantly, any person made subject to such an order may apply to the court to have to order dissolved or varied.

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[74] The other offences include murder, threats to kill or cause serious harm (Non-Fatal Offences Against the Person Act, 1997, s. 5), explosives offences under the Explosive Substances Act, 1883, firearms offences under the Firearms Acts, drug trafficking offences (Criminal Justice Act, 1994, s. 3) and organised crime offences under the Criminal Justice Act, 2006.

[75] s. 26(3). Such discretion would presumably be limited by constitutional principles so that the orders are not disproportionate or vague.

Under section 26(8), a court may grant the application if satisfied that there are circumstances that have occurred since the time of making the order that merit variation or revocation.

B. The Protection of Persons Order

The second order that can be imposed pursuant to the provision in the 2007 Act is called a "protection of persons order". Under section 26(5) of the Act, a protection of persons order can be imposed upon an adult offender convicted on indictment of an offence under the Schedule two of the Act. Like the monitoring order, the protection of persons order can be imposed on foot of a conviction in addition to an ordinary custodial sentence. The order comes into effect when the individual is released from prison, and can last for a maximum period of seven years. The court again has discretion in this regard. The order is to prohibit an individual from engaging in "any behaviour that in the court's opinion, would be likely to cause the victim of the offence concerned, or any other person named in the order fear, distress or alarm or would be likely to amount to intimidation of any such person". The provision is not narrowed down beyond this statement, and no further information is stated in the provision as to what this means specifically. The declared purpose of the order is to protect the victim or any other named person from harassment by the offender.[76]

As with monitoring orders, protection of persons orders can be discharged or varied on application to the court by the individual against whom the order has been made (section 26(8)). Notice that such an application is being made to an Inspector of the Gardaí in the area were the individual is resident. A court may grant the application if satisfied that there are circumstances that have occurred since the time of making the order that merit variation or revocation. Breach of a "monitoring order" or "protection of person order" is a criminal offence under section 26(10) of the Criminal Justice Act, 2007. The penalty on summary conviction is a fine of up to €2000 and/or imprisonment of up to 6 months.

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[76] s. 26(4).

C. Implementation and Effectiveness

Little information is yet available as to how many orders have been made, or what conditions have been imposed as part of the protection of persons orders. Moreover, there is insufficient information available as to the effect of the provisions to date. Prior to the enactment of the provisions, the then Minister for Justice, Mr McDowell, stated that the aim was to protect the public, keep the offender on the "straight and narrow" and give the Gardaí "some handle" over the person.[77] Apart from emphasis upon giving the public a sense of security, very little else is said about the purpose of introducing these measures into Irish law,[78] and there has been little by way of discussion, debate or proposals for the future in the context of these types of orders.

Of practical effect, the monitoring order under the provision mirrors the obligations imposed under Part 2 of the Sex Offenders Act, 2001, discussed above. Similar to the current sex offender register, the obligations under section 26(2) involve passive rather than active monitoring (but with the exception that notification regarding change of address must be *before* the move occurs). This to some extent limits the scope of the obligation placed upon the individual.

Another related purpose of the provisions is apparent from the offences that invoke the orders. Considering the nature of the offences listed in Schedule 2, the provision was clearly intended to some extent to target offenders involved in "gangland" offences. In a public consultation of the Bill prior to its enactment (organised by the Irish Council for Civil Liberties), national and international experts had argued that the measure would do nothing to tackle gangland crime.[79] One criminological expert commented that he was "puzzled by the suggestion that the rights of victims can in some way be enhanced by diminishing the rights of people accused of crimes. Quite simply, this flies in the face of

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[77] 634 Dáil Debates 619.

[78] See *e.g.* Mr Damien English, TD, 634 Dáil Debates 691, 23 March 2007.

[79] "Re-Balancing Rights? Contemporary Issues in Human Rights and Criminal Justice", Public Consultation held in the Presidents Hall of the Law Society of Ireland on 17 February 2007.

the facts".[80] Furthermore it is not made clear how the provision is to mesh with the notification provision under the Criminal Justice Act, 2006 (see below). Overall, the effectiveness of the measures introduced has yet to be assessed.

III. POST-RELEASE PROVISIONS FOR DRUG TRAFFICKING OFFENDERS

A. Notification Orders under the Criminal Justice Act, 2006

When the Government published the Criminal Justice Bill 2004, provision was made in this Bill for a drug offenders register. Apart from being in keeping with the hard-line approach for drug offenders, it is unclear what the rationale for a drug offenders register was. There was no explanation provided in the explanatory notes as to the rationale or necessity of such a measure. Little discussion or emphasis was placed upon this provision at all prior to the enactment of the Bill. Greater emphasis was placed on other provisions of the Bill that was considered to be "one of the most significant and reforming pieces of criminal legislation in a long time".[81] The purpose of the Act as a whole was stated to be to contribute to "the fight against criminal gangs".[82] In addition to the increase in resources provided to the Gardaí, prosecution services and the courts, it was stated that the Act demonstrated "the Government's unwavering commitment to defeating organised gangs". Moreover, the provisions were stated to be reasonable, and justified by the level of threat posed by organised crime.[83] In addressing the issue of the register specifically, the then Minister for Justice Mr McDowell, referring to it as "the management of offenders after their release", believed the register would be beneficial to

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[80] Professor Robert Gordon, speaking at the Public Consultation (previous note), Law Society 2007.

[81] Address by the Tánaiste at the Criminal Law Conference 2006, Royal College of Surgeons. Changes made under the Act included in the areas of investigating offences, sentencing, firearms and organised crime.

[82] "Criminal Justice Bill Published", available at www.justice.ie/en/JELR/Pages/Criminal_justice_bill_published.

[83] The Minister and Tánaiste announcing the publication of the Bill.

the Gardaí in monitoring organised criminals.[84] It is clear that the register was modelled to a large extent upon the register for sex offenders under the 2001 Act.

The Irish Human Rights Commission (IHRC) observed that the provision was presumably designed to ensure the Gardaí have current information on the names, addresses and whereabouts of persons previously convicted of drug trafficking offences, but apart from this could see no reason for the register.[85] They could not see how the register would be an effective, necessary or proportionate response to the prevention of drug trafficking. Moreover the IHRC considered that the requirements amounted to an interference with private life in contradistinction to Article 8 of the ECHR, and that in this context it was not in pursuit of a legitimate aim or necessary in a democratic society.

Part 9 of the Criminal Justice Act, 2006, came into force on 2 October 2006, and introduced what is essentially a drug offenders register. Under the 2006 Act, any person who has been convicted of a drug trafficking offence, within the meaning of section 3(1) of the Criminal Justice Act, 1994, and sentenced to more than 12 months in prison, will be made subject to the register.[86] The obligation applies to all offenders convicted on indictment after the commencement of the Act (section 89(1)), and although the provision is not fully retrospective, the notification orders can also be imposed if the offender was convicted before the commencement of the Act, if he/she is still awaiting sentence, or if the offender is serving the sentence in prison, is on temporary release, or the sentence is otherwise still in force (section 89(3)).[87] Persons convicted after the commencement of the Act, and those awaiting sentence, are automatically subject to the provisions, whereas an application must be made to the Circuit Court by a superintendent Garda in the case of persons under section 89(3). A court may impose the obligations where it considers it in the interests of the common good and appropriate in all the circumstances.

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[84] The Minister and Tánaiste announcing the publication of the Bill.

[85] Irish Human Rights Commission, *Observations on Additional Proposals for Amendments to the Criminal Justice Bill 2004*, 8 March 2006.

[86] Criminal Justice Act, s. 88 and 89.

[87] s. 89(2) and (3)(a-c).

The obligation to notify also applies to those convicted of a drug trafficking offence outside the jurisdiction, if that offence would constitute a drug trafficking offence in Ireland.[88]

When such an order is imposed, a certificate to that effect is issued to the offender by the court that sentenced him, and also to the Gardaí and the Governor of the prison where the offender is serving his sentence. The Governor of the prison is obliged to notify the offender prior to his release that he is subject to the provision, and must also inform the Gardaí at least 10 days before the offender's release.[89]

Pursuant to the provision, the individual has seven days from the "relevant date"[90] to notify the Gardaí of specific information including name, date of birth and home address.[91] The individual is also required to notify the Gardaí, within seven days, of a change in name, address, residence away from the given address for a "qualifying period",[92] or an intention to leave the State for a period of seven or more days. Such obligations can be fulfilled either by the individual attending in person at a Garda station, or by sending a written notification, either by post or by such other means as may be prescribed.[93] The length of time for which the notification requirements can last depends upon the length of the sentence of imprisonment originally imposed.[94] The maximum period for notification that can be imposed is 12 years, if the original sentence is one of life imprisonment. If the

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[88] Criminal Justice Act, s. 95.

[89] s. 91.

[90] This date is defined in s. 87 as the date of conviction (and not the date of sentence) for the drug trafficking offence. Murphy notes that this is an anomaly, given that in theory an individual is subject to the requirements from the moment of conviction, and if a sentence of less than 12 months is subsequently imposed the offender will cease to be obligated by the provisions. Murphy, "An Analysis of Sentencing Provisions in the Criminal Justice Act 2006" [2007] J.S.I.J. 60, 92-93.

[91] s. 92(6).

[92] This period is any period of seven days or two or more periods which taken together add up to seven days (s. 92(11)).

[93] s. 92(8).

[94] s. 90. If part of the sentence is suspended, the part that is not suspended is regarded as the term of imprisonment for the purposes of the section (s. 90(5)), and if two or more sentences are imposed consecutively or are partly concurrent the aggregate sentence is the period of imprisonment (s. 90(6))

original sentence is more than 10 years but not life the period of notification is seven years; if the sentence is more than five years but less than 10 years the notification is for five years; if the sentence is more than one year but not more than five years the notification is for three years; and if the sentence is a suspended one then the notification period is one year.[95] Two offences are created under this Part of the Criminal Justice Act, 2006. The first creates an offence for non-compliance with the notification requirements (section 94(2)). The second creates an offence for furnishing the Gardaí with information known to be false or misleading. The penalty for both offences, on summary conviction, is a fine of up to €3000 and/or up to 12 months imprisonment.

Significantly, pursuant to section 98, the requirements may be discharged in certain circumstances. Where an adult is subject to registration for a period of 12 years and a juvenile to a period of six years, this individual may apply to the Circuit Court, after a period of eight years and four years respectively have passed to have the order discharged. The court may discharge the order if the interests of the common good are no longer served by his continuing to be subject to them.

B. Post-Release Orders under the Criminal Justice (Amendment) Act, 2009

Calls for further changes in the law to tackle drug offenders emerged in the wake of the brutal murders of Shane Geoghegan in 2008 and Roy Collins in 2009. These tragic murders seemed to be the catalyst for further stringent measures to be levied against organised criminals, with the Minister for Justice, Mr Dermot Ahern, stating that "the government will rule nothing out which is reasonable and consistent with the rule of law in tackling these gangs head on".[96] In response to the

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[95] These periods are halved if the offender is under 18 years of age (s. 90(4)).

[96] Dáil Statement by the Minister for Justice, Equality and Law Reform, Mr. Dermot Ahern, on the killing of Shane Geoghegan, 13 November 2008, available at http://www.justice.ie. Many opposed the Bill believing that although the measures were tough they were not necessary and would be of little effect in fighting organised crime. See for example Senator Ivana Bacik, Seanad Debates, 196 Dáil Debates 15 (Second Stage).

perceived threat from organised criminals, a number of legislative "packages" were introduced, in order to re-enforce the power of the authorities in the "war" against gangland activities. Among the provisions introduced is the Criminal Justice (Amendment) Act, 2009.[97]

Section 14 of this Act amends the Criminal Justice Act, 2007, by inserting after section 26, section 26A which provides that where a person is convicted of an offence under Part 7 of the 2006 act or an offence specified in Schedule 2 (in furtherance of activities of a criminal organisation), the court in sentencing the offender shall consider whether it is appropriate to make an order under this section (known as a "post-release (restrictions on certain activities) order"). The provision provides that the order shall not be made unless the court considers that it is in the public interest to do so, and the court shall take into consideration matters such as past criminal record and other circumstances relating to the offender (section 26(a)(2)). The order according to section 26(a)(3) may restrict or impose conditions on the persons movements, activities and/or association with others, and can be imposed for any period up to seven years as the court considers appropriate (section 26(a)(4)). Furthermore, an order made may be revoked or varied on application by the offender, if the court considers it proper to do so (section 26(a)(6)). It is an offence under section 26(a)(8) to fail to comply with the post-release order. The penalty under summary conviction is a maximum fine of €5000 and/or imprisonment of up to 12 months.

C. Implementation and Effectiveness

It is difficult to ascertain exactly how the drug offenders register is being currently implemented. It was reported in 2009 that the register was still being organised and set up by the Gardaí but not in full working mode, two years after it had been introduced.[98] The courts on the other hand have been ordering drug trafficking offenders to be registered since shortly after its

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[97] Another notable piece of legislation introduced is the Criminal Justice (Surveillance) Bill 2009.

[98] "Register of drug dealers still not ready after two years" *Independent*, 17 May 2009.

inception.[99] One probable reason for any delay in getting the "register" up and running is the lack of Garda resources to deal with the increased workload.[100] It is the Gardaí who are responsible for checking information and ensuring compliance with the obligations under the 2006 Act and who are furthermore responsible for ensuring that "post-release (restrictions on certain activities) orders" are implemented and complied with. So far, there is minimal information as to how the Gardaí are coping with these cumbersome duties.

Speaking about organised crime legislation generally, the Minister for Justice stated that "there is no more fundamental human right to which all our citizens are in equality entitled than the protection of their lives and property from those who break the law".[101] With regards to the drug offenders register, it was never stated directly that the purpose for this measure was public protection, and one cannot readily imply that the register targets any one specific risk aimed at securing public protection. Moreover minimal direction has been given to the Gardaí as to what is to be done with the register.

There is little evidence that notification requirements for other types of offenders, notably sex offenders, have any protective effect, despite their protective aims. It is doubtful that the purpose of notification for drug trafficking offenders had anything to do directly with public protection. Rather it may be an element of the securitisation of identity envisioned by Rose.[102] Although securitisation of identity is also associated with protection, it seems in this context at least that the measures are more concerned with classification and identification, rather than with the effective use of such information towards public protection. Moreover, although applicable to the world at large, certain categories of individuals may be more susceptible, by virtue of

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[99] Information as to how many are on the register is currently unavailable.

[100] It is noted however that there has been an increase in Garda numbers in recent years. See Dáil Statement by the Minister for Justice, Equality and Law Reform, Mr. Dermot Ahern, on the killing of Shane Geoghegan, 13 November 2008.

[101] Dáil Statement by the Minister for Justice, Equality and Law Reform, Mr. Dermot Ahern, on the killing of Shane Geoghegan, 13 November 2008.

[102] Rose, "Government and Control" (2000) 40 *British Journal of Criminology* 321-339.

their status, to being subjected to securitisation. In the context of sex-offenders one concern noted, that may be applied to the broader range of offenders subject to post-release provisions, is that the register may be too heavily relied upon by the Gardaí, and may lead to miscarriages of justice.

Furthermore, the effectiveness of the drug offenders register in terms of compliance rate has yet to be evaluated. It is also unclear as to whether the register was intended to have a deterrent effect. If one considers other surveillance measures for this category of offender, one sees a recurring intention that such measures might not stop crime, but will make it more difficult for criminals.[103] Its effectiveness in this regard has also yet to be evaluated.

A public protection element may be more readily inferred from the "post-release orders" under the 2009 Act. There has not been any real discussion yet as to how these orders are to be considered effective, apart from enabling the Gardaí to monitor and restrict the individual's liberty after release.

IV. CIVIL OR CRIMINAL?

One question arising out of the provisions documented above is whether or not they constitute a form of punishment. As with the post-release arrangements elsewhere, emphasis has been placed upon the civil as opposed to criminal nature of registration and the other orders. This has not however displaced concern that their effect upon offenders is punitive to some degree.

The constitutionality of notification requirements under the Sex Offenders Act, 2001, has been challenged and upheld in the Irish Courts in the case of *Enright v. Ireland*.[104] Finlay-Geoghegan J. in the High Court determined that in order for the requirements to be considered part of the punishment, they must be punitive in intent and effect. The learned judge found the provision of the 2001 Act to be for the benefit of the public, and that there was no punitive intention on the part of the Oireachtas.

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[103] Measures include existing surveillance techniques and the new provisions under the Criminal Justice (Surveillance) Act, 2009.

[104] *Enright v. Ireland* [2003] 2 I.R. 321.

The element of risk was a big factor in the case, with the court relying heavily on, and ultimately siding with, expert evidence that the risk posed by sex offenders demanded measures to manage this risk.[105] Furthermore, these measures were not found to constitute disproportionate interference with the constitutional rights of offenders under Articles 38.1 and 40.3 of the Constitution given that the Act was there to protect the constitutional rights of other citizens.[106]

The decision was supported by the Central Criminal Court in the case of *People (DPP) v Cawley*, where it was said that "notification requirements .. are undoubtedly a consequence of the offences but could hardly be properly said to be a penalty".[107]

There is somewhat of a conflict between these cases and subsequent decisions on the Sex Offenders Act, 2001, which do not rule out the prospect of the requirements being punitive despite having a protective aim. In the case of *DPP v. NY*, Fennelly J. held that if an individual poses a low risk, the application of the Act "constitutes a real and substantial punishment", and therefore the court could have regard to this when sentencing.[108] This view was endorsed by the Supreme Court in the case of *CC v. Ireland*, who felt that the register could be regarded as being punitive in nature.[109] Hardiman J. in this case considered that enrolment on the register was a very "formalised stigma" and had no hesitation in regarding the compulsory enrolment as a punitive consequence of conviction.[110]

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[105] Rogan argues that one cannot assume that the decision in *Enright* could not be assumed to apply automatically to a challenge of s. 26 of the Criminal Justice Act, 2007, due to the focus upon the particular risk posed by sex offenders in the case. See Rogan "Extending the Reach of the State into the Post-Sentence Period: Section 26 of the Criminal Justice Act 2007 and 'Post-Release' Orders" (2008) 15 D.U.L.J. 214, 226.

[106] The court applied the tests developed in *Tuohy v. Courtney* [1994] 3 I.R. 1 and *Heaney v. Ireland* [1994] 3 I.R. 593, and found that the test of proportionality was satisfied.

[107] *People (DPP) v. Cawley* [2003] 4 I.R. 321, 335.

[108] *DPP v. NY* [2002] 4 I.R. 309.

[109] *CC v. Ireland* [2006] 4 I.R. 1.

[110] The case concerned the constitutional compatibility of offences of strict liability, the issue of notification requirements being considered in this context.

In an attempt to analyse the conflicting judgments Clarke J. in the case of *P.H. v Ireland* said that "the provisions of the 2001 Act were amongst the "relevant circumstances" which should be taken into account when imposing sentence".[111] Rather than being part of the punishment, the requirements were an additional burden which "must be weighed in the balance". Although no challenge has been made in their regard, this could also be the case for notification requirements under Part 9 of the Criminal Justice Act, 2006, and section 2 of the Criminal Justice Act, 2007, and for the other post-release orders that offenders may be bound by.

The emphasis upon the civil nature of the post-release provisions may obscure the negative effect that they may have on ex-offenders.[112] Significantly, it means that the same protections existing for individuals in the criminal sphere – due process rights such as presumption of innocence, liberty and proportionality – are not present (or at least are not present at the same level) when such orders are imposed upon individuals as a civil measure. This arguably denies a balanced approach to the question of all post-release measures that in a very real way interfere with the lives of ex-offenders after they have served their sentence. Given that they are imposed on foot of a conviction, it is difficult to see how they can easily be separated as solely an administrative requirement.[113] While there may be a protective purpose, this should not cloud the fact that the obligations are involuntary, coerced and potentially punitive.[114] Furthermore the argument that the measures cannot constitute a punishment, being for preventative and deterrent purposes, ignores that these aims are often legitimately drawn-on as grounds to imposing punishment.[115] This further calls into question the focus upon the

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[111] *P.H. v Ireland* (High Court, unreported, 16 February 2006), at para.7.7.

[112] See also O'Malley, "Principles of Sentencing: Some Recent Developments" (2001) 1 J.S.I.J. 55.

[113] Ashworth argues that just because a measure is deemed civil and not criminal should not necessarily mean that it cannot correctly be considered punishment. Ashworth et al, "Neighbouring on the Oppressive: The Government's Anti-Social Behaviour Order Proposals" (1998) 16 *Criminal Justice* 7.

[114] See Zedner, *Criminal Justice* (Oxford University Press, 2004).

[115] Hudson, *Understanding Justice* (Open University Press, 2003).

non-punitive but protective intention of the provisions. Moreover, as Thomas argues, "what starts life as a preventative, regulatory measure can easily become a more punitive measure in its own right".[116] Even if the measures themselves are not considered to constitute punishment, it must still contended with that failure to comply with the orders leads to criminal sanctions being imposed.

V. EXCLUDING THE EX-OFFENDER

Facing life on the outside after imprisonment can be very difficult for any offender, especially if they have been incarcerated for a significant period of time. The new post-release measures contribute to the increasing surveillance of ex-offenders, and the displacement of many of the rights that are assumed to be restored to individuals upon release. The need for balance is important here, considering that the essential effect of post-release provisions is that they suspend the individual's "freedom" after release, or place conditions and restrictions upon it that ordinarily would not have existed. The individual does "suffer" because of this, as rights ordinarily restored after release, are in reality not recovered or are limited. Policies like notification requirements emphasise that re-integrative strategies are shifting from an approach to bring the offender into the community and help him be a part of it, to an approach perpetuating his exclusion in that community. It is vital therefore that liberty, privacy and proportionality interests be considered in the context of post-release provisions.

The seriousness of the offences which give rise to the various orders under the Acts discussed above cannot be taken lightly, nor can measures enacted to deal with such offenders be readily criticised as purely political rhetoric. As O'Malley has noted, an ordered society requires some control, the essential element being that such control should be as least restrictive and

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[116] Thomas, "When Public Protection Becomes Punishment? The UK use of Civil Measures to Contain the Sex Offender" (2004) 10 *European Journal on Criminal Policy and Research* 337, 337.

destructive as possible.[117] Any measure introduced here requires careful consideration not just of the effect upon the offender but also the interests of the public. The public have a right to be protected, and their liberty interests are just as important to weigh in the balance. However, one might wonder the extent to which the policies are expressive rather than effective. Are they necessary in the interests of the public, or do they merely act instead as an extra hurdle for the ex-offender to be successfully integrated into the community?

The importance of having a balanced approach was recognised by those involved in the enactment of the provisions under the 2001 Act. It was considered that offenders "should be offered assistance and direction to remove them from that category and ensure they are put on the right road".[118] The authors of the 2009 Discussion Document also commented on the need to balance public protection with the offenders' constitutional rights (privacy) and their reintegration (through interventions and support).[119]

A positive element of the post-release measures for sex offenders is that the element of rehabilitation has been given fresh consideration and merit. It was stated prior to the introduction of the 2001 Act that "a co-ordinated approach" was needed to sex offending, and emphasis was placed upon the need for treatment in prison.[120] It was further stated to be "more beneficial to society if effective treatment is provided for people in prison rather than putting them on a sex offenders register and allowing them out on the streets".[121] In April 2009 the Irish Prison Service announced a new policy for the management of sex offenders in custody, which through therapeutic interventions, aims to reduce the risk

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[117] O'Malley, "Community-Based Sentences and Social Control" (1993) 11 I.L.T. 201, 204.

[118] Mr McGuinness speaking in the Dáil, Vol 520(1) Dáil Debates (Second Stage), June 2000.

[119] *The Management of Sex Offenders – A Discussion Document* (Dublin, January 2000).

[120] See for example Ms Sullivan speaking at the Committee Stage of the Sex Offenders Bill 2000, 10 October 2000.

[121] Ms Sullivan (Committee Stage).

of re-offending in the future.[122] Intervention and support for offenders in the community, and especially in making the transition from prison to community has also been advocated. In other jurisdictions, community-based interventions have been found to reduce the recidivism rate,[123] and thus public interest considerations are provided for under such interventions. Child Protection agencies have also emphasised the positive effects of rehabilitation, and consider that community based interventions are vital for reducing recidivism, and that they furthermore would support the suggestion (by the authors of the Discussion Document 2009) to link participation in treatment both inside and outside of prison, with and incentive such as eligibility for temporary release.[124] In general most penal systems, being reluctant to permit early or temporary release of convicted sex offenders,[125] are increasingly using supervision and treatment as a solution to managing released sex offenders. Recent proposals seek to offer sex offenders early release if they agree to supervision and treatment in the community.[126]

No such element of support or rehabilitation is provided for in connection with post-release measures for drug trafficking offenders or those subject to the provisions in the 2007 Act. Rogan remarks that the complete focus on public protection (Criminal Justice Act, 2007, s. 26) is difficult to explain given that "public perceptions would be unlikely to be that sexual

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[122] For detail on the therapeutic interventions see The Irish Prison Service, *Sex Offender Management Policy: Reducing Re-offending, Enhancing Public Safety*, 22 April 2009.

[123] See for example Lipsey and Cullen, "The Effectiveness of Correctional Rehabilitation: A Review of Systematic Reviews" (2007) 3 *Annual Review of Law and Social Science* 297-320; McGrath, Cumming, Livingston and Hoke, "Outcome of a treatment programme for adult sex offenders: From prison to community" (2003) 18 *Journal of Interpersonal Violence* 3-17.

[124] See Barnardos, *Submission into Management of Sex Offenders – Discussion Document*, 30 April 2009.

[125] In Ireland the Whitaker Report found that sex offenders rarely qualified for temporary release under the Criminal Justice Act, 1960, nor benefited from the practice of "shedding". Whitaker Report, *Committee of Inquiry into the Penal System* (Dublin, 1985).

[126] See the Department of Justice Discussion Document 2009, para. 6.7.5, and para. 6.8.5. See also "Sex offenders offered early release if they get treatment" *Irish Examiner*, 23 April 2009.

offenders are more worthy of rehabilitative efforts that those convicted of offences in the Schedule to the Criminal Justice Act, 2007".[127] Thus there is a distinct lack of a balance between the interests of the public and the rights of offenders inherent in these provisions.

In relation to the "registers" under the various Acts, it is not clear that a balanced approach is being achieved. Little evidence exists at present as to their effectiveness, and their all-encompassing nature means offenders with little or no risk of offending are assimilated into the mix, rather than confining the requirements to high-risk offenders. In those circumstances all the requirements may do is act as a further encumbrance and barrier to integration. Relinquishing the shackles of a conviction and punishment are made undesirably more difficult.

Furthermore White (in the context of sex offenders) suggests three reasons why the value of the register as an investigative tool should be tempered with caution.[128] Firstly, as noted above, the lack of empirical evidence on the register means no conclusions can be drawn regarding it effectiveness. Secondly, he points out that it is difficult to prove a link between the register and the detection of the offenders. Thirdly, there is a very real danger that the register could be too heavily relied upon, with miscarriages of justice arising therefrom. Such arguments also need to be weighed in the balance, in determining whether notification requirements are appropriate and fair. Such arguments also carry weight in the context of the notifications requirements under the other Acts. Moreover, there is no requirement for continuous risk assessment in relation to the other registers, as there is for the sex offender register. Thus those registers will more likely incorporate offenders who may not even present a future risk. As a surveillance tool then, the registers' use must be carefully balanced against the interests of the individual, especially in order to enable the transition from offender to ex-

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[127] Rogan, "Extending the Reach of the State into the Post-Sentence Period: Section 26 of the Criminal Justice Act 2007 and 'Post-Release' Orders" (2008) 15 D.U.L.J. 214, 221.

[128] White, "Controlling Sex Offenders: Raising Critical Questions about the Sex Offenders Bill 2000" (2001) 4 I.J.F.L. 8, 11.

offender. There is a real prospect that the register could be counter productive and primarily act as a barrier to reintegration.

The disclosure in employment for sex offenders may also be an unbalanced provision. White comments that "it would be a mistake to presume that all those convicted of an offence of a sexual nature will necessarily be a future threat to children and vulnerable adults".[129] The provision may arguably have a disproportionate effect upon offenders who pose little or no risk in the future, given that it can provide a barrier to legitimate employment, and can deny the individual opportunity to become reintegrated into normal social life. This is not to say that public safety is not a viable concern. Some measure of scrutiny and monitoring is often necessary and justifiable, both in the context of an effective criminal justice system and in terms of public protection.

As was stated in the Dáil prior to enactment of the Act, the remit of the protection for the public from sex offenders is much wider than the provisions under the Act, and any approach must also encompass support for victims and rehabilitation for offenders.[130] This is true also in light of the fact that the Act excludes from its provisions many people who represent a real danger but have not been convicted of an offence.[131] This is not to say that the precautionary measures are not also necessary, but the argument is made that the protection of children and adults will encompass a greater social role around sexual offending and the administration of care services also. [132] Sexual offending will not be reduced or eliminated, nor its effects eradicated, by the

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[129] White (2001), 8. See also Grubin, "Sex Offending against Children: Understanding the Risk" (*Police Research Series Papers*, Home Office, 1998).

[130] *E.g.* Mr McGuinness, Mr Crawford and Mr Callely, Second Stage of the Bill, Dáil Éireann Vol. 520, 1 June 2000.

[131] Mr Neville noted in the Committee Stage of the Sex Offenders Bill 2000, 10 October 2000.

[132] Murphy observes that reducing sexual victimisation will require a lot more in terms of social policy than simply focusing on imprisoned or convicted sex offenders (at 708) and that studies of sexual abuse in Ireland support the need to adopt a public health approach to the problem of such abuse (at 710). Murphy, "Offender Rehabilitation Programmes for Imprisoned Sex Offenders – Grounds for Optimism?" in O'Mahony (ed.), *Criminal Justice in Ireland* (Institute of Public Administration, 2002), 705-725.

implementation of post-release provisions alone. The effectiveness of such provisions may in fact be significantly diminished, if considered outside of the "stranger danger" scenario. One must in this regard consider the risk posed by sex offenders, as demonstrated by available empirical evidence. Studies on the rates of recidivism reveal an inaccuracy regarding the perception that sex offenders are prone to re-offending. A recent study conducted in Ireland found that, in line with the international picture, sex offenders were significantly less likely to be re-imprisoned (18% within 3 years) than other types of offenders.[133] Studies also demonstrate that most sexual crime is committed by individuals known to the victim.[134] The Savi Report in 2002, documented that in four out of five cases of sexual abuse against children, the abuser is known to the child, and that furthermore the risk of sexual abuse by a stranger was slightly higher for adult victims.[135] A measure like registration reinforces the idea of "stranger danger", and does little to protect children or adults who may be living with or otherwise have a relationship with or are in close proximity to the offender.

The imposition of other measures, such as sex offender orders can have the effect of targeting an ex-offender long since disentangled from the criminal justice system, and draw him into the loop again. "Protection of persons orders" and "post-release (restrictions on certain activities) orders" may also hold the offender within the system for longer than he might originally have been there. Such orders may make it more difficult for the offender to be reintegrated into society and, at least in some cases, have a disproportionate effect. Protecting the public from serious harm is a vital concern, but the proper approach would be to only apply an order to high-risk offenders and when absolutely

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[133] O'Donnell, Baumer and Hughes, "Recidivism in the Republic of Ireland" (2008) *Criminology and Criminal Justice* 123, available at http://crj.sagepub.com.

[134] "Demonising paedophiles does not help problem" *Irish Times*, 18 December 1997.

[135] *The Savi Report, Sexual Abuse and Violence in Ireland* (Dublin Rape Crisis Centre: Liffey Press, 2002). The Report found that abuse by a stranger was 30% for women in comparison with 24% for girls, and 38% for men in comparison with 20% for boys.

necessary.[136] Otherwise the prospect of drawing "less" dangerous ex-offenders into the loop becomes greater. The balance may, in such instances, fall too far against the personal rights of the ex-offender. Caution must also be exercised in view of the fact that failure to comply with such orders leads to criminal sanctions. In the absence of due process considerations (adherent to criminal standards) it is doubtful whether the appropriate balance can be achieved.

The overall tenor of the measures introduced is premised upon providing public safety through control and monitoring techniques as opposed to support for and reintegration of the offender.[137] The 2001 Act was actually described by the Department of Justice as a "cornerstone of the Government's unyielding response to those who perpetrate sexual offences and those sexual predators in our community".[138] The Acts targeted at drug traffickers were described as demonstrating "the Government's unwavering commitment to defeating organised gangs".[139] At the very least, post-release provisions for sex offenders recognise the need for accompanying support for offenders, but this is entirely lacking in relation to the provisions under the other Acts. Without addressing the need for after-care services for offenders it is unlikely that the measures under the 2007 Act, the 2006 Act and the 2009 Act will do anything to deal effectively with the reintegration of prisoners and desistance from criminal activity. Moreover, freedom is conditioned, and there is now a statutory requirement on those who have served their sentence to prove that state monitoring of them is unwarranted. Thus one might argue that the measures are disproportionate and

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[136] There is no evidence to suggest that the courts are not taking a cautious approach. In general information is not yet available as to how the courts are dealing with such orders.

[137] The importance of prison after-care in the desistance of crime has been highlighted by the Whitaker Committee in 1985. Commission of Inquiry into the Penal System, *Report on the Commission of Inquiry into the Penal System* (Stationery Office, 1985) 1, 102-108.

[138] *Background Briefing Note: Sex Offenders Act 2001*, available at www.justice.ie.

[139] "Criminal Justice Bill Published" www.justice.ie/en/JELR/Pages/Criminal_justice_bill_published.

unfair, particularly considering that nothing can be said as to their effectiveness thus far.

The policies under the Acts reflect a precautionary logic, in which adhering to public safety through surveillance and control is the primary focus. Apprehending risk permits the State to interfere in the personal lives of ex-offenders after they have served the penalty for their offence. Liberty and privacy have become conditional elements of release. The right of offenders to move on with their lives after they have served their time is outweighed in political policy by an overwhelming need for security. The orders imposed may arguably be justified in the interests of the public, but that does not mean that offenders, even categories of offenders considered to pose a risk to public safety, are not owed justice.[140] Regardless of the priority given to protecting the public, it must be accepted that the residual rights of the individual remain, and that they are still entitled to the due process and personal rights enjoyed by all citizens. The right to privacy, liberty, the right to earn a livelihood, and move freely within the state are basic, fundamental rights that are curtailed and restricted as result of notification requirements and other orders, and there must be a balance between such rights and the rights of the public.[141] As Rogan argues "the fact of conviction should not allow the state to interfere with an individual's liberty for a significant period after the expiration of a sentence".[142]

CONCLUSION

The Acts under discussion in this chapter particularly highlight the pervasive elements of risk assessment and public protection currently dominating penal policy, while also revealing the latent refocusing of criminal policies away from the crime

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[140] See Hudson, "Balancing Rights and Risk: dilemmas of justice and difference," in Gray, Laing and Noaks (eds.), *Criminal Justice, Mental Health and the Politics of Risk* (London: Cavendish Publishing, 2002) 99-122, 100.

[141] The increasingly punitive and restrictive line of the legislature means that responsibility will lie with the courts to achieve and maintain a balance in this sensitive area.

[142] Rogan, "Extending the Reach of the State into the Post-Sentence Period: Section 26 of the Criminal Justice Act 2007 and 'Post-Release' Orders" (2008) 15 D.U.L.J. 214, 226.

towards the criminal. They represent a move away from the notion that, once an offender has served his sentence, he has paid his debt to society, and the justice system has no further claim over him.

The IHRC have stated that "[a] central pillar of human rights law is that any interference with individual rights must be justified by demonstrating that the interference is in pursuit of a legitimate aim, and that the interference is proportionate to the achievement of that aim. Furthermore, adequate and effective safeguards should be in place to ensure that the rights of the individual are not interfered with arbitrarily or unjustifiably".[143] While emphasis upon victims' rights and public interest is important, the provisions discussed above impose obligations and restrictions on offenders that directly interfere with their personal rights (privacy, private family life, freedom of movement) after they have served the penalty for their offence. It not clear that all of the measures examined are in pursuit of a legitimate aim in the sense of being necessary and proportionate. The notification requirements and the monitoring order are of dubious value in protecting the public. The protection of persons orders, on the other hand, may be more justifiable in that they are targeted towards offenders who pose a significant risk. However, it is important that such orders only be imposed when necessary in the public interest. Furthermore safeguards are in place to ensure that the measures are not overly onerous or disproportionate. In certain circumstances, the individual can apply to have the order varied or discharged. This is an essential element of the provisions, which introduces some measure of balance.

One notable shortfall in the provisions, particularly under the CJA 2006, CJA 2007 and the CJ(A)A 2009, is the lack of a rehabilitation element. The problem of re-entry has been identified in Ireland, and research has revealed that the best way of ensuring reintegration and rehabilitation of offenders is providing support and after-care services that address the problems faced by ex-offenders.[144] The focus of the new policies

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[143] Irish Human Rights Commission (IHRC), *Observations on Additional Proposals for Amendments to the Criminal Justice Bill 2004*, 8 March 2006.

[144] See for example Commission of Inquiry into the Penal System, *Report on the Commission of Inquiry into the Penal System* (Stationery Office, 1985);

is primarily public safety and offender management, and this to some degree contributes to widening the divide between the offender and the rest of society. Re-entry has come to be defined in terms of public safety. Providing support and rehabilitation for the offenders has become much less important than managing any risk that he may pose in the community.

Originally, post-release measures were created to deal with the release of a very specific type of offender. Public perception and loathing of sex offenders triggered a political "fetishism" of control towards this group in particular. Pre-empting risk became a vital strategy in coping with sexual offending, and provided a catalyst for the surveillance infrastructure that controls and disciplines the sex offender. This technique has now overflowed into other areas, and applies to a much broader category of offenders. This has been done often regardless of any public demand, and without the same emphasis upon risk that instigated the sex offender provisions. Thus one might agree with Garland's statement that "[i]n today's political climate, a record of prior offending affects the individual's perceived moral status rather more than it changes their actuarial risk".[145]

The growth in practices of disclosure of criminal records and notification is indicative of a risk information discourse. The reluctance to be viewed as soft on crime has produced policies designed to demonstrate to the public that "something is being done" and that are distinctively expressive. The problem is that rather than enhance public safety the measures may instead stigmatise, marginalise and hinder the integration of offenders, causing rather than inhibiting criminal behaviour in the future. The criminogenic effect of penal laws is a prospect that cannot be ignored.[146] Moreover the provisions deny the reality that

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National Economic and Social Forum, *Re-integration of Prisoners* (NESF, 2002); O'Donnell, Teljeur, Hughes, Baumer and Kelly, "When Prisoners go Home: Punishment, Social Deprivation and the Geography of Reintegration" (2007) 17 I.C.L.J. 3.

[145] Garland, *The Culture of Control* (Oxford University Press, 2001), 192.

[146] See Farrell and Swigert, "Prior Offence Record as a Self-Fulfilling Prophecy" (1978) 12 *Law and Society Review* 3, 437-453; Becker, *Outsiders: studies in the sociology of deviance* (New York, 1963).

offenders tend to grow out of crime and could inevitably keep individuals within the system for much longer than they originally might have been there. This is particularly so in relation to young offenders, and one might question their inclusion in the measures enacted (*e.g.* notification).

This new politics of risk control is unlikely to be dismantled any time in the near future. As the Minnesota State Senate irrefutably put it, when proposing to pass a new predator commitment law, "How could any politician vote against this law?". The policy of "protection rather than rehabilitation" is potently evident in the treatment of ex-offenders. The once-vital goals of rehabilitation and reintegration have now been redefined in terms of risk management. The legitimising of control and surveillance has, as Foucault suggested, lowered the level from which it becomes natural and acceptable to be punished.[147] It is evident that the desire to control has led to a re-evaluation of who are citizens for the purpose of protection, whose rights merit vindication, and whose rights are sidelined in the interests of an all-consuming need for security. As Garland explains, "we allow ourselves to forget what penal welfarism took for granted: namely that offenders are citizens too and their liberty interests are our liberty interests".[148]

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[147] Foucault, *Discipline and Punish: The Birth of the Prison*, translated by Alan Sheridan (Penguin Books, 1977), 303.
[148] Garland (above, note 145), 182.