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8 August 2011

Dear Sir or Madam

Submission to the VLRC on Sex Offenders Registration

1. Liberty Victoria welcomes the opportunity to make a submission to the Victorian Law Reform Commission ("VLRC") on sex offenders registration.

2. Liberty Victoria would like to thank the volunteers Ms Emily Giblin, Ms Jo Hambling, and Ms Mercia Mitchell who provided research assistance.

Liberty Victoria

3. Liberty Victoria has a long and proud history of campaigning for civil liberties and human rights for more than 70 years. Officially known as the Victorian Council of Civil Liberties Inc, its lineage extends back to the Australian Council for Civil Liberties ("ACCL"). The ACCL was formed in Melbourne in 1936 and was determined to offer 'a means of expression to those people in all parties who believe that social progress may be achieved only in an atmosphere of liberty.' Brian Fitzpatrick was the ACCL's General Secretary for twenty-six years and helped to form the Victorian Council for Civil Liberties before his death in 1965.

4. Throughout its history, Liberty Victoria has defended the right of individuals and

organisations to free speech, freedom of the press and of assembly, and freedom from discrimination on the grounds of race, religion or political belief. It has operated in accord with the ACCL's original platform, working not only to defend existing civil liberties and oppose their limitation, but to campaign for the 'enlargement of these liberties.' We are now one of Australia's leading civil liberties organisations.

Sex Offenders Registration – The Need for Discretion

5. There is no doubt that the prevention of sexual offences is an important legislative objective. Sexual offences have the potential to devastate victims and cause wider damage the community. Such offending is even more egregious when the victims are children. As held in *WCB v R*:[1]

> *"Our society is becoming more aware of the incidence of sexual abuse of children and its potentially destructive impact. Such conduct commonly involves a gross breach of trust that is likely to have a profound and lasting effect on the victim, family and community. The frequency with which it appears that an offender before the court was a victim of sexual abuse when they were a child, is another indicium of the irreparable damage that is done to victims of sexual abuse and its consequences for the community."*[2]

6. Notwithstanding the importance of the objective of preventing sexual offences, there are real doubts as to whether the Act in its present form is best suited to achieve such aspirations, and whether it strikes the right balance between protecting the community and protecting the rights of registered persons.

7. In particular, the failure of the Act to provide a discretionary power for judicial officers to refuse to make a registration order with regard to Class 1 and Class 2 offences has the potential to result in persons being registered who do not pose any significant risk to the community. This not only works an injustice upon those persons who are then made subject to the onerous conditions of registration, but also dilutes the forensic value of the register as a database of persons who pose a real risk of recidivism.

8. The central problem with mandating judicial officers to make registration orders by reference to certain categories of offences, as opposed to the level of risk of an

[1] [2010] VSCA 230 (10 September 2010).
[2] Per Warren CJ and Redlich JA at [40].

offender in a given instance, is that it necessarily works an injustice to those in the unusual or exceptional case. As noted by Mildren J in the context of mandatory minimum sentences in *Trenerry v Bradley* (1997) 6 NTLR 175 at 187 where is was observed:

> *"Prescribed minimum mandatory sentencing provisions are the very antithesis of just sentences. If a Court thinks that a proper just sentence is the prescribed minimum or more, the minimum prescribed penalty is unnecessary. It therefore follows that the sole purpose of a prescribed minimum mandatory sentencing regime is to require sentencers to impose heavier sentences than would be proper according to the justice of the case."*[3]

9. Such observations are equally applicable with regard to registration orders. If a Court already has the power to make a given order in the exercise of its direction, then nothing is gained by mandatory registration in an appropriate case, because the Court would make the order in any event. In practice, mandatory registration prevents judicial officers from *refusing* to make orders in the unusual or exceptional case where that is in the interests of justice.

10. There have been recent and well-publicised examples of young persons, engaged in what is commonly described as "sexting", who have been charged with and then pleaded guilty to offences including the production and possession of child pornography.[4] Such conduct may include the retention of sexual images that have been sent, unsolicited, to the person. Further, such offending may encapsulate the taking of photographs by young persons who are engaged in age appropriate sexual relationships.

11. It should be noted that the offence of producing child pornography, contrary to s 68 of the *Crimes Act* 1958 (Vic) almost certainly extends to the act of taking a photo or downloading an image from the internet.[5]

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[3] Cited with approval in *Olsen v Sims* [2010] NTCA 8 (30 November 2010), [77].

[4] See Nicole Brady, "'Sexting' youths placed on sex offenders register", The Age, 24 July 2011, <http://m.theage.com.au/victoria/sexting-youths-placed-on-sex-offenders-register-20110723-1hugu.html>

[5] As noted in Bourke's Criminal Law Victoria: "The viewing of images from the internet constitutes production, and not merely possession, of the photograph or publication. The act of voluntarily downloading a pornographic image from the internet onto a computer screen constitutes the act of "making" a photograph: *R v Smith; R v Jayson* [2003] 1 Cr App R 212 at 222; [2002] EWCA Crim 683. The downloading of the image creates or causes the image to exist on the computer screen…" [s 68.30].

12. The Victorian child pornography offences differ from many other Australian jurisdictions in defining a child as a minor under the age of 18, as opposed other jurisdictions where the relevant age is 16.[6] It should also be noted that, in Victoria, the offence of producing child pornography does not have the same statutory defence as that provided with regard to the possession of child pornography, namely:

"that the accused made the film or took the photograph or was given the film or photograph by the minor and that, at the time of making, taking or being given the film or photograph, the accused was not more than 2 years older than the minor was or appeared to be…"[7]

13. Simply put, this means that an 18 year-old person, who with consent was taking sexual photographs of his or her 17 year-old partner, would potentially be committing an offence under the Act and be exposed to mandatory registration, notwithstanding that the sexual relationship was itself legal.

14. Under the Act the offences of procuring, producing and possessing child pornography are all Class 2 offences. In the case of a single offence, this results in a mandatory minimum period of 8 years registration under the Act.[8] In the case of two offences, the duration is extended to 15 years, and in the case of three or more offences to registration for life.

15. Young 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 privacy and freedom of movement, but are prevented from engaging in a wide range of child-related employment.[9] 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.[10] This has a significant impact on the employability and social integration of those on the register. For those persons who pose no significant risk to the community, there is a

[6] *Crimes Act* 1900 (NSW), s 91FA; *Criminal Code*, s 207A (QLD); *Criminal Law Consolidation Act* 1935 (SA), s 62; *Criminal Code*, s 216 (WA).
[7] Section 70(2)(d) of the *Crimes Act* 1958 (Vic).
[8] Section 34 of the Act.
[9] Section 68 of the Act.
[10] Section 67 of the Act.

real question as to whether the stigma of being on the register, is actively counter-productive with regard to their rehabilitation.

16. This state of affairs 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 offenders 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.

17. As noted in the VLRC discussion paper, it seems clear that the system of registration provided for by the Act engages and limits human rights protected by the *Charter of Human Rights and Responsibilities Act* 2006 ("the Charter"). This includes the right to freedom of movement, the right to privacy, and the right to freedom of association.[11]

18. For some offenders, it may well be that the limitation to their human rights is justified and proportionate. 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.[12] The onus of "demonstrably justifying" the limitation resides with the party seeking to uphold the limitation, and in light of what must be justified, the standard of proof is high.[13]

19. Simply put, it is submitted that in many cases the mandatory period of registration will constitute a disproportionate limitation of the human rights of the offender having regard to the level of risk posed by the offender to the community. Without preserving the discretion of judicial officers to *refuse* to make orders in appropriate cases, the Act necessarily works an injustice to those who do not pose a risk to the public. Accordingly, there is a real issue as to whether the Act, as it stands, is consistent with the Charter, and whether the Supreme Court of Victoria, in an appropriate case, should make a declaration of inconsistent interpretation pursuant to s 36 of the Charter.

20. The best way to protect the community and to ensure that only persons who are a

[11] [5.2].
[12] 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].
[13] *Re Application Under the Major Crime (Investigative Powers) Act 2004* (2009) 24 VR 41, [147]; *R v Momcilovic* 265 ALR 75. [143]-[144].

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. It should be noted that the corresponding legislation in Tasmania, the *Community Protection (Offender Reporting) Act* 2005 (Tas) preserves the discretion of judicial officers to refuse to make an order in appropriate cases.

21. There should be no fixed categories as to when there is a limited discretion to refuse to make a registration order. There will be other examples of offending, other than those considered above, where it ma be inappropriate to make a registration order. For example, in cases of consensual sexual activity between young persons when there is slightly more than a 2 year age difference between them.[14]

22. Moreover, 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.[15] 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.

23. Further, 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 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 *Serious Sex Offenders (Detention and Supervision) Act* 2009, 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.

24. 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* [2010] UKSC 17, in the context of the

[14] See s 45(4)(b) of the Crimes Act 1958.
[15] 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.

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.[16]

25. Liberty Victoria is also concerned about the use of static risk assessment tools by those persons tasked with administering the registration scheme. There has been significant criticism of static risk assessment tools, both in academic literature,[17] and in the Courts.[18] In *DPP (WA) v Comeagain* [2008] WASC 235 (22 October 2008), McKechnie J held:

> *"There remains an issue with all the predictive tools in that they have not yet been validated. They were developed, in part, to overcome the perceived and actual weaknesses of an unguided clinical assessment and have been embraced by professionals, psychiatrists and psychologists, as an improvement on an unguided assessment. Nevertheless, it would be an error to attribute a degree of scientific certainty to the tools simply because they deliver an arithmetical outcome. They remain unvalidated. Years will have to pass before a retrospective survey can determine whether and, to what extent, the predictive tools are reliable."*[19]

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[16] Section 39(2) of the Act.

[17] Ian Coyle, 'The Cogency of Risk Assessments', (2011) Psychiatry, Psychology and Law. 1-27.

[18] In *TSL v Secretary to the Department of Justice* (2006) 14 VR 109 at 122 ("*TSL*"). Callaway JA cited an issues paper prepared by Professor Bernadette McSherry concerning the dangers of evidence provided by mental health professionals, especially in light of the "…potential for judges and juries to misunderstand and misuse risk assessments, assigning greater accuracy and inevitability to predicted behaviours than is warranted". Callaway JA also referred to Kirby J's reasons for judgment in *Fardon v Attorney-General (QLD)* (2004) 223 CLR 575 at 623, where his Honour held that "[e]xperts in law, psychology and criminology have long recognised the unreliability of predictions of criminal dangerousness. In a recent comment, Professor Kate Warner remarked '[A]n obstacle to preventive detention is the difficulty of prediction. Psychiatrists notoriously overpredict. Predictions of dangerousness have been shown to have only a one-third to 50% success rate'" [124] [citations omitted].

See further *DPP (WA) v Mangolamara* (2007) 169 A Crim R 379 at [165]-[166], *Attorney-General (NSW) v Tillman* [2007] NSWSC 605 (18 June 2007) per Bell J (as her Honour then was) at [72]-[76]. See further B McSherry and P Keyzer, *Sex Offenders and Preventative Detention: Politics, Policy and Practice*, 2009, pp 19-49.

[19] At [20]. See further *DPP (WA) v GTR* [2007] WASC 318 at [111]-[112]; cf *DPP (WA) v GTR* (2008) WAR 307 at [162].

26. There is a danger that on over-reliance on static risk factors results in inflated assessments of dangerousness that fail to consider the dynamic factors reducing the risk of recidivism.

27. Lastly, Liberty Victoria is concerned that there is insufficient transparency with regard to how personal information that is stored on the sex offenders register may then be entered on corresponding databases in other States or by Federal authorities. There needs to be an urgent review of the protocols and procedures with regard to how such information is exchanged, stored, and how it managed once a person is no longer on the register.

28. Thank you for the opportunity to make this submission. Please contact Jane Dixon SC or Michael Stanton of the Policy Committee of Liberty Victoria, for any further information or assistance.