Victorian Council for Civil Liberties Inc
Reg No: A0026497L

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

libertyvictoria.org.au

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Sex Offenders Registration Amendment (Miscellaneous) Bill 2017

1. In relation to the Sex Offenders Registration Amendment (Miscellaneous) Bill 2017, we repeat our previous criticisms of the sex offenders registration regime made in our submission on the Sex Offenders Registration Amendment Bill 2016.

2. In that submission we noted that 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.

For convenience we have set out our concerns about those issues at the end of this submission.

3. In relation to the Sex Offenders Registration Amendment (Miscellaneous) Bill 2017, there are two positive steps (subject to qualifications):

    (1) The exceptions from sex offender registration for young persons in some circumstances such as consensual sexting. We addressed this issue in evidence before the Victorian Parliament's Law Reform Committee Inquiry into Sexting in 2012 here.

    While the Bill takes some steps to address those concerns, it does not go far enough. For example, to be exempted an offender has to be 18 or 19 years' old. A 20 year-old would not be able to be exempted, if, for example he or she was engaged in consensual sexting with a 17 year-old partner (despite it being lawful to have sexual intercourse, a 17 year-old is still a minor for the child pornography offences under the *Crimes Act* 1958). Again this underscores how mandatory systems create injustice and that judges and magistrates are best placed to make decisions about registration (subject to judicial review if the police, the Director of Public Prosecutions, or the accused wants to challenge the registration decision).

    (2) The increase in the duration of the Chief Commissioner's power of suspension from reporting requirements for registrants from 12 months to 5 years. However, it would be much better if a person on the register had a right of review that could be enforced after a period of around 2 years.

    While the Bill also separately provides for amendments to the powers of suspension, and under the amendments proposed by the Bill the Chief Commissioner can apply to any court after 15 years (see the proposed amendments to s 39A of the Act), that does not extend to registrant, who must still apply to the Supreme Court for suspension. That is an extreme and often disproportionate measure. 15 years is far too long to wait for review, and there is no good reason why a registrant should not be able to apply to the Court that made the original order rather than the Supreme Court.

4. There are many problematic aspects of the Bill:

(1) The Bill's "clarification" that a registrant remains on register for life, and is prohibited from child related employment for life.

That was not understood by many to be the operation of the Act. If an offender commits a single offence, and is registered for a period of 8 years or 15 years, many lawyers and judicial officers would not have thought that the person remains on the register for life (and accordingly is banned from child related employment for life), with only the reporting requirements lapsing after 8 or 15 years. In cases where there was a discretion, there is a real issue as to whether judges and magistrates would have made registration orders if that was clear. This underscores the need for a review mechanism.

(2) There is no capacity for review of mandatory registration and the prohibition on child related employment. That means the scheme necessarily operates unfairly (as the sexting amendments in fact demonstrate).

(3) With regard to child offenders, or adult offenders who have committed schedule 3 or 4 offences, registration is discretionary. A child offender should not be necessarily prohibited from child-related employment for the rest of his or her life as a result of being placed on the register. There should be capacity for review, for both child and adult registrants. A person, all the more so a child, should be given the opportunity to rehabilitate, and should not be forced to carry the stigma of being on the register for the rest of their lives. Liberty Victoria supports the VLRC recommendation that the SORA provisions related to child related employment be incorporated into the *Working With Children Act 2005* so that if necessary independent judicial officers can consider the suitability of child related employment for individual registrants.

For example, consider an 18 year-old, who was experiencing depression and drug addiction. He goes out with friends and while severely intoxicated at a nightclub commits three offences of sexual assault by indecent touching. It is out of character but the Magistrate convicts him and sentences him to a 2 year Community Correction Order ('CCO') with treatment conditions and community work. The Magistrate decides to place him on the register for 8 years (because it was regarded as being part of the one incident under s 34 of the SORA). The CCO is a moderate sentence, and the offender does not appeal against the registration order, and wants to get on with his life. The offender turns his life around, completes the CCO and all courses, gets off drugs and has his mental health issues addressed. He goes

to university and studies nursing or teaching. He would not be able to work as a paediatric nurse or primary or secondary school teacher, given that would constitute child related employment. It doesn't matter that his offending has nothing to do with children and/or was out of character – having been placed on the register the prohibition on child related employment is mandatory for life.

(4) There should be judicial oversight over the taking and retention of the DNA of registrants. A person should not necessarily have his or her DNA taken by police because they are placed on the register. The Courts have a vital role as the independent umpire to make sure such a procedure is proportionate.

Systemic Issues with the Sex Offenders Register

A. The Number of Registrants

5. 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 endorses the recommendation of the VLRC that there is a need to "strengthen the scheme by sharpening its focus".

6. The register was originally intended to be a database of information on persons 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 depends on the self-reporting of registrants).

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

B. Mandatory Registration

8. 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).

9. That is problematic because there will be some circumstances where an offender does not

pose a substantial risk to the sexual safety of the community or where the period of registration is disproportionate to the level of risk.

10. Persons who may be assessed as posing no real risk of predatory or escalating sexual offending 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 a wide range of child-related employment.[1] That is even so in circumstances where the relevant offending was not related to children.

11. 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.[2] This has a significant impact on the employability and social integration of those on the register.

12. 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.

13. 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 register. Liberty Victoria submits that, having regard to the difficult administrative task in managing and updating the database of registered persons, it is vital that persons who are registered as sex offenders are those who actually pose a significant risk of engaging in sexual offending.

14. 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 orders in appropriate cases.

15. 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.[3] There may well be examples of offenders acting in ways completely out of character, where the uncontradicted expert evidence is that the

[1] Section 68 of the Act.
[2] Section 67 of the Act.
[3] See further *ARM v Secretary to the Deptartment of Justice* [2008] VSCA 266 at [13] with regard to the now repealed *Serious Sex Offenders Monitoring Act* 2005.

person does not pose a risk to the community, or only requires a very limited period of supervision.

16. 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 registered person 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.

17. 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*,[4] in the context of the equivalent British scheme, such 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, constitutes a disproportionate limitation to the human rights of registered persons.[5]

18. 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), and that Part 5 of the *Sex Offenders Registration Act* 2004 (Vic), 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 agreed with those recommendations.

C. Complexity of Reporting Conditions

19. Under the reforms to the *SORA* made by the *Sex Offenders Registration Amendment Act* 2014, registrants are now 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.

[4] [2010] UKSC 17.
[5] Section 39(2) of the Act.

20. That means that a registrant who, for example, has dinner at a friend's house and speaks with their 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.

21. 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 – the alleged criminality was a failure to report and update the register.

22. 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.

23. 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 potentially arbitrary application of the breach provisions.