Victorian Council for Civil Liberties Inc
Reg No : A0026497L

GPO Box 3161
Melbourne, VIC 3001
t 03 9670 6422
info@libertyvictoria.org.au

www.libertyvictoria.org.au

18 April 2016

Liberty Victoria Comments on the

Serious Sex Offenders (Detention and Supervision) Amendment (Community Safety) Bill 2016

1. Liberty Victoria opposes the enactment of the *Serious Sex Offenders (Detention and Supervision) Amendment (Community Safety) Bill 2016* (Vic) ("the Bill").

2. Liberty Victoria understands that the Bill represents, in part, a legislative response to the Harper Review into the Management of Serious Sex Offenders On Supervision Orders and to the murder of Ms Masa Vukotic.

3. Liberty Victoria recognises that no legislative response could be sufficient to remedy the harm caused to Ms Vukotic and her family and friends.

4. The findings of the Harper Review have not been made public, and so Liberty Victoria is unable to know whether the reforms to the *Serious Sex Offenders (Detention and Supervision) Act 2009* ("the *SSODSA*") contemplated by the Bill are based on its recommendations.

5. The principal issue considered below is whether the measures proposed to be introduced by the Bill are reasonably adapted for the purpose of making the Victorian community safer, and constitute a proportionate limitation on the rights of people made subject to *SSODSA* orders.

6. Liberty Victoria will focus on six of the proposed reforms:

(1) The introduction of a category of “restrictive conditions” for persons subject to *SSODSA* orders. Breach of “restrictive conditions”, including by committing a “relevant offence” (a sexual offence) or a “violent offence”, will result in a mandatory minimum term of 12 months’ imprisonment (proposed s.10AB of the *Sentencing Act 1991*), subject to the special reasons exception pursuant to s.10A of that Act;

(2) The introduction of core “violent conduct” conditions for all persons subject to *SSODSA* orders. Those conditions provide “…if the court requires an offender to reside at a residential facility, [the offender must] not engage in conduct that poses a risk to the good order of the residential facility or the safety and welfare of offenders or staff at the residential facility or visitors to the residential facility” (s.16(2)(ac) of the *SSODSA*), and the offender must “not engage in conduct that threatens the safety of any person, including the offender" (proposed s.16(2)(ad) of the *SSODSA*). These are also defined as “restrictive conditions” subject to mandatory minimum imprisonment of 12 months in circumstances of breach (proposed s.3);

(3) An extension of the duration of police holding powers from 10 hours to 72 hours, whereby a person subject to a *SSODSA* order can be detained without charge in circumstances where there is a reasonable suspicion that there is a risk that the person may breach a condition of a *SSODSA* order (proposed s.168 of the *SSODSA*);

(4) An expansion of the circumstances in which a relevant person can make disclosure about a person subject to a *SSODSA* order;

(5) A requirement that, on confirmation or renewal of a supervision order or a detention order, a Court must register the offender on the Sex Offenders Register pursuant to the *Sex Offenders Registration Act 2004* (“*SORA*”) for at least 15 years (proposed s.6B of the *SSODSA*); and

(6) A requirement that a person subject to search or seizure of property under the *SSODSA* provide reasonable assistance for police to access computers and other devices (proposed s.158H of the *SSODSA*).

(1) Mandatory Sentences for Breaches of Restrictive Conditions of a *SSODSA* Order

7. As repeated recently in our submission on the *Crimes Legislation Amendment Bill 2016*, Liberty Victoria is strongly opposed to mandatory sentencing.

8. Liberty Victoria is opposed to the mandatory minimum sentence provisions in the *Sentencing Act 1991*, and accordingly is also opposed to the expansion of those provisions to persons who have breached restrictive conditions under the *SSODSA*.

9. It must be noted from the outset that "violent offences" that would result in breach of the *SSODSA* orders and mandatory imprisonment have been defined to include (proposed Schedule 1A to the *SSODSA*):

    (1) Assault (which can include threatening behaviour and does not require any physical contact);

    (2) Threats to kill, and threats to cause serious injury;

    (3) Criminal damage, and threats to destroy or damage property; and

    (4) Breach of a family violence protection order or intervention order.

10. The Bill would also include attempted violent offences and incitement to commit violent offences.

11. There will be circumstances where the imposition of a mandatory minimum term of 12 months' imprisonment for breaching a *SSODSA* order by committing such an offence (or attempted offence) is completely disproportionate to the offending conduct.

12. It must be remembered that the mandatory minimum period of imprisonment does not include any element of punishment for the breaching offence itself, which will attract its own, additional, penalty.

13. Even for more serious violent offences there may be circumstances where such a sentence for a breach offence is completely disproportionate, such as where a person subject to a *SSODSA* order has committed a violent offence in circumstances of excessive self-defence.

14. To include relatively minor offences such as assault, criminal damage and threats (which are commonly dealt with by the Magistrates' Court) under the definition of "violent offence" indicates that the Bill is designed to try to ensure compliance from persons subject to supervision orders in residential facilities such a Corella Place as opposed to preventing more serious harm to members of the community.

15. There is significant scope for such provisions resulting in mandatory imprisonment to be misused by police or custodial officers.

16. Liberty Victoria shares the Law Council of Australia's concerns about mandatory sentencing regimes,[1] and also agrees with the criticisms of mandatory sentencing by the former NSW Director of Public Prosecutions Mr Nicholas Cowdery AM QC.[2]

17. Further, in November 2015, the Attorney-General ("AG") gave a reference to the Sentencing Advisory Council ("SAC") to advise on "Sentencing Guidance". The SAC has been specifically asked to advise the AG on the most effective legislative mechanism to provide sentencing guidance to the courts in a way that promotes consistency of approach in sentencing offenders and promotes public confidence in the criminal justice system.

18. In light of the AG reference, this Bill is premature. Why would the AG pre-empt the report and recommendations of the SAC given it will be giving careful

---

[1] Law Council of Australia, Policy Discussion Paper on Mandatory Sentencing, May 2014. Mandatory sentencing regimes:

(1) Undermine the fundamental principles underpinning the independence of the judiciary and the rule of law;
(2) Are inconsistent with Australia's international obligations, particularly Australia's obligations with respect to the prohibition against arbitrary detention as contained in Article 9 of the International Covenant on Civil and Political Rights (ICCPR); and the right to a fair trial and the provision that prison sentences must in effect be subject to appeal as per Article 14 of the ICCPR;
(3) Increases economic costs to the community through higher incarceration rates;
(4) Disproportionately affect vulnerable groups within the community, including Indigenous Australians and persons with a mental illness or intellectual disability;
(5) Potentially result in unjust, harsh and disproportionate sentences where the punishment does not fit the crime;
(6) Fails to deter crime;
(7) Increases the likelihood of recidivism because prisoners are placed in a learning environment for crime whereby inhibiting rehabilitation prospects;
(8) Wrongly undermines the community's confidence in the judiciary and the criminal justice system as a whole; and
(9) Displaces discretion to other parts of the criminal justice system, most notably law enforcement and prosecutors, and thereby fails to eliminate inconsistency in sentencing.

[2] www.justinian.com.au/storage/pdf/Cowdery_Mandatory_Sentencing.pdf.

consideration to different sentencing mechanisms, including mandatory minimum sentences?

19. Liberty Victoria's submission to SAC can be found here: https://libertyvictoria.org.au/LVSubmission-Sentencing-Guidance-Reference20160208

20. Liberty Victoria opposes any further fettering of judicial discretion in sentencing. For the reasons we mention in our submission to the SAC, this kind of prescriptive model leads to, amongst other things:

    (1) More accused persons taking matters to trial or contested hearing (because of the disincentive to plead guilty caused by the mandatory minimum sentence and/or the risk that a judicial officer will not find the exception of "special reasons"). This results in significant public expense and protracted proceedings for complainants and a considerable burden to police informants and witnesses;

    (2) Increased plea bargaining where the key decisions are made by prosecuting authorities as to whether to proceed with such charges, which depends on potentially subjective and variable decision making by members of the executive which are not amendable to judicial review; and

    (3) A model of prescriptive sentencing which will be continually "ratcheted up" over time with longer standard periods of imprisonment, or (as this Bill demonstrates) broader categories of offences. The kind of model is very susceptible to politicised decision making as part of "law and order auction" campaigning.

21. While the AG seems to regard the "special reasons" exception as preserving judicial discretion, this Bill just further entrenches a coercive system. Over time the exceptions can be whittled away and the test of establishing "special reasons" made more difficult to satisfy. In reality most judicial officers will regard the threshold of establishing "special reasons" as very high and difficult for offenders to satisfy in light of the matters that must be established under s.10A of the *Sentencing Act 1991* (Vic)

22. Mandatory sentences are unnecessary. If there are individual cases where an offender receives an inadequate sentence for breaching a condition of a *SSODSA* order then the Crown can appeal to seek to have the sentence increased.

23. Further, the Court of Appeal has the power to give guideline judgments and make statements of sentencing principle that are binding on Victorian courts. Were it necessary, the Crown can always seek guidance from the Court of Appeal with regard to the seriousness of offences of breaching *SSODSA* orders, and if current sentencing practices are inadequate it can seek to have them increased.

(2) "Good Order" Offences

24. The Bill would result in a mandatory minimum term of 12 months' imprisonment for breaching the following core "violent conduct" conditions of a *SSODSA* order:

    (1) "…if the court requires an offender to reside at a residential facility, [the offender must] not engage in conduct that poses a risk to the good order of the residential facility or the safety and welfare of offenders or staff at the residential facility or visitors to the residential facility" (s.16(2)(ac) of the *SSODSA*); and

    (2) "[the offender must] not engage in conduct that threatens the safety of any person, including the offender" (proposed s.16(2)(ad) of the *SSODSA*).

25. These proposed provisions are incredibly broad. The meaning of conduct that would pose a risk "to the good order" of a residential facility could extend to persons being a nuisance to staff, behaving in a rowdy manner, or even potentially protesting about conditions and/or treatment. For such conduct to potentially result in a 12-month mandatory minimum term of imprisonment is draconian.

26. Further, the proposed provisions would also result in a person who engages, or threatens to engage, in self-harm being subject to a 12-month mandatory minimum term of imprisonment. That is also draconian.

27. There is no evidence that these provisions are required to ensure community safety, or are in any way a proportionate response to serious criminal offences committed by persons subject to the *SSODSA*. Indeed, the purpose of such provisions do not appear to be to protect the community, rather it appears that community safety is being used as a pretence to enact laws to ensure that persons subject to *SSOSDA* conditions are compliant in residential facilities. While it is important that such facilities are run in an orderly fashion, to impose a significant period of 12 months' imprisonment for those who pose a risk to the

"good order" of such places, or who engage or threaten to engage in self-harm, is completely disproportionate.

28. Notably, this would see persons in such facilities subjected to harsher penalties for such conduct than those in prisons pursuant to s.53 of the *Corrections Act 1986* and r.50 of the *Corrections Regulations 2009*.

(3) Expansion of the Holding Power

29. If enacted the Bill would expand the duration of police holding powers from 10 hours to 72 hours (up to 3 days in custody) for persons subject to *SSODSA* orders. A person can be detained without charge and does not need to be brought before Court (proposed s.168 of the *SSODSA*).

30. The *SSODSA* provides that such powers may be exercised "…only if there are reasonable grounds to suspect that there is an imminent risk that the offender will breach a condition of a supervision order" (s.164), and contemplates that a person will usually be held in police station cells (s.165).

31. However, there is no evidence that this proposed power is necessary or proportionate. There is no evidence or analysis suggesting it would have prevented past serious offences from occurring.

32. If a person has his or her liberty removed then he or she should be brought before a Court as soon as possible in order for an independent judicial officer to determine whether that loss of liberty is justified. That is a fundamental principle underpinning our criminal justice system. However, this holding power requires no such oversight.

33. For a person to be able to have their liberty removed, for up to 3 days, based on a "reasonable suspicion" that there is an imminent *risk* that a person will breach an order, without any judicial oversight, is clearly creating a power that can and will be abused.

34. For example, in combination with other reforms proposed by the Bill, such powers could be used where a police officer reasonably suspects that there is an imminent *risk* that a person will engage in conduct that poses a *risk* to the good order of a residential facility. The power could be used to impose discipline in a residential facility. The scope for the abuse of such powers is manifest.

(4) Expansion of Disclosure Provisions

35. If enacted the Bill would greatly expand the circumstances where disclosure can be made of information about a person who is subject to a *SSODSA* order.

36. At present, a relevant person (including a police officer, a person from the Department of Justice, a person from the Department of Health and Human Services, or a person who delivers services on behalf of those Departments) can disclose to another relevant person any "…information obtained by the person in carrying out a function under [the *SSODSA*] or any other Act" in circumstances including where such disclosure "…is reasonably necessary to lessen or prevent a serious and imminent threat to a person's life, health, safety or welfare" (s.189(1)(C)(d)).

37. If enacted the Bill would permit such disclosure in circumstances including where:

> …the relevant person believes on reasonable grounds it is necessary to use or disclose the information— (i) to reduce the risk of a person committing a violent offence or engaging in violent conduct; or (ii) to lessen or prevent a threat to the life, health, safety or welfare of any person.

38. That is a significant reduction in the threshold for the provision of information regarding persons subject to *SSODSA* orders (there would no longer be a requirement of a "serious and imminent" threat). This will result in information about persons subject to *SSODSA* orders being much more widely disseminated.

39. There is a real concern that if personal information about persons made subject to *SSODSA* orders becomes more widely distributed, then this might not only breach the person's privacy, but may result in the information falling into the hands of those who would perpetrate vigilante conduct. That is why it is so important for there to be significant restrictions on the use and dissemination of such information.

40. The Government has not made the case as to how this lowering of the threshold will result in greater community safety, or that it has proper safeguards in place that will protect this information.

(5) *SORA* Registration

41. The Bill proposes that on confirmation or renewal of a *SSODSA* order, a Court must make an order registering the offender on the sex offender register pursuant to the *Sex Offenders Registration Act 1986* ("*SORA*") for at least 15 years (proposed s.6B of the *SSODSA*).

42. The Bill fails to recognise that there are different considerations as to whether a person should be made subject to a *SSODSA* order and a *SORA* order. Simply put, there will occasionally be circumstances where a person is subject to a *SSODSA* order who should not be subject to a *SORA* order.

43. Liberty Victoria repeats its concerns with the *SORA* regime made in our submission on the *Sex Offenders Registration Amendment Bill 2016,* where it was submitted that there are at least three foundational problems with the current system of sex offender registration in Victoria:

    (a) The expanding number of registrants (with an estimated 10,000 registrants by 2020);

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

    (c) The complexity of reporting obligations.

44. Such persons, once registered under the *SORA*, not only face significant limitations to their liberty, privacy and freedom of movement, but are prevented from engaging in child-related employment (s.68 of the *SORA*). That is so even in circumstances where the relevant offending was not in any way related to children.

45. A consequence of being on the register is that it is unlawful for a registrant to work, amongst other things, in schools, transport services, and various clubs, religious organisations, associations or movements that provide services to children (S.67 of the *SORA*). This has a significant impact on the employability and social integration of those on the register.

46. 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.

47. There will be persons made subject to *SSODSA* orders who have not committed any offences against children and present no danger to the safety of children. For example, a person may be made subject to an *SSODSA* order based on a serious single offence that was committed against an adult, perhaps in circumstances that were out of character and/or when heavily intoxicated. That offence may be historical. That person may have served a lengthy prison sentence, completed extensive sex offender rehabilitation courses, and then been released into the community. While a judge may determine that the person still should be subject to a period of supervision in the community, the broader mandatory conditions of being on the *SORA* may have absolutely no connection to the needs of the offender or the community.

48. In its 2012 report on Sex Offenders Registration, the Victorian Law Reform Commission called for the Courts to determine whether a person should be placed on the register in all circumstances (and thus remove mandatory registration), 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*. Liberty Victoria continues to strongly support those recommendations.

49. It is a matter of concern that rather than responding meaningfully to such recommendations, the Government is broadening the categories of persons subject to mandatory *SORA* registration.

(6) Search and Seizure and Requiring the Assistance of Offenders

50. Liberty Victoria is opposed to the Bill's proposed creation of a criminal offence whereby a person subject to a search or seizure of property under the *SSODSA* regime must not fail to provide assistance that is reasonably necessary for police to access computers or other devices (proposed s.158H of the *SSODSA*). A failure to provide such assistance would be punishable by a maximum term of 5 years' imprisonment.

51. This follows similar provisions being proposed with regard to *SORA* registrants under the *Sex Offenders Registration Amendment Bill 2016*.

52. Liberty Victoria is opposed to such provisions that would abrogate the right to freedom from self-incrimination. There is no evidence that police require such powers and that the normal methods of forensic analysis of seized computer hard drives and other devices are insufficient.

53. The creation of such offences represent a further abrogation of the golden thread of the criminal law that it is for the prosecution to prove offences to the criminal standard, and that no person may be compelled to be a witness in his or her own prosecution.

Conclusion

54. Liberty Victoria has serious concerns about the Bill. It should not be enacted.

55. Some of the reforms, such as the mandatory minimum term of 12 months' imprisonment for breaching restrictive conditions, are simply draconian.

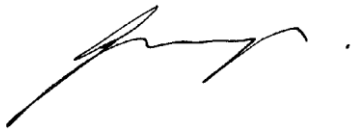
56. The Government has not explained how these proposed reforms would better protect the community, or prevent incidents such as the murder of Ms Vukotic.

57. There is a real danger that, in the understandable desire to respond to such shocking incidents, the legislature rushes to enact laws without proper consideration of the pitfalls.

58. The Government has not made the case as to how such reforms are proportionate limitations to the rights of persons made subject to *SSODSA* orders. Liberty Victoria is concerned that if enacted such reforms would be open to significant abuse.

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



George A Georgiou SC
President
Liberty Victoria