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**THE LEGAL IMPLICATIONS OF CHEMICAL CASTRATION OF SEX
OFFENDERS IN CRIMINAL LAW**

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I INTRODUCTION

The United Kingdom recently announced a trial program of voluntary chemical castration for sex offenders, following reported successes of similar programs in Europe and the United States. Although neither New Zealand nor Australia currently offer such a program, chemical castration has been the subject of regular media and political debates over the past few years in both countries, and these debates will likely increase following the introduction of the United Kingdom trial.

This paper discusses the potential introduction of chemical castration into New Zealand criminal law, and argues that this inclusion is not appropriate, despite some impressive reductions in sexual re-offending rates reported in countries following the introduction of such a program. It discusses two issues that are central to any discussion of chemical castration. First is the appropriateness of classifying the program as voluntary when it is offered as an alternative to incarceration or as a condition of parole, and the implications of a non-voluntary program. Second is whether chemical castration is therapeutic in nature, or is more correctly to be recognised as an additional punishment. If chemical castration is a punishment, this raises issues of human rights and eugenics that require careful consideration.

Despite what appears to be a high level of support for chemical castration from the public, it is suggested that the New Zealand government needs to carefully consider the

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legal implications of introducing such a program and ought not to be influenced by popular demand, or initial reports of success from other countries, without a full understanding of the specific parameters and scope of these programs.

II INTERNATIONAL APPLICATION OF CHEMICAL CASTRATION TO SEX OFFENDERS

Surgical castration as a punishment for sex offenders was practiced as far back as history records, and was still widely used up until the end of the Second World War.¹ When its use declined, it was on the basis that it was considered too invasive a procedure to be ordered or even sanctioned by the courts. In the 1970s, the development of drugs that reduced the amount of testosterone in a male led to what is now referred to as chemical castration.²

The use of chemical castration drugs has been the subject of widespread debate, particularly in the last 10 years. Several countries currently have, or are considering introducing, chemical castration laws, or are considering its use. Sweden, Germany and Denmark were among the first countries to allow chemical castration, as an alternative to the surgical form which is also permitted. It is significant that in these countries it is utilised solely as a voluntary treatment.³

¹ Several European countries still offer this as a voluntary treatment, including Denmark, Germany, Norway, Finland, Estonia, Iceland, Latvia and Sweden. See Kimberly Peters, 'Chemical Castration: An Alternative To Incarceration' (1993) 21 *Duquesne Law Review* 307 n12 citing Nickolaus Heim and Carolyn Hursch, 'Castration For Sex Offenders: Treatment Or Punishment? A Review And Critique Of Recent European Literature' (1979) 8 *Archives Of Sexual Behaviour* 281.

² According to Larry Helm Spalding, 'Florida's 1997 Chemical Castration Law: A Return To The Dark Ages' (1998) 25 *Florida State University Law Review* 117, n4, this term was first used by the Arizona Supreme Court in *State v Christopher* 652 P2d 1031, 1031 (Ariz 1982) and subsequently gained popularity in the media due to the emotional power in the word 'castration'.

³ For the purposes of this paper, the term 'voluntary treatment' refers to programs where the sex offender volunteers to take chemical castration drugs, and approval from medical professionals must be obtained before use of the drug begins. This is contrasted with 'compulsory treatment' where the sex offender is required to take chemical castration drugs and medical professionals are often not involved. For a further discussion of this see below Part V.

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The voluntary nature of these laws resulted in very little public attention or debate being given to these programs. This was reserved for the United States laws, introduced in the late 1990s. California was the first state to enact a compulsory chemical castration law. Any person convicted for the second time of forcible or statutory rape will be automatically required to undergo chemical castration as a condition of parole.⁴ The treatment is to continue for as long as the State determines is necessary, and there is no requirement that medical personnel are involved in the process.

Following the introduction of the Californian law several other states implemented legislation, some with slight variances. Montana,⁵ for example, widened the scope of the law to include anyone committing rape for the second time, with discretion for a first offence if it is considered particularly heinous.⁶ Oregon law requires only the commission of a “sex crime”, and while the law is still mandatory, it requires the Department of Corrections to first determine that the individual is “most likely to benefit” from chemical castration, and that a physician confirms that the drug is not “medically contra-indicated.”⁷ One interesting feature of all three laws is the length of time the medication can be ordered for, commonly “until the state determines it to be no longer necessary.”⁸ The Florida statute states expressly that this might include life.⁹

Most recently, the French Government in 2005,¹⁰ and the United Kingdom in 2007¹¹ have introduced chemical castration legislation. In both countries it is a voluntary procedure.

⁴ Cal Penal Code Ann 645.

⁵ Mont Code Ann 45-5-512.

⁶ Florida, Iowa and Louisiana also enacted laws similar to Montana: Florida Statute 794.0235, Iowa Code Ann 903B.10, Louisiana Rev Stat Ann 15.538.

⁷ Or Rev Stat Ann 144.625 (2006) (2) (a)-(c).

⁸ See, for example, Iowa Code Ann 903B.10(4), Montana Code Ann 45-5-512(4), California Penal Code Ann 645(d).

⁹ Florida Statute 794.0235 (2)(a).

¹⁰ ‘French Test “Chemical Castration”’ BBC News, <<http://news.bbc.co.uk/2/hi/europe/4170963.stm>> 13 January 2005, at 5 February 2008. An earlier Bill was introduced in 1997 but rejected: Alexander Dorozynski, ‘France Plans Compulsory Treatment Of Sex Offenders’ (1997) 314 *British Medical Journal* 393.

¹¹ ‘Sex Crime Drug Treatments Planned’ BBC News.

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In both Australia and New Zealand, calls for the introduction of chemical castration legislation are increasing. In Australia the New South Wales Opposition Justice Spokesman Andrew Humpherson advocated for chemical castration in 2004¹² and 2005¹³ without success. Most recently in 2007 it was raised by the Queensland Opposition Corrective Services Spokesman Rob Messenger as a sentencing option following the placement of a violent child sex offender into a street containing 23 children.¹⁴

In New Zealand, two cases in 2005, concerning sex offenders Lloyd McIntosh, and then leader of the Christian Heritage political party Graham Capill, brought the debate firmly into the spotlight.¹⁵ Two political parties, United Future NZ and the ACT party, have both spoken out strongly in favour of introducing legislation, and there also appears to be support from the National party.¹⁶ With the issue of criminal sentencing emerging as an important political platform for the 2008 New Zealand general election, chemical castration is an issue that is likely to attract a significant amount of attention in New Zealand in the near future.

<http://news.bbc.co.uk/2/hi/uk_news/6746965.stm> 13 June 2007, at 5 February 2008. Chemical Castration has been available in the United Kingdom since 1973 as a voluntary treatment, but not as a condition of parole: see Alison Carpenter, 'Belgium, Germany, England, Denmark and the United States: The Implementation Of Registration And Castration Laws As Protection Against Habitual Sex Offenders' (1998) 16 *Dickinson Journal of International Law* 435, 444.

¹² 'Carr Rejects Chemical Castration For Sex Offenders' ABC Online.

<www.abc.net.au/news/stories/2004/11/24/1250694.htm> 24 November 2004 at 5 February 2008; Anne Davies, 'Chemical Castration Trial Rejected As Ridiculous' Sydney Morning Herald <www.smh.com.au/news/national/chemical-castration-trial-rejected-as-ridiculous/2004/11/24/101219620131.html> 25 November 2004 at 5 February 2008.

¹³ Natasha Wallace, 'Pedophile Made Good His Threat' Sydney Morning Herald <www.smh.com.au/news/national/pedophile-made-good-his-threat/2005/07/04/1120329388566.html> 4 July 2005 at 5 February 2008.

¹⁴ Tanya Chilcott, 'Where To From Here' Courier Mail <www.news.com.au/couriermail/story/0,23739,22692048-5003416,00.html> 2 November 2007 at 5 February 2008.

¹⁵ United Future NZ Party, 'Alexander: An Argument For Chemical Castration' (Press Release, 13 January 2005); United Future NZ Party, 'Alexander: Capill Prime Candidate For Chemical Castration' (Press Release, 28 June 2005); ACT, 'Support For Castration Proposal' (Press Release, 28 May 2005).

¹⁶ Judith Collins (National-Clevedon) *Parliamentary Debates Parole (Extended Supervision) And Sentencing Amendment Bill Second Reading* <http://www.hansard.parliament.govt.nz/hansard/Final/FINAL_2004_06_29.htm#_Toc145230882> 29 June 2004 at 5 February 2008.

III THE DRUG

Chemical castration involves the injection of a drug that reduces testosterone. In the United States, the nominated drug is depo-provera or Medroxyprogesterone Acetate (MPA). One of the main issues with the use of MPA is that it was originally developed as a female contraceptive pill, and not specifically for use in chemical castration. Of particular concern is its suitability for long term use. Pfizer, the manufacturer of the drug, has added a black box warning to the product, stating that “prolonged use could result in significant side effects, and should not be used long term- over two years.” This has not prevented, as described above, the United States legislation which allows the drug to be administered for the life of the offender.

There are numerous side effects listed for MPA. The most serious include cancer¹⁷ and a depletion of bone mineral density,¹⁸ which could potentially result in osteoporosis and multiple bone fractures. It has also been shown that MPA use in high doses is associated with the birth of children with congenital abnormalities.¹⁹ The minor side effects include

¹⁷ The United States Food and Drug Administration originally approved MPA for use as a female contraceptive in 1974, but stayed approval two months later, and withdrew approval in 1978 due to cancer concerns: David M Boyers, ‘Emotion Over Reason: California’s New Community Notification And Chemical Castration Feel Good But Fail “Sensible Scrutiny”’ (1997) 28 *Pacific Law Journal* 740, 763. Cancer has been found following tests on monkeys: Kari Vanderzyl, ‘Castration As An Alternative To Incarceration: An Impotent Approach To The Punishment Of Sex Offenders’ (1994) 15 *Northern Illinois University Law Review* 107, 117. Cancer has also been found following tests on beagles: Sidney A Shapiro, ‘Scientific Issues And The Function Of Hearing Procedures: Evaluating The FDA’s Public Board Of Inquiry’ (1986) *Duke Law Journal* 288, 314. There is no evidence that this cancer will transfer to humans: see Gregory Lehne, ‘Treatment Of Sex Offenders With Medroxyprogesterone Acetate’ In 6 *Handbook Of Sexology, The Pharmacology And Endocrinology Of Sexual Function* 516 (1988) in Daniel Icenogle, ‘Sentencing Male Sex Offenders To The Use Of Biological Treatments’ (1994) 15 *Journal of Legal Medicine* 279, 284.

¹⁸ On November 14 2004 Pfizer, the manufacturer of MPA issued a Black Box Warning stating that ‘prolonged use could result in a significant reduction in bone mineral density... bone loss is greater with increasing duration of use and may not be completely reversible.’ Pfizer classifies long term use as being over two years: US Food And Drug Administration, *Black Box Warning Added Concerning Long-Term Use of Depo-Provera Contraceptive Injection* <www.fda.gov/bbs/topics/ANSWERS/2004/ANS01325.html> (2004) at 5 February 2008.

¹⁹ Gregory Lehne, ‘Treatment Of Sex Offenders With Medroxyprogesterone Acetate’ In 6 *Handbook Of Sexology, The Pharmacology And Endocrinology Of Sexual Function* 516 (1988) in Daniel Icenogle,

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weight gain, mild lethargy, cold sweats, hot flashes, nightmares, hypertension, elevated blood sugar and shortness of breath.²⁰ In many chemical castration trials these minor side effects have been serious enough to result in significant numbers of volunteers choosing to discontinue the trial.

A further concern is the dosage level. For female contraceptive use, the recommended dose is 150 mg every three months. For use in chemical castration, United States reports indicate that most men are given between 400-500 mg per week.²¹ There have been no significant studies of potential side effects with these dosages.

IV HOW EFFECTIVE IS CHEMICAL CASTRATION?

The rationale for chemical castration legislation is based on two beliefs that appear to be commonly accepted by the public. The first is that sex offenders have a very high recidivism (re-offending) rate, and the second is that this rate is significantly reduced following chemical castration. It has been stated that sex offenders are four times more likely to re-offend than non-sex offenders.²² It has also been stated that an adolescent sex offender will commit 380 sex crimes in his lifetime,²³ and that 80% of sex offenders will commit further sex offenses.²⁴ Supporters of chemical castration often refer to studies that show recidivism rates drop to approximately 3% after treatment.²⁵

'Sentencing Male Sex Offenders To The Use Of Biological Treatments' (1994) 15 *Journal of Legal Medicine* 279, 284.

²⁰ Phillip J Henderson, 'Section 645 Of The California Penal Code: California's "Chemical Castration" Law: A Panacea Or Cruel And Unusual Punishment?' (1998) 32 *University of San Francisco Law Review* 653, 656.

²¹ Daniel Icenogle, 'Sentencing Male Sex Offenders To The Use Of Biological Treatments' (1994) 15 *Journal of Legal Medicine* 279, 284.

²² Jean Peters-Baker, 'Challenging Traditional Notions Of Managing Sex Offenders: Prognosis Is Lifetime Management' (1998) *University of Missouri-Kansas City Law Review* 629, 629.

²³ Don Riesenber, 'Motivations Studies And Treatments Devised In Attempt To Change Rapists Behaviour' (1987) 257 *Journal of the American Medical Association* 899, 900 in Jennifer M Bund, 'Did You Say Chemical Castration?' (1997) 59 *University of Pittsburg Law Review* 157.

²⁴ Jennifer M Bund, 'Did You Say Chemical Castration?' (1997) 59 *University of Pittsburg Law Review* 157. See also Kimberley Peters, 'Chemical Castration, An Alternative To Incarceration' (1993) 31

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Whether the figures mentioned above are accurate is a matter for debate. Other studies have shown that the recidivism rate of sex offenders is lower than that suggested above. One report, discussing 334 patients from 22 studies showed recidivism rates of between 3-83%, with a mean of 27%.²⁶ The American Psychological Association has suggested that there is only a 13% chance that a sex offender will re-offend²⁷ and that this rate is lower than any other category of offenders, except murderers.²⁸ The effectiveness of MPA has also been questioned. In a Quebec study only 50% of participants reported a reduction in sexual fantasies,²⁹ which would indicate that the drug was having its intended effect, and a trial in Oregon revealed no difference in recidivism from those taking the medication and those not taking it.³⁰

One of the reasons for the inconsistencies in results arises from the logistics of the trials themselves. The number of participants in the trials is often small,³¹ and there is no

Duquesne Law Review 307, 314, who gives the recidivism rate as 59%, and William Baker, 'Castration Of The Male Sex Offender, A Legally Impermissible Alternative' (1984) 30 *Loyola Law Review* 377, 395, who places the rate at close to 100%.

²⁵ A study by the Johns Hopkins Sexual Disorders Clinic of 600 treated paraphiliacs showed a recidivism rate of less than 3%: Daniel Icenogle, 'Sentencing Male Sex Offenders To The Use Of Biological Treatments' (1994) 15 *Journal of Legal Medicine* 279, 284.

²⁶ Ariel Rosler And Eliezer Wiztum, 'Pharmacotherapy Of Paraphilias In The Next Millennium' (2000) 18 *Behavioural Science Law* 43, 45, cited in John Stinneford, 'Incapacitation Through Maiming: Chemical Castration, The Eighth Amendment And The Denial Of Human Dignity' (2006) 3 *University of St Thomas Law Journal* 559, 575.

²⁷ R Karl Hanson and Monique Bussiere, 'Predicting Relapse: A Meta-Analysis Of Sexual Offender Recidivism Studies' (1998) 66 *Journal of Consulting And Clinical Psychology* 348, 357 in Elizabeth Garfinkle, 'Coming Of Age In America- The Misapplication Of Sex-Offender Registration And Community Notification Laws To Juveniles' (2003) 91 *California Law Review* 163, 172.

²⁸ American Civil Liberties Union President Nadine Strossen citing National Centre For Institutions And Alternatives Study, in Panel Discussion, 'Megans Law And The Protection Of The Child In The Online Age' (1998) 35 *American Criminal Law Review* 1319, 1323.

²⁹ Pierre Gagne, 'Treatment Of Sex Offenders With Medroxyprogesterone Acetate' (1981) 138 *American Journal of Psychiatry* 644 in Daniel Icenogle, 'Sentencing Male Sex Offenders To The Use Of Biological Treatments' (1994) 15 *Journal of Legal Medicine* 279, 285.

³⁰ Barry Maletzky and Gary Field, 'The Biological Treatment Of Dangerous Sexual Offenders, A Review And Preliminary Report Of The Oregon Pilot Depo-Provera Program' (2003) 8 *Aggression and Violent Behaviour* 391, 406, in John Stinneford, 'Incapacitation Through Maiming: Chemical Castration, The Eighth Amendment And The Denial Of Human Dignity' (2006) 3 *University of Saint Thomas Law Journal* 559, 569.

³¹ As an example, the first trial contained only 8 patients: John Money, 'Use Of An Androgen-Depleting Hormone In The Treatment Of Male Sex Offenders' (1970) 6 *Journal of Sexual Research* 165 in Robert

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possibility of using placebos to truly test the drug's effectiveness.³² In addition, the studies are voluntary,³³ contain high dropout rates due to side effects,³⁴ and rely on self-reporting which would appear unlikely to occur when this might result in the participant being arrested for committing a further crime or for breaching parole.³⁵ Finally, the majority of the studies relied on are 30-40 years old, and none look at long term recidivism rates.³⁶

The effectiveness of chemical castration has in addition been challenged by psychiatrists, who do not consider that MPA will be effective in all cases. Sex offenders can be classified into four categories:

- I- Paraphiliacs, who use unacceptable stimuli such as children;
- II- Those who confess to committing a sex offence, but transfer blame to non-sexual or non-personal forces, often alcohol, drugs or stress;
- III- Violent offenders;
- IV- Those who deny the criminal nature of their actions, or who deny they have committed the crime.

Miller, 'Forced Administration Of Sex-Drive Reducing Medications To Sex Offenders: Treatment Or Punishment?' (1998) 4 *Psychology Public Policy and Law* 175, 184.

³²Audrey Moog, 'California Penal Code S645, Legislators Practice Medicine On Child Molesters' (1999) 15 *Journal of Contemporary Health Law and Policy* 711, 722.

³³Lisa Keesling, 'Practicing Without A License: Legislative Attempts To Mandate Chemical Castration For Repeat Sex Offenders' (1999) 32 *John Marshall Law Review* 381, 404.

³⁴Gordon Hall, 'Sexual Offender Recidivism Revisited: A Meta-Analysis Of Recent Treatment Studies' (1995) 63 *Journal of Consulting and Clinical Psychology* 802, 807, in John Stinneford, 'Incapacitation Through Maiming: Chemical Castration, The Eighth Amendment And The Denial Of Human Dignity' (2006) 3 *University of St Thomas Law Journal* 559, 575. See also Fred S Berlin and Carl Meinecke, 'Treatment Of Sex Offenders With Antiandrogenic Medication- Conceptualisation, Review Of Treatment Modalities And Preliminary Findings' (1981) 138 *American Journal of Psychiatry* 601, 603-5, reporting a study in which 11/20 patients discontinued.

³⁵Linda Grossman 'Research Directions In The Evaluation And Treatment Of Sex Offenders' (1995) 3 *Behavioural Science And The Law* 421, 426.

³⁶Barry Maletzky and Gary Field, 'The Biological Treatment Of Dangerous Sexual Offenders, A Review And Preliminary Report Of The Oregon Pilot Depo-Provera Program' (2003) 8 *Aggression and Violent Behaviour* 391, 406, in John Stinneford, 'Incapacitation Through Maiming: Chemical Castration, The Eighth Amendment And The Denial Of Human Dignity' (2006) 3 *University of St Thomas Law Journal* 559, 575.

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It is only the first category that is likely to benefit from chemical treatment, and a United Kingdom study suggests that this category consists of less than 5% of sex offenders.³⁷ The intended effect of the use of MPA is to lower the amount of testosterone, resulting in a decrease in sexual desires. For paraphiliacs, who often report that their offending is motivated by uncontrollable sexual desire, chemically reducing this desire would see likely to reduce future offending³⁸ For offenders in the other three categories, however, the use of MPA is considered to be ineffective as it fails to address the primary motivation for the offending (alcohol/drug addiction, violent tendencies). It has been suggested that not only will the treatment be ineffective for offenders in these other categories, but that it might actually be detrimental.³⁹ The stigma of being forced to undertake this form of medication might make violent offenders more violent,⁴⁰ and for those who deny personal responsibility for their actions, the provision of medication might help support their belief that their actions are the result of an external factor that they cannot, and therefore do not need to try to, control.⁴¹

Even if the treatment is likely to be effective for a particular offender, it should also be noted that testosterone levels increase within 7-10 days of discontinuing treatment.⁴² As most legislation requires injections of MPA to be administered weekly, there are serious implications if an offender misses one week. In addition, there are suggestions that over

³⁷ Don Grubin of Newcastle University, quoted in Owen Dyer, 'Drug Treatment Is Proposed To Manage Child Sex Offenders' (2007) 334 *British Medical Journal* 1343.

³⁸ Fred S Berlin, "'Chemical Castration' For Sex Offenders' (1997) 336 *New England Journal Of Medicine* 1030, 1030; Larry Helm Spalding, 'Florida's 1997 Chemical Castration Law: A Return To The Dark Ages' (1998) 25 *Florida State University Law Review* 117.

³⁹ Douglas Besharov and Andrew Vacchs, 'Sex Offenders: Is Castration An Acceptable Punishment?' (1992) 78 *American Bar Association Journal* 42, 42.

⁴⁰ Larry Helm Spalding, 'Florida's 1997 Chemical Castration Law: A Return To The Dark Ages' (1998) 25 *Florida State University Law Review* 117, 133.

⁴¹ Karen J Rebish, 'Nipping The Problem In The Bud: The Constitutionality Of California's Castration Law', (1998) 14 *New York Law School Journal Of Human Rights* 507, 520.

⁴² Kari Vanderzyl, 'Castration As An Alternative To Incarceration: An Impotent Approach To The Punishment Of Sex Offenders' (1994) 15 *Northern Illinois University Law Review* 107, 117.

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time, offenders will become immune.⁴³ Offenders can also counteract the effects by taking additional testosterone drugs.⁴⁴

From the public's perspective, this lack of consistent data as to effectiveness is dangerous. If people are informed that someone is a convicted sex offender but is undergoing chemical castration, they are likely to assume that this is 100% effective, when clearly this is not the case.⁴⁵

V IS A CHEMICAL CASTRATION STATUTE APPROPRIATE?

Setting aside the issue of whether chemical castration is effective, there are additional concerns with a statute of this nature that warrant consideration. The first issue is whether the imposition of chemical castration drugs is to be considered therapeutic, or whether it is a punishment. If it is to be considered an additional punishment, then there are serious questions to be asked about the appropriateness of this. Second, the circumstances in which it is appropriate to order a medical procedure as part of a sentence must be considered, particularly when the long-term side effects are not known, and the medication might be ordered for a potentially unlimited duration.⁴⁶

⁴³ Gina Kolata, 'Ideas And Trends: The Many Myths About Sexual Offenders' *New York Times* (New York) 1 September 1996, E10, in Beth Miller, 'A Review Of Sex Offender Legislation' (1998) 7-SPG *Kansas Journal of Law and Public Policy* 40, 50.

⁴⁴ Madeline Baro, 'Medical, Legal Experts Debate Merits Of Castration Bill' *Texas News* <<http://Texnews.com/Texas97/Ouch050897>> 8 May 1997 at 20 November 2007, quoting Gordon Cappelletty, Director of Adult and Adolescent Sex Offender Treatment Program at California School Of Psychology at Fresno California.

⁴⁵ A person taking chemical castration drugs can still achieve an erection, have sexual intercourse and father children: Mary Clarke, 'Florida's Hormonal Control Statute: Arguments For Constitutionality Under Florida's Right Of Privacy' 23 *Nova Law Review* 501, 505.

⁴⁶ A comparison can be drawn in the United States with the requirement that offenders accept psychosurgery or psychotropic drugs as a condition of parole, see *Kaimowitz v Dept Of Mental Health* CIV 73-19434-AW (Cir Ct Wayne County, Mich July 10 1973) at p20: "There must be close scrutiny of the adequacy of consent when an experiment ... is dangerous, intensive, irreversible and of uncertain benefit to the patient and society."

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In the United States, a consideration of these issues has been restricted to academic commentary. Despite the fact that the California statute has been in force for 10 years, these issues have not received judicial consideration. Most of the offenders undergoing chemical castration have agreed to it as part of a plea bargain, and therefore have no right of appeal under United States law.⁴⁷ In addition, the courts have taken the approach that this is simply another parole condition. There is no right to parole, and therefore a person can simply refuse the option and remain in prison for the duration of their sentence.

A Treatment or Punishment?

The question of whether chemical castration is a medical treatment or punishment is one that is strongly debated amongst United States academics. In *Rennie v Klein*⁴⁸ it was held that to be considered treatment and not punishment, a four-part test must be met:

1. There must be therapeutic value;
2. It must be a recognised and accepted medical practice;
3. It must be part of an ongoing psychotherapeutic program;
4. There must be no unreasonably harsh side effects.

It can be suggested that none of these are met. First, as has been shown above, the therapeutic value is limited to only one category of sex offenders. Second, many medical professionals have doubts as to the efficacy of the drugs, and concerns as to the long term side effects. There are reports of doctors refusing to administer the drug for this reason.⁴⁹ Third, it is widely accepted that to have any chance of success, the drug must be

⁴⁷John Stinneford, 'Incapacitation Through Maiming: Chemical Castration, The Eighth Amendment And The Denial Of Human Dignity' (2006) 3 *University of St Thomas Law Journal* 559, 561. Alternatively, appeals are rejected on procedural grounds. See Elizabeth Cloud, 'Constitutional Law- 1st Amendment And Freedom Of Thought- Banishing Sex Offenders' (2005) 28 *University of Arkansas at Little Rock Law Review* 119.

⁴⁸462 F Supp 1131, 1143 (DNJ 1978).

⁴⁹Barry Maletzky and Gary Field, 'The Biological Treatment Of Dangerous Sexual Offenders, A Review And Preliminary Report Of The Oregon Pilot Depo-Provera Program' (2003) 8 *Aggression and Violent Behaviour* 391, 399, in John Stinneford, 'Incapacitation Through Maiming: Chemical Castration, The Eighth Amendment And The Denial Of Human Dignity' (2006) 3 *University of St Thomas Law Journal* 559, 575.

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administered as part of an ongoing counselling or therapy programme. At least in United States, this is not occurring. Fourth, concerns have been raised as to both the known side effects and the lack of knowledge as to long term side effects.

One academic has commented that chemical castration must be viewed as a punishment, because this is the only way it will be accepted by the public.⁵⁰ The Californian legislation clearly considers this to be a punishment. Section 645 states that the individual “shall, upon parole, undergo [MPA] treatment or its chemical equivalent, *in addition to any other punishment* prescribed for that offence.”⁵¹ Further, the injections are administered by Department of Corrections personnel, not by doctors.⁵² It is arguable that by applying the *Rennie v Klein* test chemical castration can be seen at present as a punishment, rather than treatment.

In order for it to be reclassified as a treatment, three alterations to current practice would arguably be required. First, chemical castration would need to be administered in combination with therapy. Secondly, different drugs that do not result in potentially dangerous side effects would need to be developed, and thirdly more detailed studies are conducted demonstrating more consistent results. Satisfying these changes would lead to acceptance among the medical community.

The fact that chemical castration is arguably a form of punishment at present raises a further issue for consideration. The imposition of chemical castration in these circumstances could be seen as an example of double jeopardy. The offender has completed the sentence of imprisonment imposed by the court and is then subject to the further (possibly indefinite) punishment of compulsory medication, in effect the offender is being punished twice for one crime. An alternate way of looking at chemical castration

⁵⁰ Daniel Icenogle, ‘Sentencing Male Sex Offenders To The Use Of Biological Treatments’ (1994) 15 *Journal of Legal Medicine* 279, 284.

⁵¹ Emphasis Added. See Lisa Macgillivray, ‘California’s Mandatory Chemical Castration Program For Repeat Sex Offenders: An Analysis Of The Legislation Under German And American Constitutional Law’ (1997) 21 *Suffolk Transnational Law Review* 143, 177.

⁵² JC Oleson, ‘The Punitive Coma’ (2002) 90 *California Law Review* 829, 896.

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is that it is an example of punishing a person for a crime he has not yet committed. Both of these interpretations currently form part of the academic debate on chemical castration in the United States, and for this reason ought to be considered in any discussion on chemical castration legislation.⁵³

B Voluntary or Compulsory Application?

Even if chemical castration is classified as a punishment following the above test, the objections based on this can be removed if chemical castration is voluntary, and the offender has the ability to refuse to take MPA. In the US states, where the imposition of MPA appears mandatory, there is an argument that it is in fact still voluntary. The legislation requires MPA to be taken as a condition of parole. The individual can therefore choose between accepting parole and chemical castration, or choosing to remain in prison. United States academics have argued that this is a voluntary choice, even if it is not one which the particular individual would wish to make.⁵⁴

The line between voluntary and compulsory chemical castration must be regarded as being crossed, however, if the offender is given a further penalty in addition to his initial sentence for refusing to accept the parole condition.⁵⁵ In *Ohio v Thompson*⁵⁶ for example, the defendant refused the condition and the trial judge, upheld on appeal, increased the sentence on the basis that this demonstrated a lack of rehabilitative potential. The Florida statute states that the refusal of treatment is a second degree felony, punishable by an additional 15 years imprisonment. In addition, agreeing to the condition and then

⁵³ See Norman Finkel, 'Moral Monsters And Patriot Acts' (2006) *Psychology, Public Policy and Law* 242 and Jennifer Siverts, 'Punishing Thoughts Too Close To Reality: A New Solution To Protect Children From Pedophiles' (2005) *Thomas Jefferson Law Review* 393, which consider both chemical castration and civil confinement.

⁵⁴ See Kenneth Fromson, 'Beyond An Eye For An Eye: Castration As An Alternative Sentencing Measure' (1994) 11 *New York Law School Journal Of Human Rights* 311 and Pamela Hicks, 'Castration Of Sexual Offenders' (1993) 14 *Journal of Legal Medicine* 641. Cf Bryan Keene, 'Chemical Castration: An Analysis Of Florida's New 'Cutting Edge' Policy Towards Sex Criminals' (1997) 49 *Florida Law Review* 803, 818.

⁵⁵ Larry Helm Spalding, 'Florida's 1997 Chemical Castration Law: A Return To The Dark Ages' (1998) 25 *Florida State University Law Review* 117, 128.

⁵⁶ 1988 WL 88350 (Ohio App 1988).

choosing to discontinue is not only a violation of parole, but is in addition another felony.⁵⁷ In this case, it seems that this cannot be considered voluntary.

VI THE IMPLICATIONS OF CHEMICAL CASTRATION AS A COMPULSORY FORM OF PUNISHMENT

The above discussion has highlighted two significant issues with chemical castration. First, for the majority of sex offenders it appears to meet the criteria for punishment rather than treatment, and second, despite how carefully the statute is phrased as a voluntary parole condition, there is potential for the voluntariness to be negated. The compulsory use of a drug that is designed to prevent reproductive acts as a form of punishment leads to parallels with the Eugenics Movement in the 1920s and 1930s that are worth considering.

A The Eugenics Movement

The Eugenics Movement was founded on the idea that certain traits, including intelligence and criminality, had a genetic basis and were therefore inheritable. Proponents of Eugenics had the goal of improving the quality of the human race by encouraging the breeding of people with traits seen as desirable, and discouraging the breeding of those with undesirable traits. The latter form of eugenics was known as negative eugenics, and by the late 1920s was being aimed at those considered feeble-minded and criminal. Laws were passed enabling compulsory sterilisation of these people to prevent them reproducing and passing on the undesirable genes. In *Skinner v State of Oklahoma*⁵⁸ Walter Skinner was ordered to undergo sterilisation following his third criminal conviction. None of his convictions were for sexual offences, but for theft and armed robbery and there was no indication that sterilisation would prevent him from re-offending. Skinner appealed the order and was successful, but on the basis that the

⁵⁷ Fla Stat 794.0235(5)(A)-(B) (1997).

⁵⁸ 316 US 535 (1942).

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statute was discriminatory⁵⁹ not that sterilisation was an unacceptable punishment. Following World War II, when the extreme aspects of eugenics were revealed, eugenics was considered an unacceptable breach of human rights, and the movement declined.

An order for chemical castration is an arguable return to eugenics. Medical experts are of the opinion that MPA will not be effective to prevent recidivism in a majority of sex offending cases and it is classified as a punishment under the *Rennie v Klein* test. If it is not therapeutic, then an order for its use must logically have a different motivation, and the most obvious reason for administering MPA is to prevent reproduction. Although genetics as a science has progressed since the *Skinner* decision in the 1930s, in which the relevant legislation was motivated by a belief that children of criminals through a combination of genetics and the environment they are raised in, are more likely than children of non-criminal parents to become criminals themselves. In other words, although chemical castration might not prevent the sex offender from re-offending, it might prevent him from having children who will also be criminals. Prevention of undesirable offspring rather than rehabilitation of the criminal is in line with eugenics, and the decision in *Skinner*.

This conclusion might appear to be a stretch in logic, but the argument becomes more persuasive if one considers that there is a current trend, particularly in the United States, of a return to eugenics principles and the idea that it would be beneficial to society if certain members did not have children. Another example of this trend can be seen in the United States courts' other application of MPA orders, in the sentencing of people for (non-sexual) child abuse.

B The Use of MPA in Child Abuse Cases

⁵⁹ The particular crimes listed that would result in a sterilization order were 'blue collar' crimes and not 'white collar', therefore violating the Equal Protection Clause of the 14th Amendment.

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Orders for the use of MPA, or other forms of contraception, have appeared over the last 2 decades in sentencing for child abuse cases. The abuse convicted of includes physical abuse of a child,⁶⁰ neglect,⁶¹ and drug abuse.⁶² For females the most common drug ordered in sentencing was Norplant,⁶³ a device consisting of six matchstick sized capsules containing levonorgestrel, a synthetic form of the naturally occurring hormone progesterone (also used in MPA), which acts as a contraceptive. The capsules are surgically implanted in the upper arm, and last for five years.⁶⁴

There are obvious parallels to be drawn between the use of contraceptive drugs in child abuse cases and sexual offending cases. First, the contraceptive use is offered in plea bargaining or as a parole condition. In *People v Johnson* for example, Darlene Johnson was offered a choice of sentence, either one year in jail or probation and the use of Norplant.⁶⁵ Second, the academic commentary raises the same issues of whether this is voluntary or compulsory.⁶⁶

The main difference in the debates is that in the child abuse cases academics generally accept that this is a punishment, rather than a treatment whereas in the sex offender cases this classification depends on whether the high success rates of MPA are believed. In the

⁶⁰ For example, Darlene Johnson, convicted of child abuse for beating her two children with a belt and electrical cord: *People v Johnson* No 29390 (Cal Super Ct Jan 2 1991); Michelle Carlton, who failed to prevent her partner shaking her baby, resulting in the baby's death and Cathy Knighten, who smothered her infant child: cited in Steven Spitz, 'The Norplant Debate: Birth Control or Woman Control?' (1993) 25 *Columbia Human Rights Law Review* 131.

⁶¹ For example, Melody Baldwin, who let her 4 year old overdose on psychiatric drugs: '10 Year Term Imposed Despite Sterilization' *Chicago Tribune* (Chicago) 11 November 1988, 3; Debra Forster, who left her infant son alone in a hot apartment for 2 days: 'Woman's Sentence Is Birth Control' *New York Times* (New York) 26 May 1988, A22.

⁶² For example, Malissa Crawley: M Anderson, 'Criminal Penalties For Women Engaged In Substance Abuse During Pregnancy' (2000) 21 *Women's Rights Law Reports* 181, 181.

⁶³ Until its removal in 2000 due to concerns regarding side effects and safe removal.

⁶⁴ Melynda G. Broomfield, 'Controlling The Reproductive Rights Of Impoverished Women: Is This The Way To "Reform" Welfare?' (1996) 16 *Boston College Third World Law Journal* 217.

⁶⁵ No 29390 (Cal Super Ct Jan 2 1991).

⁶⁶ See for example Joan Callahan, 'Contraception Or Incarceration: What's Wrong With This Picture?' (1995-6) 7 *Stanford Law and Policy Review* 67 who considers it voluntary, cf Elizabeth Wylie, 'Birth Control For Child Abusers: Statutory Concerns And Privacy Issues In Court Enforced Contraception' (1993) 12 *Review of Litigation* 489.

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child abuse cases, this acceptance is the obvious result of a consideration of the facts in the cases. Clearly, Norplant will have no impact on recidivism rates of women convicted of hitting or neglecting their children. It will simply prevent them from having more children. This is acknowledged by academics who regard the use of Norplant as a response to increasing child abuse, and more telling with regard to eugenics, as a means of addressing the increasing amount of money spent by the states in supporting these children when removed from their parent's care.⁶⁷

Due to the fact that this motivation is clear, the use of Norplant has been heavily criticised as being an unacceptable punishment. That chemical castration has not received the same level of criticism can be explained on the basis that chemical castration is being ordered for offenders who have committed sex crimes and therefore an apparent link exists between the crime and the order for chemical castration. If the strength of this link is challenged, as this paper suggests it ought to be, then parallels between chemical castration and compulsory sterilisation for non-sex offences can be drawn. The implication of enacting legislation which denies to certain members of society the right to reproduce, a fundamental human right,⁶⁸ is an issue that needs to be considered in any debate on chemical castration.

C Conclusion

The parallels between the use of MPA as chemical castration and as compulsory contraception suggest that both are examples of eugenics principles re-emerging in society. It is only due to the fact that chemical castration is being ordered for offenders who have committed sex crimes, and therefore an apparent link exists between crime and punishment, that these parallels have not been more clearly drawn. The fact that science

⁶⁷ See, for example, Stacey Arthur, 'The Norplant Prescription: Birth Control, Women Control Or Crime Control?' (1992) 40 *UCLA Law Review* 1, 25; Colleen M Coyle, 'Sterilisation: A Remedy For The "Malady" Of Child Abuse' (1992) 5 *Journal of Contemporary Health Women's Law Journal* 1, 2; Toni Saunders 'Banning Motherhood: An RX To Combat Child Abuse?' (1994) 26 *St Marys Law Journal* 203.

⁶⁸ See, for example, Article 16, Universal Declaration of Human Rights (1948).

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suggests that this link is not as significant as is commonly believed is something that needs to be taken into consideration.

VII THE POSITION IN NEW ZEALAND

The New Zealand Parole Act 2002 as currently drafted appears to allow for chemical castration drugs to be ordered. Under s15, special conditions on the granting of parole can be imposed. Any condition must be designed to:

- (a) reduce the risk of re-offending by the offender; or
- (b) facilitate or promote the rehabilitation and reintegration of the offender.

A condition requiring the taking of prescription medication is specified as one such special condition, provided that a person qualified to prescribe the medication explains fully the known risks to the offender and the offender consents. The offender can withdraw consent at any time, and should this occur this is not considered an additional offence, as in the United States, but might be considered a ground for recall of parole.

Whether the requirement that an offender take MPA is considered a treatment or a punishment will depend on the manner in which such a condition is implemented. If New Zealand adopts an approach similar to the United States, an automatic condition for all sex offenders without the involvement of the medical profession and with no follow-up therapy, then this will likely be considered a punishment. If New Zealand follows the United Kingdom/France approach, with a voluntary program supervised by medical professionals who verify the appropriateness of the drug for the particular offender, then it might be accepted as a treatment. The issue of potentially serious side effects is still something that needs to be considered.

Although the parole condition would possibly be considered voluntary, assuming the United Kingdom/France model is followed, there is an additional issue that needs to be

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considered. The Parole Act also contains the potential for a compulsory order to be made. While the Act states in s32 that conditions imposed on parole must cease at the conclusion of the parole period, under s107I a sentencing court may make an Extended Protection Order. This would allow for mandatory conditions to be imposed for a maximum of 10 years following release. An Extended Protection Order can only be made following a health assessor's report, and again, the taking of medication can be the subject of such an order. The potential exists, therefore, for MPA to be ordered for a long period of time, the parole period followed by a 10 year protection order. Although this is shorter than the potentially unlimited duration of the United States laws, it still clearly exceeds the two year maximum recommended by the manufacturer of the drug. Breach of a condition under this order will result in an offence, punishable by a prison term not exceeding two years. Withdrawal of consent to a prescription medication, however, is not considered a breach.

The fact that this protection order exists might have an impact on the ability of the offender to give consent. While in both the United States and New Zealand an offender can refuse a parole condition and choose to remain in jail, this choice appears less free in New Zealand. An offender refusing parole in New Zealand can still be subject to a compulsory order on release. Offenders might therefore accept the parole condition on the theory that the time of the Extended Protection Order might be reduced, or that since they will likely be subject to administration of the drug anyway, they might as well accept it as a parole condition.

VIII CONCLUSION

It can be seen that the Parole Act as currently drafted does allow for chemical castration to be ordered, either as a condition of parole, and/or as a compulsory order for up to 10 years following release, and that therefore chemical castration can be easily introduced into New Zealand law. It is suggested, however, that before this occurs, there ought to be a full consideration of the issues that have been raised in other countries.

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In particular, it should be recognised that chemical castration is potentially effective in treating only one class of sex offenders, and then generally only in conjunction with counselling when voluntarily undertaken. The ability to impose chemical castration under a compulsory extended protection order is something that will need to be debated.

Section 7 of the Parole Act states that the paramount consideration in every case is the safety of the community. The myth that chemical castration is 100% effective in preventing sex offenders from re-offending has been shown to be unsupported by scientific studies, and this is a factor that should be made very clear in any discussion of its introduction into New Zealand sentencing. To consider chemical castration as a complete cure results in a substantial risk to the community.

The safety of the offender is also a factor that warrants consideration. There is not yet enough known about the long-term side effects of the drugs used. Although it is recognised that any future studies are likely to suffer from similar problems to those already undertaken, provided these factors are taken into consideration valuable information can still be gained from the studies. In addition, should chemical castration be imposed, any person taking the medication ought to be monitored closely to ensure the drug is successful, and monitored for any serious side effects.

There appears to be a high level of public support in New Zealand for chemical castration, following several high profile sex offence cases, and two political parties refer to the introduction of chemical castration legislation in their justice policies. This debate is likely to increase over the next year in the lead-up to the general election in November 2008. Despite this appearance of public support there are serious legal implications that need to be considered before a Bill introducing chemical castration is introduced. New Zealand should closely watch the trials in other countries before considering introducing such a procedure here.