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29th March 2016

Liberty Victoria Comments on the

Sex Offenders Registration Amendment Bill 2016

Sex Offenders Registration in Victoria

1. The *Sex Offenders Registration Amendment Bill 2016* (Vic) ("the Bill") seeks to amend the *Sex Offenders Registration Act 2004* (Vic) ("the *SORA*") in order to:

    (a) provide for the making of "prohibition orders" in relation to registrable offenders;

    (b) permit the Chief Commissioner of Victoria Police to publish information about registrable offenders who cannot be located;

    (c) extend the IBAC's monitoring functions to include compliance with Part 3 of the *SORA*;

    (d) provide for the correction of errors in notices of reporting obligations; and

    (e) amend Schedule 2 to the *SORA* to include further offences against the Commonwealth *Criminal Code*.

2. The main feature of the Bill is to create a system for the making of interim and final prohibition orders against persons on the sex offender register ("registrants") in the Magistrates' Court of Victoria. That issue will be the focus of this submission.

3. For the reasons that follow Liberty Victoria is opposed to the Bill:

    (a) The Bill fails to provide registrants with the same important protections that are provided by the *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic)

("the *Detention and Supervision Order Act*");

(b) The threshold for making a prohibition order is too low, and will result in almost all registrants being eligible to be made subject to such orders and potentially punished by imprisonment for non-compliance;

(c) The power to make conditions is too broad, and extends beyond necessary conditions to merely "desirable" conditions;

(d) There is no indication that the already over-stretched Magistrates' Court of Victoria has the resources or capacity to deal with such matters properly;

(e) There is no indication that there are the resources to ensure that registrants, who will often be economically disadvantaged and suffering from various physical and/or mental health issues, will be legally represented; and

(f) The Bill fails to address the broader systemic failures in the Victorian sex offender registration scheme.

Human Rights and Proportionality

4. It is clear that the system of registration provided for by the *SORA* engages and limits human rights protected by the *Charter of Human Rights and Responsibilities* ("the Charter"). That includes the rights to liberty, privacy and freedom of movement.

5. Liberty Victoria does <u>not</u> take issue that there should be a system of registration and supervision for offenders who pose a significant risk to the sexual safety of the community. In human rights terms, when a particular offender does pose such a risk to the safety of others, a system of registration and supervision will often be a proportionate limitation to the person's rights in order to protect the rights of others.

6. However, the limitation of a human right must be demonstrably justified in every individual case, and such a limitation must be only to the extent necessary.[1] The onus of "demonstrably justifying" the limitation resides with the party seeking to uphold the limitation (in this case the State), and in light of what must be justified, the standard of proof is high.[2]

7. The *Detention and Supervision Act* already allows for the making of supervision orders

[1] Section 7(2) of the Charter; *Re Application Under the Major Crime (Investigative Powers) Act 2004* (2009) 24 VR 41, [148]; *R v Oakes* [1986] 1 SCR 103, [67]-[71].

[2] *Re Application Under the Major Crime (Investigative Powers) Act 2004* (2009) 24 VR 41, [147]; *R v Momcilovic* (2010) 25 VR 436, [143]-[144].

against persons who have been convicted of a relevant sexual offence. That process occurs under the supervision of the County and Supreme Courts of Victoria. However, for a person to be eligible for such an order, he or she must have received a custodial sentence for a relevant offence.[3]

8. To that end, it should be noted that a Community Correction Order ("CCO") also allows for the imposition of extensive conditions.[4]

9. The experience of the County Court of Victoria with regard to the *Detention and Supervision Act* was that while such orders were originally only intended to apply to a limited category of offenders, the Court's lists were quickly overloaded by such applications at considerable public expense.

10. Problematically, this Bill places the jurisdiction for the hearing of applications for prohibition orders into the already over-stretched Magistrates' Court of Victoria. In the extrinsic material there is no consideration as to how this will impact upon the resources of the Court or how those potentially subject to such orders will obtain legal representation to uphold their rights.

11. Resourcing is very important for the State and the Courts and it is also of vital importance for a registrant. Without proper resourcing of both the Magistrates' Court of Victoria and those who will be required to make and respond to such orders, there will obviously be cases where persons will be made subject to orders that are unjust.

[3] Section 4(1)(b). Section 5 of the *Bail Act 1977* (Vic) ("*the Bail Act*") permits Victorian courts to impose conditions on an accused person, including residential and non-association conditions, together with any other "…condition that the court considers appropriate to impose in relation to the conduct of the accused".

[4] Section 48 of the *Sentencing Act 1991* (Vic).

The Test for Making a Prohibition Order

12. The test for the making of an interim or final prohibition order is only that the Court is satisfied on the balance of probabilities that a registrant has engaged in the relevant conduct, and poses a "risk" to the sexual safety of another person, and that the making of the order will reduce that risk (proposed ss.66E(1),66I(1)). There is no need for the Court to identify a risk to a particular person or class of person.

13. That is a lower standard than the *Detention and Supervision Act*, which provides that a registrant must be found to be an "unacceptable risk" (s.9).

14. It is difficult to contemplate any offender who has committed a relevant sexual offence that will not be regarded as a bare "risk".

15. Further, the *Detention and Supervision Act* provides (s.9(2)) that:

> [o]n hearing the application, the court may decide that it is satisfied as required… only if it is satisfied
>
> (a) by acceptable, cogent evidence; and
> (b) to a high degree of probability—
>
> that the evidence is of sufficient weight to justify the decision.

16. The Bill contains no equivalent provision that would seek to protect the rights of respondents to applications for prohibition orders. It only requires an assessment report to be completed for child registrants (proposed s.66L).

17. Accordingly, under the Bill it would appear that a Magistrate will usually make a determination of risk on the basis of the surrounding circumstances of the registrant without any need for cogent evidence as to risk assessment.

18. Further, the *Detention and Supervision Act* expressly provides (s.15(6)):

> The court must ensure that any conditions of a supervision order (other than the core conditions)—
>
> (a) constitute the minimum interference with the offender's liberty, privacy or freedom of movement that is necessary in the circumstances to ensure the purposes of the conditions; and
> (b) are reasonably related to the gravity of the risk of the offender re-offending.

19. This Bill contains no equivalent provision. While the Bill does provide that the making of an order must be "proportionate" to the risk of committing further offences (proposed s.66J(e)), it does not provide the same express protection of a respondent's human rights. That is a serious failing of the Bill.

20. Accordingly, the Bill fails to provide the same protections as afforded to respondents

under the supervision order regime. No explanation has been given as to why that should be so. That is surprising given that the Bill allows for the imposition of incredibly wide-ranging conditions.

Conditions

21. Under the changes foreshadowed in the Bill, a person subject to a prohibition order may be made subject to conditions that "appear to be necessary or desirable in the circumstances" (proposed s.66Q).

22. For example, the practical consequences of a prohibition order on a registrant may include conditions that he or she:

    (a) cannot live in the family home;

    (b) cannot see or contact his or her children;

    (c) cannot work in his or her place of employment;

    (d) cannot attend community activities or events;

    (e) cannot contact his or her friends;

    (f) cannot engage in "specified behaviour";

    (g) can be made subject to monitoring through police searches of their home and person without warrant (s.66V), with police having the power to seize items (s.66Y);

    (h) can be made subject to drug and alcohol testing (s.66T);

    (i) can be compelled to provide information to assist police to search computers and other devices, with a failure to do so without reasonable excuse a criminal offence punishable by 5 years' imprisonment (s.66X).[5]

23. Such prohibition orders can be made for up to 5 years (s.66P(2)(a)), which extends well beyond the statutory limit of 2 years' imprisonment that the Magistrates' Court of Victoria can impose for a single offence.

24. Contravening a prohibition order is punishable by a maximum penalty of 5 years' imprisonment (s.66ZP).

25. Accordingly, when one has regard to the above matters it is clear that prohibition orders

[5] Liberty Victoria is strongly opposed to such a provision that abrogates the person's freedom from self-incrimination.

have the potential to be extraordinarily broad and there needs to be considerable vigilance in ensuing they are only used where strictly necessary.

26. Liberty Victoria submits that the test for making "necessary or desirable" conditions is far too broad – a given condition can only be a proportionate limitation of a registrant's human rights if it is necessary. The idea of "desirability" is amorphous and will result in very subjective decision-making by judicial officers.

27. Liberty Victoria submits that the threshold for making prohibition orders and associated conditions is so low that there will be many cases where such conditions are completely disproportionate to the offending conduct.

A Missed Opportunity

28. Further to the above, Liberty Victoria submits that the Bill fails to deal with systemic problems in the Victorian sex offender registration system, and accordingly represents a missed opportunity for reform.

29. There are at least three foundational problems with the current system of sex offender registration in Victoria:

    (a) The expanding number of registrants;

    (b) The absence of judicial discretion as to whether a person should be placed on the register; and

    (c) The complexity of reporting obligations.

30. The Bill completely fails to address these systematic issues, and indeed makes them worse by increasing the number of offences that result in compulsory registration.

The Number of Registrants

31. The Victorian Law Reform Commission (VLRC) Report on Sex Offenders Registration of 2012 estimated that there will be 10,000 registrants by 2020. Liberty Victoria strongly endorses the recommendation of the VLRC that there is a need to "strengthen the scheme by sharpening its focus".

32. The register was originally intended to be a database of information on offenders who posed a significant risk to the sexual safety of the community in order to *prevent* offending conduct (particularly against children). It has now effectively become an

unwieldy warehouse of information that may in some circumstances assist with prosecution *after* a crime has occurred (although that often depends on the accuracy of self-reporting by registrants).

33. Accordingly, the register has shifted from a proactive to a reactive model.

Mandatory Registration

34. For many criminal offences registration under the *SORA* is mandatory. At present, if a person is found guilty or pleads guilty to a Schedule 1 or Schedule 2 offence under the *SORA*, then registration must occur (for a duration of 8 years, 15 years, or life depending on the number of offences and the circumstances).

35. That is problematic because there will be some circumstances where an offender does not pose a significant risk to the sexual safety of the community, or where the period of registration is disproportionate to the level of risk.

36. Persons who are assessed as posing no significant risk of reoffending should not be subject to mandatory registration as sex offenders. Such persons, once registered, not only face significant limitations to their liberty, privacy and freedom of movement, but are prevented from engaging in child-related employment.[6] That is so even in circumstances where the relevant offending was not in any way related to children.

37. A consequence of being on the register is that it is unlawful to work, *inter alia*, in schools, transport services, and various clubs, religious organisations, associations or movements that provide services to children.[7] This has a significant impact on the employability and social integration of those on the register.

38. For those persons who pose no significant risk to the community, there is a real question as to whether the stigma of being on the register is actively counter-productive with regard to their rehabilitation.

39. This not only works a serious injustice to the person made subject to the order, but also results in an ever-expanding list of persons who are placed on the sex offender register. Liberty Victoria submits that, having regard to the difficult administrative task in managing and updating the database of registrants, it is vital that persons who are registered as sex offenders are those who actually pose a significant risk of engaging in

[6] Section 68 of the Act.
[7] Section 67 of the Act.

sexual offending.

40. The best way to protect the community and to ensure that only persons who are a real risk of reoffending be placed on the sex offenders register, and thus preserve the value of the register itself, is to preserve the discretion of judicial officers to refuse to make registration orders in appropriate cases.

41. Further, judicial officers should be empowered to set shorter registration periods than the three fixed periods under the Act of 8 years, 15 years, and life. This is because the limitation to the rights of those registered will only be proportionate if the period of registration is the minimum necessary in the circumstances.[8] There may well be examples of offenders acting in ways completely out of character, where the uncontradicted expert evidence is that the person does not pose a risk to the community, or only requires a very limited period of supervision.

42. Persons who are registered as sex offenders should have a statutory right of review. There should be set periods (perhaps once every two years from the date of the registration order) during which time an order must be reviewed, with the registrant at liberty to apply for leave to review an order due to new facts or circumstances or where it is in the interests of justice. This is similar to the system of review provided for under the *Detention and Supervision Act*, and would be a much better way of ensuring that the limitation to a person's human rights is proportionate, and that the register is focused upon those who pose a real risk to the community.

43. As held in *R (on the application of F (by his litigation friend F)) and another (FC) v Secretary of State for the Home Department*,[9] in the context of the equivalent British scheme, legislation that provides for mandatory registration needs be subject to review in order to be compliant with fundamental human rights standards. While that case concerned mandatory life registration with no right of review, it is also strongly arguable that the Act, by only allowing review of life registration in the Supreme Court of Victoria after 15 years (which of course has not yet ever occurred), constitutes a disproportionate limitation to the human rights of registered persons.[10]

44. In its 2012 report, the VLRC called for the Courts to determine whether a person should be placed on the register in all circumstances (and thus remove mandatory registration),

[8] See further *ARM v Secretary to the Department of Justice* [2008] VSCA 266 at [13] with regard to the now repealed *Serious Sex Offenders Monitoring Act* 2005.
[9] [2010] UKSC 17.
[10] Section 39(2) of the Act.

and that Part 5 of the *SORA*, concerning the prohibition on child-related employment, should be removed from that Act and integrated with the *Working with Children Act 2005* (Vic). Liberty Victoria strongly supports those recommendations.

Complexity of Reporting Conditions

45. Further, under the reforms to the *SORA* made by the *Sex Offenders Registration Amendment Act 2014*, registrants are now required to report almost all contact with children, even when supervised. "Contact" is defined as including physical contact, oral communication or written communication if engaged in for the purpose of forming a personal relationship with the child, whether or not such contact is supervised.

46. That means that a registrant who, for example, has dinner at a friend's house and speaks with the friend's child at the dinner table which could be regarded as forming a "personal relationship" with the child is obliged to immediately notify the register, even in circumstances where all contact was fully supervised. A failure to report is punishable by imprisonment.

47. Registrants have been regularly prosecuted for failing to comply with their reporting obligations. That has included a registrant being prosecuted for failing to disclose membership of a library, which was regarded by police as an organisation with a child membership and also an "Internet Service Provider". There was no allegation that the registrant had committed any inappropriate conduct whilst at the library (indeed the computer records demonstrated that he was using the library internet to look for employment), but the alleged criminality was a failure to report and update the register of the fact of his membership.

48. Problematically, there are now so many reporting obligations on registrants, and the matters are of such complexity, that often the real issue is whether an informant wishes to pursue breach proceedings against a given registrant.

49. That is problematic because it creates a situation where different members of Victoria Police will have different standards as to whether a person should be breached, particularly for a "technical" breach. Accordingly, the increased complexity of reporting requirements has also increased the potential for the arbitrary application of the breach provisions.

Conclusion

50. This Bill represents a missed opportunity for reform.

51. Liberty Victoria does not take issue that in some circumstances supervision of a registrant will be a proportionate limitation of their human rights.

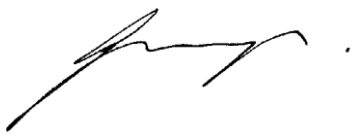
52. However, this Bill fails to provide adequate safeguards and should not be passed. There is no indication that the Magistrates' Court of Victoria has the resources or capacity to deal with these matters, or that registrants will be able to be legally represented. Applications for prohibition orders have the potential to result in registrants being made subject to wide-ranging conditions long after they have served their sentences, and potentially subject to imprisonment in circumstances of breach.

53. There is the clear potential for registrants to be made subject to orders and conditions that are completely disproportionate to their offending conduct. Further, there has been no explanation as to why the existing power to make conditions as part of the CCO regime is inadequate.

54. The Victorian Parliament should consider these matters carefully. There is a danger that, in the understandable desire to protect children and others in the Victorian community from sexual offending, this Bill will be rushed through Parliament without the proper consideration of the above matters and without ensuring that there are adequate safeguards.

Please contact Gillian Garner through the Liberty Victoria office on 9670 6422 or info@libertyvictoria.org.au if we can provide any further information or assistance.

Yours sincerely



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