

# The purpose of the sex offenders registration scheme

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## Introduction

- 2.1 The *Sex Offenders Registration Act 2004* (Vic) states that it imposes reporting obligations on sex offenders to provide police with up to date information for law enforcement purposes and to reduce the risk of re-offending.<sup>1</sup>
- 2.2 The registration scheme was established in 2004 with the goal of reducing the risk of harm to children by sexual abuse. This remains the aim seven years later. However, expectations about *how* the scheme should contribute to this goal have shifted.
- 2.3 The purpose of the scheme as set out in the legislation does not clearly describe the function that it serves today. The Ombudsman's February 2011 report on the management of sex offenders indicates that the information is—or should be—collected for the purpose of alerting the Department of Human Services to children at risk of harm.<sup>2</sup>
- 2.4 This chapter discusses how and why the sex offenders registration scheme was established and the purpose that it now fulfils. The evidence base for the scheme is discussed in Chapter 4.

## The origins of the scheme

- 2.5 The origins of Victoria's sex offenders registration scheme are found in regimes created in the 1990s in the United States and the United Kingdom. The approach taken by these countries has provided a template for all other jurisdictions that have introduced registration schemes.<sup>3</sup>
- 2.6 The regimes in the United States and the United Kingdom are briefly described below.<sup>4</sup> The following section then outlines the steps that led to the registration of sex offenders in Victoria.

## Overseas approaches

### United States

- 2.7 The United States is understood to have been the first country in the world to establish a register of sex offenders. Individual states independently created and administered registration schemes under different laws. Although registration began in the 1940s,<sup>5</sup> modern sex offender registration schemes emerged during the early 1990s in response to high-profile cases.<sup>6</sup> Community notification laws permitting the public dissemination of information about registered offenders began to appear from 1990.<sup>7</sup>
- 2.8 The United States federal government entered the field in 1994, with the passage of the *Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act* (Wetterling Act).<sup>8</sup> The Wetterling Act mandated the development of state registration schemes. It required offenders who were convicted of various criminal offences against children, or 'sexually violent offences' against children or adults, to register their address with a state law enforcement agency.<sup>9</sup> The local law enforcement agencies were to be notified of any change of address<sup>10</sup> and were required to send an address verification form to the offender annually for 10 years.<sup>11</sup> States had three years within which to implement the registration scheme or otherwise lose 10 per cent of their federal crime control funding.<sup>12</sup>

1 *Sex Offenders Registration Act 2004* (Vic) s 1(1)(a).

2 Ombudsman Victoria, *Whistleblowers Protection Act 2001: Investigation into the Failure of Agencies to Manage Registered Sex Offenders* (2011).

3 Terry Thomas, *The Registration and Monitoring of Sex Offenders: A Comparative Study* (Routledge, 2011) 80. Other countries that have established registers include Canada, the Republic of Ireland, France, Jamaica, Hong Kong and Kenya.

4 The United States and United Kingdom registration schemes are discussed in more detail in Appendix F.

5 California enacted the first state sex offender registration law in 1947: State of California Department of Justice, *Sex Offender Registration and Exclusion Information* (2009) <<http://www.meganslaw.ca.gov/sexreg.aspx>>.

6 Andrew J Harris and Christopher Lobanov-Rostovsky, 'Implementing the Adam Walsh Act's Sex Offender Registration and Notification Provisions: A Survey of the States' (2010) 21(2) *Criminal Justice Policy Review* 202, 203; Thomas, *The Registration and Monitoring of Sex Offenders*, above n 3, 59.

7 Washington State's *Community Protection Act 1990* established the first community notification scheme in the United States.

8 *Violent Crime Control and Law Enforcement Act of 1994*, § 170101, Pub L No 103–322, 108 Stat 1796. The Wetterling Act was named after Jacob Wetterling, an 11-year-old boy who was abducted at gun point in Minnesota and never found.

9 *Violent Crime Control and Law Enforcement Act of 1994*, § 170101(a)(1)(A), Pub L No 103–322, 108 Stat 1796.

10 *Ibid* § 170101(b)(3)(A).

11 *Ibid*, §§ 170101(a)(1)(A), (a)(3)(A).

12 *Ibid* § 170101(f).

- 2.9 The Wetterling Act has been amended many times. Significantly, in January 1996 it was amended by the federal Megan's Law<sup>13</sup> to require state law enforcement agencies to 'release relevant information' about registered offenders 'that is necessary to protect the public'.<sup>14</sup> Failure to comply with the amendments would again lead to a loss of federal funding.<sup>15</sup>
- 2.10 Ten years later, in 2006, the *Adam Walsh Child Protection and Safety Act* introduced new federal registration laws.<sup>16</sup> The Adam Walsh Act is divided into seven sub-titles, the first of which is the *Sex Offender Registration and Notification Act*, replaced the registration and notification requirements of the Wetterling Act. The new regime requires the states to make information about registrable offenders readily accessible to the public via an internet site, or again risk losing a percentage of federal funding.<sup>17</sup> The Act expands federal government control of state registration and notification schemes and seeks to foster national consistency.<sup>18</sup>

## United Kingdom

- 2.11 Although the United States pioneered the establishment of registration schemes, the approach taken by the United Kingdom has had a more direct impact on the design and operation of schemes in Australia.
- 2.12 A registration scheme for sex offenders began in the United Kingdom with the enactment of the *Sex Offenders Act 1997* (UK).<sup>19</sup> This legislation formed the basis of Australia's first registration scheme in New South Wales in 2000.<sup>20</sup> The New South Wales scheme in turn influenced the model registration legislation on which all Australian jurisdictions, including Victoria, based their schemes.<sup>21</sup>
- 2.13 There was public consultation in the United Kingdom about the development of its scheme. In 1996, the Home Office issued a consultation document on the sentencing and supervision of sex offenders, including proposals to impose reporting obligations.<sup>22</sup>
- 2.14 The document explained that the primary purpose of the obligations would be 'to ensure that the information on convicted sex offenders contained within the police national computer was fully up to date'.<sup>23</sup> It proposed that convicted sex offenders should be required to notify the police of any change of address to enable local police to know if a convicted offender had moved into their area.<sup>24</sup> The document explained that 'If the police were armed with this information, it could not only help them to identify suspects once a crime had been committed, but could also possibly help them to prevent such crimes. It might also act as a deterrent to potential re-offenders'.<sup>25</sup>
- 2.15 The scheme introduced in 1997 required offenders to report their name and address to police, in writing or in person, when convicted of one of 14 sexual offences, including adult-victim

13 42 USC § 13701. Megan's Law had been enacted in New Jersey in October 1994, following the rape and murder of a seven-year-old girl, Megan Kanka, by a neighbour who was a convicted child sex offender: Lyn Hinds and Kathleen Daly, 'War on Sex Offenders: Community Notification in Perspective' (2001) 34(3) *Australian and New Zealand Journal of Criminology* 256, 265, 269, endnote 12. The New Jersey legislation made public notification of the names of registered offenders mandatory for that state: at 265.

14 42 USC § 14071(d).

15 Thomas, *The Registration and Monitoring of Sex Offenders*, above n 3, 47.

16 42 USC §§ 16901–16991 (2010). Adam Walsh, aged six, was abducted from a shopping mall in Florida in 1981.

17 Ibid §§ 16918, 16925.

18 Thomas, *The Registration and Monitoring of Sex Offenders*, above n 3, 50. The aims of fostering greater consistency have not yet been achieved. Only four states were 'substantially compliant' with the Sex Offender Registration and Notification Act by June 2011, despite more than 250 bills having been enacted since 2007 by states attempting to comply: Donna Lyons, *Sex Offender Law: Down to the Wire* (June 2011) National Conference of State Legislatures <<http://www.ncsl.org/default.aspx?tabid=23039>>.

19 *Sex Offenders Act 1997* (UK) c 51.

20 *Child Protection (Offenders Registration) Act 2000* (NSW). When the original New South Wales legislation was introduced into Parliament, reference was made to the United Kingdom legislation: New South Wales, *Parliamentary Debates*, Legislative Assembly, 1 June 2000, 6475 (Paul Whelan). The Wood Royal Commission Report, which led to the establishment of the New South Wales registration scheme, preferred the United Kingdom approach to that in the United States: The Hon J R T Wood, *Royal Commission into the New South Wales Police Service: The Paedophile Inquiry*, Final Report Volume V (August 1997) 1221, 1226–7.

21 In July 2003, the Australasian Police Ministers' Council announced that police ministers from all states had agreed to develop legislation to establish a register in each state, based on the New South Wales Act, that would be in place in one year: New South Wales Ombudsman, *Review of the Child Protection Register: Report under s 25(1) of the Child Protection (Offenders Registration) Act 2000* (May 2005) 5.

22 Home Office, *Sentencing and Supervision of Sex Offenders: A Consultation Document*, Cm 3304 (1996).

23 Ibid 8.

24 Ibid.

25 Ibid.

offences.<sup>26</sup> Offenders were simply required to report their name and address to police, and report any change to these details thereafter; there was no annual reporting requirement.<sup>27</sup> The reporting period was directly linked to the sentence the person received, and could be indefinite, 10 years, seven years or five years, with a halved period for young people.<sup>28</sup>

- 2.16 In 2003, the *Sexual Offences Act 2003* (UK) created a number of new sexual offences and made many of them registrable offences.<sup>29</sup> As a result, the number of offences that gave rise to registration increased from 14 to 58. The requirements of the 1997 scheme were essentially retained but the new legislation added to the details that registered offenders were required to report, decreased the number of days they had in which to report changes and introduced annual reporting for the first time.<sup>30</sup>
- 2.17 The scheme has been regularly amended by other legislation and administrative actions, both before 2003 and afterwards. The changes have broadened the scope of the scheme beyond sexual offences, increased the reporting obligations placed on registered offenders, and introduced new disclosure powers.<sup>31</sup>

## National law enforcement initiatives

- 2.18 Australian registration schemes emerged in part from initiatives to improve the capacity of law enforcement agencies to work together by building national information management systems.
- 2.19 These initiatives have been fostered by police ministers. In 1980, the Australian Police Ministers' Council was formed 'to promote a co-ordinated national response to law enforcement issues and to maximise the efficient use of police resources'.<sup>32</sup> The Council was later expanded and renamed the Australasian Police Ministers' Council. It is now the Ministerial Council for Police and Emergency Management—Police.

## The Australian Bureau of Criminal Intelligence

- 2.20 The initial role of the Australian Police Ministers' Council was to establish national common police services and develop a coordinated approach to police policy and operations. One of the national common police services it established was the Australian Bureau of Criminal Intelligence, which facilitated the exchange of criminal intelligence between law enforcement agencies from 1981.<sup>33</sup>
- 2.21 In 1989, the Australian Bureau of Criminal Intelligence began looking into child sexual abuse and paedophilia at a national level. The following year, it commenced a national project to collect and disseminate intelligence on paedophiles, and this included maintaining a database of information to which all police forces had access.<sup>34</sup>
- 2.22 This activity was publicly acknowledged in 1995, when the Commonwealth Parliamentary Joint Committee on the National Crime Authority reported on the extent of organised criminal activity by paedophiles in Australia. The Committee examined whether the National Crime Authority should have an ongoing role in the investigation of organised paedophile networks.

26 *Sex Offenders Act 1997* (UK) c 51, sch 1, ss 2(3), (5). Offenders could also be made subject to the reporting obligations if they were found not guilty by reason of insanity, or if they were cautioned by police in respect of one of the offences: *Sex Offenders Act 1997* (UK) c 51, s 1(1). Thomas notes that the practice of cautioning was used in relation to relatively minor offences where the police believed they had enough evidence to gain a conviction and the offender admitted to the offence in question: Thomas, *The Registration and Monitoring of Sex Offenders*, above n 3, 64.

27 *Sex Offenders Act 1997* (UK) c 51, ss 2(1)–(2).

28 *Ibid* s 4(2).

29 *Ibid* sch 3.

30 *Ibid* s 85. Previously, offenders were only required to make an initial report and a report when particular details changed.

31 Terry Thomas, 'The Sex Offender Register, Community Notification and Some Reflections on Privacy' in Karen Harrison (ed) *Managing Sex Offenders in the Community* (Willian Publishing, 2009) 69–70. Section 327A of the *Sexual Offences Act 2003* (UK) contains a duty to disclose information to a member of the public on request if they have a legitimate concern, and a presumption to disclose if children are known to be in a household, whether or not there is a request.

32 Australasian Police Ministers' Council, *National Common Police Services Annual Report 1996–97* (1997) 1.

33 The Australian Bureau of Criminal Intelligence was replaced in January 2003 by the Australian Crime Commission: *Australian Crime Commission Act 2002* (Cth). Other common police services established by the Australian Police Ministers' Council included: the National Exchange of Police Information (functions transferred to CrimTrac); the National Police Research Unit (now the Australasian Centre for Policing Research); the Australian Police Staff College (now Australian Institute of Police Management); the National Uniform Crime Statistics Unit (now National Crime Statistics Unit); and the National Institute of Forensic Science.

34 The Hon J R T Wood, *Royal Commission into the New South Wales Police Service: The Paedophile Inquiry*, Final Report, Volume V (1997) 1193; Joint Committee on the National Crime Authority, Parliament of Australia, *Organised Criminal Paedophile Activity* (1995) [4.13].

It concluded that it was better to leave the investigation of all child sexual offences to the police and recommended that the Australian Police Ministers' Council consider:

- the flow of information about paedophile offenders and suspects between Australian law enforcement agencies
- whether enhancing the Australian Bureau of Criminal Intelligence's database is 'the most appropriate avenue along which to proceed'
- whether formal agreements on information sharing between relevant law enforcement agencies should be put in place.<sup>35</sup>

2.23 Responding to the Committee's report in February 1997, the Commonwealth Government said that

there is already a high level of cooperation and information sharing between Australian law enforcement agencies in relation to child-sexual offences and offenders. Nonetheless, because many paedophiles are known to move interstate and often change their name once they suspect police interest in their activities, it is clearly important to maintain an effective national database which is readily accessible to investigators in all jurisdictions.<sup>36</sup>

2.24 The notion of the Australian Bureau of Criminal Intelligence being responsible for a national database was again raised in August 1997 by the Royal Commission into the New South Wales Police Service, conducted by the Hon Justice James Wood (the Wood Royal Commission).<sup>37</sup> The Wood Royal Commission recommended that the Australian Bureau of Criminal Intelligence should maintain a national index or register of paedophiles.<sup>38</sup>

2.25 Later that year, the Australasian Police Ministers' Council formed a project team that included the Australian Bureau of Criminal Intelligence, New South Wales Police, Victoria Police and the Australian Federal Police to examine the 'technical feasibility' of developing a national database and report to the Council by November 1998.<sup>39</sup>

2.26 In the meantime, the Commonwealth committed \$50 million for the establishment of national policing information systems under an initiative known as CrimTrac.<sup>40</sup> After receiving the project team's report on the technical feasibility of a national child sex offender database, the Australasian Police Ministers' Council referred the matter to the CrimTrac Steering Committee for further work.<sup>41</sup>

## CrimTrac

2.27 CrimTrac was established as a central agency for national law enforcement information systems in July 2000 when the Commonwealth Minister for Justice and Customs and the state and territory police ministers signed an intergovernmental agreement.<sup>42</sup>

2.28 The CrimTrac agency assumed responsibility for a range of mainframe systems that had been established by the National Exchange of Police Information (NEPI). NEPI had been formed in 1990 to provide national police services and had been responsible for the national fingerprint system and the establishment and maintenance of national computer systems.<sup>43</sup>

2.29 Among the capabilities that the police ministers expected CrimTrac to develop was a National Child Sex Offender System to improve information sharing among state and territory law

35 Joint Committee on the National Crime Authority, Parliament of Australia, *Organised Criminal Paedophile Activity* (1995) [4.14].

36 Government Response to the Report of the Parliamentary Joint Committee on the National Crime Authority: *Organised Criminal Paedophile Activity* (tabled 5 February 1997).

37 In March 1994, the NSW Parliament had referred allegations about police protection of paedophiles to the Independent Commission Against Corruption (ICAC) for investigation. ICAC produced an interim report in September 1994. The investigation was then passed to the Wood Royal Commission, which had been established in May 1994: Joint Committee on the National Crime Authority, above n 35, [1.9]. The Wood Royal Commission is discussed below from [2.34].

38 The Hon J R T Wood, *Royal Commission into the New South Wales Police Service: The Paedophile Inquiry*, Final Report, Volume V (1997) 1241–3.

39 Australasian Police Ministers' Council, *National Common Police Services Annual Report 1997–98* (1998) 13.

40 The Federal Coalition had pledged \$50 million over three years during the 1998 federal election campaign: CrimTrac, *Annual Report 2000–01* (2001) 12; CrimTrac, *Annual Report 2004–05* (2005) 31.

41 Australasian Police Ministers' Council, *Annual Report 1997–98*, above n 39, 58.

42 *Intergovernmental Agreement for the Establishment and Operation of CrimTrac* (2000). Disclosure of information from the Victorian Sex Offenders Register to CrimTrac is discussed in greater detail in Chapter 9.

43 CrimTrac, *Annual Report 2000–01* (2001) 20.

enforcement agencies in relation to child sex offenders.<sup>44</sup> Work on the National Child Sex Offender System began during 2002.<sup>45</sup>

- 2.30 In June 2003, the Australasian Police Ministers' Council agreed to the development of a child protection register in each jurisdiction. A few months later, in November 2003, the Council formally agreed to CrimTrac creating the Australian National Child Offender Register (ANCOR) as a national database of information about registered sex offenders.
- 2.31 ANCOR replaced the National Child Sex Offender System and commenced operation on 1 September 2004.<sup>46</sup> The Commonwealth provided one third of the funding and the states and territories the other two thirds.<sup>47</sup> CrimTrac describes ANCOR as 'a web-based system designed to assist police to register, case manage and share mandatory information about registered offenders'.<sup>48</sup>
- 2.32 Not all police forces use the ANCOR database to host their registers. Police in Victoria and New South Wales have created registers on their own databases, although they replicate some of the information onto ANCOR so that relevant agencies can be alerted when registered sex offenders travel interstate or overseas. There are also differences in the information being collected under the increasingly divergent schemes.
- 2.33 The Commission is aware that the future of ANCOR is currently under consideration by the police commissioners of all jurisdictions. The need for the Sex Offenders Registration Act to support disclosures by Victoria Police to other law enforcement agencies is discussed in Chapter 9.

## The Wood Royal Commission

- 2.34 When introducing legislation to create the first sex offenders registration scheme in Australia, the New South Wales Minister for Police said that it was a response to the Wood Royal Commission.<sup>49</sup>
- 2.35 The Wood Royal Commission was established in May 1994 to investigate corruption within the New South Wales Police Service. Its terms of reference included the investigation of the impartiality of the police and other agencies in investigating and pursuing prosecutions including paedophile activity.<sup>50</sup>
- 2.36 The terms of reference were expanded in 1996 to require the Wood Royal Commission to assess:
- existing laws and penalties concerning child sexual offences
  - the effectiveness of monitoring and screening processes in protecting children who are under government care or supervision from sexual abuse
  - the adequacy of police investigatory processes and procedures and the trial process in dealing with allegations of child sexual abuse.<sup>51</sup>
- 2.37 The Wood Royal Commission received numerous submissions in support of the registration of sex offenders.<sup>52</sup> Its final report canvassed the approaches taken in the United States and the United Kingdom. While noting the 'well meaning nature' of community notification schemes like those fostered in the United States under the federal Megan's Law, and the 'compelling

44 *Intergovernmental Agreement for the Establishment and Operation of CrimTrac* (2000).

45 Law Reform Commission of Western Australia, *Community Protection (Offender Reporting) Act: Discussion Paper*, Project No 101 (2011) 72.

46 *CrimTrac, Annual Report 2004–05* (2005) 31.

47 *Ibid.*

48 *CrimTrac, Annual Report 2010–11* (2011) 3.

49 New South Wales, *Parliamentary Debates*, Legislative Assembly, 1 June 2000, 6475 (Paul Whelan, Minister for Police).

50 The Hon J R T Wood, *Royal Commission into the New South Wales Police Service: The Paedophile Inquiry*, Final Report, Volume IV (August 1997) 17. In December 1994, the terms of reference were expanded to include activities concerning pederasts as well. The Royal Commission adopted a broad definition of 'paedophiles' that included 'adults who act on their sexual preference or urge for children, in a manner that is contrary to the laws of NSW': at 27. 'Pederasts' were defined as paedophiles who engage in homosexual intercourse with a boy who is below the age of consent: at 27.

51 The Hon J R T Wood, *Royal Commission into the New South Wales Police Service: The Paedophile Inquiry*, Final Report, Volume IV (August 1997). A full account of the steps that led to expansion of the Royal Commission's terms of reference is at 17–22.

52 The Hon J R T Wood, Volume V, above n 38, 1218.

political pressures’ that led to their creation,<sup>53</sup> the Wood Royal Commission preferred a more controlled system for the storage and release of information on a needs basis.<sup>54</sup>

2.38 The Wood Royal Commission generally supported the approach taken in the United Kingdom, noting that it ‘already occurs de facto, to some extent, in the course of probation and parole supervision’.<sup>55</sup> Overall, it was cautious about the introduction of a registration scheme and saw a need for further consideration by law enforcement and privacy agencies, and other interested parties, of:

- its potential efficacy for law enforcement in monitoring offenders (including the provision of post release supervision);
- the extent to which it might add value to existing provisions for the recording of convictions and of criminal intelligence;
- the extent of the resources needed;
- identification of the classes of offenders who should be subject to ongoing registration and reporting provisions (which might be confined either to repeat offenders, or those involved in more serious offences);
- suitable privacy safeguards; and
- any practical difficulties in securing its application to offenders entering the State from other countries or from interstate.<sup>56</sup>

2.39 The Wood Royal Commission also observed that registration legislation would be of limited value unless it was part of a nationwide scheme.<sup>57</sup>

2.40 Recommendation 111 of the Wood Royal Commission’s report proposed that:

Consideration be given to the introduction of a system for the compulsory registration with the Police Service of all convicted child sexual offenders, to be accompanied by requirements for:

- the notification of changes of name and address; and for
- verification of the register;

following consultation with the Police Service, [Office of the Director of Public Prosecutions], Corrective Services, the Privacy Committee and other interested parties.<sup>58</sup>

## The New South Wales scheme—the response to the Wood Royal Commission

2.41 The New South Wales Minister for Police said that the Child Protection (Offenders Registration) Bill, introduced into Parliament in June 2000, realised a key commitment in the government’s child protection policy and responded to recommendation 111 of the Wood Royal Commission’s paedophile inquiry.<sup>59</sup>

2.42 He said that the introduction of registration would enable law enforcement authorities to collect previously unavailable intelligence, which would better enable them to prevent child sexual abuse. However, he added that

the Bill should not be regarded as a child protection cure all. Whilst it may deter some recidivist offending, it will not prevent everybody who has been convicted of a child sex offence from ever abusing another child. It is a sad fact that many child sex offenders offend compulsively and will reoffend—indeed, that is the premise that underpins the Bill.

The Bill will make a difference. It will make children safer. But it is only one of a number of child protection tools and its capabilities must not be overexaggerated.<sup>60</sup>

53 Ibid 1178.

54 Ibid 1180.

55 Ibid.

56 Ibid 1180–1.

57 Ibid 1226–7.

58 Ibid 1265.

59 New South Wales, *Parliamentary Debates*, Legislative Assembly, 1 June 2000, 6475 (Paul Whelan, Minister for Police).

60 Ibid.

- 2.43 The Bill had been developed following extensive consultation by an interagency working party chaired by the Ministry for Police.<sup>61</sup> The working party sought submissions from 22 government agencies, the New South Wales Council for Civil Liberties and the Association of Children's Welfare Agencies. It also examined registration models from a range of jurisdictions and consulted closely with United Kingdom police and the British Home Office.<sup>62</sup>
- 2.44 The legislation followed that of the United Kingdom in some respects, with a list of offences that would lead to mandatory registration.<sup>63</sup> However, it required registered offenders to keep the police informed of their employment and motor vehicles as well as their name and address.<sup>64</sup> The registration periods in the original New South Wales legislation were eight years, 10 years, 12 years, 15 years and life,<sup>65</sup> compared to the United Kingdom periods of five years, seven years, 10 years and indefinite.<sup>66</sup>
- 2.45 *The Child Protection (Offenders Registration) Act 2000* (NSW) was later amended to adopt features of model national legislation agreed by the Australasian Police Ministers' Council.<sup>67</sup>

## Model child sex offender legislation

### Development of the model

- 2.46 When it was introduced, the New South Wales registration scheme was promoted as one which would serve as a role model for other states and territories.<sup>68</sup> Four years later, in June 2004, the Australasian Police Ministers' Council agreed to model legislation for a Child Protection (Offenders Registration) Act.<sup>69</sup>
- 2.47 In 2002, the Australasian Police Ministers' Council had established an inter-jurisdictional working party to develop a national approach to child sex offender registration. The working party reported in June 2003.<sup>70</sup> It proposed a national scheme, underpinned by the need to ensure that registered child sex offenders in one jurisdiction cannot avoid their reporting obligations by moving to another jurisdiction.
- 2.48 The rationale for the proposed national scheme was the 'extremely serious nature of sex and sex-related offences against children, and the recidivist risks associated with such offending'.<sup>71</sup> However, the working party warned that the scheme should not be seen as a 'child abuse panacea'.<sup>72</sup>
- 2.49 The model legislation was subsequently developed. It drew heavily on the New South Wales scheme, but incorporated a number of reforms identified by operational police and elements from legislation introduced overseas.<sup>73</sup> Compared to the scheme that had been operating in New South Wales, the model introduced longer reporting periods and required the offender to report additional details, including information about contact with children. It also provided for

61 Represented on the working party were the New South Wales Police Service, the Privacy Commissioner, the Commissioner for Children and Young People, the Cabinet Office, the Attorney General's Department, the Department of Corrective Services, the Department of Community Services and the Department of Education and Training: New South Wales, *Parliamentary Debates*, Legislative Council, 8 June 2000, 6907 (Milton Orkopoulos).

62 New South Wales, *Parliamentary Debates*, Legislative Council, 8 June 2000, 6907 (Milton Orkopoulos).

63 *Child Protection (Offenders Registration) Act 2000* (NSW) s 3 (definition of 'Class 1 offence' and 'Class 2 offence') (repealed). The model legislation developed in 2004 was even closer to the United Kingdom legislation in some respects, with schedules of offences that would lead to registration.

64 *Child Protection (Offenders Registration) Act 2000* (NSW) s 9 (repealed).

65 *Ibid* s 14(2) (repealed).

66 *Sex Offenders Act 1997* (UK) c 51, s 1(4).

67 *Child Protection (Offenders Registration) Amendment Act 2004* (NSW), which came into force in September 2005. The New South Wales scheme has been amended many times since, including for the purpose of aligning with developments in other jurisdictions.

68 New South Wales, *Parliamentary Debates*, Legislative Assembly, 1 June 2000, 6475 (Paul Whelan, Minister for Police). The Police Minister acknowledged that New South Wales was not the first state to impose reporting requirements on sex offenders. In 1988, Queensland introduced legislation which empowered a court, at its discretion, to order a convicted sex offender to report personal details to police if the court was satisfied there was a substantial risk of re-offending: *Criminal Law Amendment Act 1945* (Qld) s 19 (repealed by the *Child Protection (Offender Reporting) Act 2004* (Qld) s 90).

69 NSW Ombudsman, *Review of the Child Protection Register: Report under s 25(1) of the Child Protection (Offenders Registration) Act 2000* (May 2005) ii, 5; Law Reform Commission of Western Australia, above n 45, 74. The Victorian Law Reform Commission has not been given access to the inter-jurisdictional working party's report and has relied on the account given by the Western Australian Law Reform Commission in its discussion paper.

70 Inter-jurisdictional Working Party, *Child Protection Offender Registration with Police: A National Approach*, Report to the Australasian Police Ministers' Council (2003), cited in Law Reform Commission of Western Australia, above n 45, 72.

71 *Ibid* 35, cited in Law Reform Commission of Western Australia, above n 45, 72.

72 *Ibid* 52, cited in Law Reform Commission of Western Australia, above n 45, 72.

73 New South Wales, *Parliamentary Debates*, Legislative Assembly, 23 June 2004, 10056 (John Watkins, Minister for Police).

registered offenders to report travel interstate and overseas, and for the mutual recognition of the reporting obligations of offenders registered in other jurisdictions.

## Implementation of the model

- 2.50 By 2007, all Australian states and territories had legislation governing the registration of sex offenders in place. Although the various schemes are based on the model, they are not uniform.<sup>74</sup>
- 2.51 Many features of Victoria's registration scheme are consistent with the national model. However, although the model was conceived as child protection legislation, the Victorian Act applies to people who offend against adults (adult sex offenders) as well as people who offend against children (child sex offenders).<sup>75</sup>
- 2.52 Victoria is not the only jurisdiction that allows for the registration of adult sex offenders.<sup>76</sup> Provisions in the Western Australian scheme for the automatic registration of offenders who commit sexual offences against adults have not yet commenced, but the relevant court may register an adult who has been found guilty of *any* offence if it is satisfied that the person poses a risk to the sexual safety or lives of one or more people, or people generally.<sup>77</sup> Tasmania and the Australian Capital Territory also permit the registration of adult sex offenders by order of the sentencing court.<sup>78</sup>
- 2.53 Mandatory registration forms part of the sex offender registration schemes in most Australian jurisdictions. In Victoria, mandatory registration applies only to adults convicted of child sexual offences. In other states and territories, conviction for child homicide, kidnapping and other offences also results in mandatory registration.<sup>79</sup>
- 2.54 Tasmania is the only state that allows some individual assessment in relation to the registration of adult child sex offenders. A person convicted of a registrable offence in Tasmania must be included in the Register 'unless the court is satisfied that the person does not pose a risk of committing a reportable offence in the future'.<sup>80</sup>
- 2.55 The length of a registered sex offender's reporting period depends upon the type and number of offences for which they were convicted and their age at the time of the offence. The correlation between reporting periods and offences varies across jurisdictions, but the possible duration of a reporting period for an adult is consistently eight years, 15 years or the rest of the offender's life.<sup>81</sup> In all jurisdictions except South Australia, the reporting period for juvenile offenders is half of the applicable period for an adult offender.<sup>82</sup>
- 2.56 Offenders who are required to report for life may apply to a court—or in New South Wales, the Administrative Decisions Tribunal—after 15 years to have their reporting obligations

74 *Child Protection (Offenders Registration) Act 2000* (NSW); *Child Protection (Offender Reporting and Registration) Act 2004* (NT); *Child Protection (Offender Reporting) Act 2004* (Qld); *Community Protection (Offender Reporting) Act 2004* (WA); *Community Protection (Offender Reporting) Act 2005* (Tas); *Crimes (Child Sex Offenders) Act 2005* (ACT); *Child Sex Offenders Registration Act 2006* (SA).

75 The national working party which recommended the establishment of a nationally consistent registration scheme in Australia considered including adult sex offenders but concluded that the scheme should be initially limited to child sex offenders: Inter-jurisdictional Working Party, above n 70, 54–6, cited in Law Reform Commission of Western Australia, above n 45, 7.

76 *Sex Offenders Registration Act 2004* (Vic) s 11.

77 *Community Protection (Offender Reporting) Act 2004* (WA) ss 12–13, sch 3. In view of the introduction of subsequent legislation that aims to cover the most serious or high-risk adult sex offenders, there is doubt that the automatic registration provisions for adult sex offenders will become operative. See Law Reform Commission of Western Australia, above n 45, 7.

78 *Community Protection (Offender Reporting) Act 2005* (Tas) s 7; *Crimes (Child Sex Offenders) Act 2005* (ACT) s 16.

79 In New South Wales, registration is mandatory for any person who commits child homicide and kidnapping offences against children: *Child Protection (Offenders Registration) Act 2000* (NSW) s 6, schs 1–2. In the Northern Territory, registration is mandatory for adults who commit child homicide: *Child Protection (Offender Reporting and Registration) Act 2004* (NT) ss 3A, 3 (definition of 'Class 1 offence' and 'Class 2 offence'). In Queensland, registration is mandatory for any person who commits child homicide: *Child Protection (Offender Reporting) Act 2004* (Qld) s 5, schs 1–2. In Western Australia, registration is mandatory for any person who commits child homicide: *Community Protection (Offender Reporting) Act 2004* (WA) s 6, schs 1–2. In the Australian Capital Territory, registration is mandatory for any person who commits child homicide or kidnapping where the offence is connected to a sexual offence: *Crimes (Child Sex Offenders) Act 2005* (ACT) s 10, schs 1–2. In South Australia, registration is mandatory for adults who commit child homicide or kidnapping where the offence is connected to a sexual offence: *Child Sex Offenders Registration Act 2006* (SA) s 6, sch 1 pts 2–3.

80 *Community Protection (Offender Reporting) Act 2005* (Tas) s 6.

81 *Child Protection (Offenders Registration) Act 2000* (NSW) s 14A; *Child Protection (Offender Reporting and Registration) Act 2004* (NT) s 37; *Child Protection (Offender Reporting) Act 2004* (Qld) s 36; *Community Protection (Offender Reporting) Act 2004* (WA) s 46; *Community Protection (Offender Reporting) Act 2005* (Tas) s 24; *Crimes (Child Sex Offenders) Act 2005* (ACT) s 16; *Child Sex Offenders Registration Act 2006* (SA) s 9(3).

82 *Child Protection (Offenders Registration) Act 2000* (NSW) s 14B; *Child Protection (Offender Reporting and Registration) Act 2004* (NT) s 38; *Child Protection (Offender Reporting) Act 2004* (Qld) s 37; *Community Protection (Offender Reporting) Act 2004* (WA) s 47; *Community Protection (Offender Reporting) Act 2005* (Tas) s 25(2); *Crimes (Child Sex Offenders) Act 2005* (ACT) s 89. Young offenders who would otherwise have been required to report for life must report for 7.5 years instead.

suspended.<sup>83</sup> Offenders with shorter reporting periods are unable to apply to have the length of their reporting obligations reduced.

- 2.57 In each Australian jurisdiction, the head of the police force maintains the register.<sup>84</sup> The extent to which the operation of the registration scheme is externally monitored and reviewed varies between jurisdictions.
- 2.58 Generally, when a registered sex offender who is required to comply with reporting obligations under the registration scheme in one jurisdiction moves to or visits interstate, they will be deemed to be a 'corresponding registered offender'.<sup>85</sup> This means that they will still be a registered offender if they move interstate and will be subject to that new state or territory's reporting requirements.
- 2.59 A summary table comparing the schemes is at Appendix E.

## The Victorian scheme

- 2.60 When introducing the Sex Offenders Registration Bill, the Minister for Police and Emergency Services said that the legislation 'evinces Victoria's commitment to lead the fight against the insidious activities of paedophiles and other serious sex offenders'.<sup>86</sup> He also said that the legislation would 'put Victoria to the forefront of law enforcement by not only committing to the mandatory registration of child sex offenders but also empowering the courts with a discretion to order the registration of serious sexual offenders who commit sexual offences against adult victims'.<sup>87</sup>
- 2.61 The Minister said that the scheme would not apply to all adult sex offenders, but only those who had previously been convicted of two or more sexual offences, or of one sexual offence and a violent offence for which they received a custodial sentence.<sup>88</sup> Although the scheme was later widened, it did not originally apply to offenders who committed less serious offences and were not given either a custodial or a supervised sentence.<sup>89</sup>
- 2.62 The opposition parties called for greater police powers, mandatory registration of young offenders, stricter reporting obligations, and compulsory notification by the courts and corrections authorities of details about registered sex offenders.<sup>90</sup> Concern was also raised about the capacity of Victoria Police to take on its new role under the scheme:
- We have some major concerns about the police capacity to implement and maintain the system, not only from a resourcing point of view but also from the quality control and data management, analysis and proactive use of the data to get best value from a lot of effort that will go into collecting and storing that data.<sup>91</sup>
- 2.63 Community notification schemes in the United States were mentioned<sup>92</sup> but no proposals were made to introduce such a scheme in Victoria.

83 *Child Protection (Offenders Registration) Act 2000* (NSW) s 16; *Child Protection (Offender Reporting and Registration) Act 2004* (NT) s 41; *Child Protection (Offender Reporting) Act 2004* (Qld) s 41; *Community Protection (Offender Reporting) Act 2004* (WA) s 52; *Community Protection (Offender Reporting) Act 2005* (Tas) s 28(1); *Crimes (Child Sex Offenders) Act 2005* (ACT) s 96; *Child Sex Offenders Registration Act 2006* (SA) s 37.

84 *Child Protection (Offenders Registration) Act 2000* (NSW) s 19; *Child Protection (Offender Reporting and Registration) Act 2004* (NT) s 64; *Child Protection (Offender Reporting) Act 2004* (Qld) s 68; *Community Protection (Offender Reporting) Act 2004* (WA) s 80; *Community Protection (Offender Reporting) Act 2005* (Tas) s 43; *Crimes (Child Sex Offenders) Act 2005* (ACT) s 117; *Child Sex Offenders Registration Act 2006* (SA) s 60.

85 *Child Protection (Offenders Registration) Act 2000* (NSW) s 3C; *Child Protection (Offender Reporting and Registration) Act 2004* (NT) s 8—there is no requirement in the Northern Territory that a person would still be required to report in the former jurisdiction; *Child Protection (Offender Reporting) Act 2004* (Qld) s 7; *Community Protection (Offender Reporting) Act 2004* (WA) s 7; *Community Protection (Offender Reporting) Act 2005* (Tas) s 11; *Crimes (Child Sex Offenders) Act 2005* (ACT) s 11; *Child Sex Offenders Registration Act 2006* (SA) ss 7–8.

86 Victoria, *Parliamentary Debates*, Legislative Assembly, 3 June 2004, 1851 (Andre Haermeyer, Minister for Police and Emergency Services).

87 Ibid.

88 Ibid; *Sex Offenders Registration Act 2004* (Vic) s 8.

89 Victoria, *Parliamentary Debates*, Legislative Assembly, 3 June 2004, 1851 (Andre Haermeyer, Minister for Police and Emergency Services). The Act initially did not extend to offenders who had committed a Class 2 offence and had not been sentenced to imprisonment or a supervisory order: *Sex Offenders Registration Act 2004* (Vic) s 6(c), repealed by the *Justice and Road Legislation Amendment (Law Enforcement) Act 2007* (Vic) s 113(b).

90 Victoria, *Parliamentary Debates*, Legislative Assembly, 24 August 2004, 46–9 (Kim Wells). See also Victoria, *Parliamentary Debates*, Legislative Council, 15 September 2004, 141 (Richard Dalla-Riva). Compulsory notification of the police by the courts and government agencies is required by the *Sex Offenders Registration Act 2004* (Vic) ss 51, 53, and the *Sex Offenders Registration Regulations 2004* (Vic) reg 18(2).

91 Victoria, *Parliamentary Debates*, Legislative Assembly, 24 August 2004, 50 (Bill Sykes).

92 Ibid; Victoria, *Parliamentary Debates*, Legislative Assembly, 25 August 2004, 142 (Ken Smith); 145 (Peter Lockwood); Victoria, *Parliamentary Debates*, Legislative Council, 15 September 2004, 141 (Richard Dalla-Riva).

- 2.64 Over time, the reporting obligations imposed on registered sex offenders have increased.<sup>93</sup> The number of offences that lead to registration has also increased.<sup>94</sup> Amendments to the legislation have often been attributed to the need to stay in step with other jurisdictions, or to follow agreements made under the auspices of the Australasian Police Ministers' Council.<sup>95</sup>

### The statutory purpose of reporting obligations

- 2.65 When introducing the legislation, the Minister for Police and Emergency Services said that requiring sex offenders living in the community to report personal details to the police would achieve two outcomes: it would reduce the likelihood of their re-offending and assist in the investigation and prosecution of future offences.<sup>96</sup>
- 2.66 These expectations are set out in section 1(a) of the Sex Offenders Registration Act:
- (1) The purpose of this Act is—
    - (a) to require certain offenders who commit sexual offences to keep police informed of their whereabouts and other personal details for a period of time—
      - (i) in order to reduce the likelihood that they will re-offend; and
      - (ii) to facilitate the investigation and prosecution of any future offences that they may commit.<sup>97</sup>

### Reduction in likelihood of re-offending

- 2.67 The expectation that registration would reduce recidivism was not debated in Parliament. One member observed, however, that 'some of the provisions in the Bill have not been backed up with the evidence needed to convince members that the measures are going to be effective'.<sup>98</sup>

### Assistance in investigating and prosecuting offences

- 2.68 The Sex Offenders Registration Act is silent about the way in which it was expected the police would use the information reported by registered sex offenders. For example, it appears to have been assumed that the police would use the information to monitor sex offenders more closely. When introducing the legislation in Parliament, the Minister for Police and Emergency Services stated that:

Premised, therefore, on the serious nature of the offences committed and the recidivist risks posed by sexual offenders, the Bill recognises that certain offenders should continue to be monitored after their release into the community.<sup>99</sup>

- 2.69 However, the Act gave the police no additional responsibilities or resources to monitor offenders. Furthermore, even though a driving force for the introduction of registration schemes throughout Australia was to support law enforcement agencies when dealing with offenders who were prone to cross state borders in an attempt to avoid detection, the Sex Offenders Registration Act does not expressly provide for information to be disclosed to the CrimTrac agency or placed on ANCOR.<sup>100</sup>

93 *Sex Offenders Registration (Amendment) Act 2005* (Vic) s 34; *Justice and Road Legislation Amendment (Law Enforcement) Act 2007* (Vic) s 14; *Justice Legislation Amendment (Sex Offences Procedure) Act 2008* (Vic) s 18; *Justice Legislation Further Amendment Act 2009* (Vic) ss 42–44.

94 *Sex Offenders Registration (Amendment) Act 2005* (Vic) ss 21–4; *Working with Children Act 2005* (Vic) s 51(5); *Crimes (Sexual Offences) Act 2006* s 45.

95 See, eg, Victoria, *Parliamentary Debates*, Legislative Assembly, 11 August 2009, 2576 (Bob Cameron, Minister for Police and Emergency Services).

96 Victoria, *Parliamentary Debates*, Legislative Assembly, 3 June 2004, 1851 (Andre Haermeyer, Minister for Police and Emergency Services).

97 Section 1(1) contains two other purposes: (b) to prevent registered sex offenders working in child-related employment (discussed later in this chapter), and (c) to empower the Police Ombudsman to monitor compliance with Part 4 of this Act (discussed in Chapter 9). The responsibilities of the Police Ombudsman were transferred to the Director, Police Integrity shortly after the *Sex Offenders Registration Act 2004* (Vic) commenced, but s 1(1)(c) was not amended.

98 Victoria, *Parliamentary Debates*, Legislative Council, 15 September 2004, 147 (Peter Hall).

99 Victoria, *Parliamentary Debates*, Legislative Assembly, 3 June 2004, 1850 (Andre Haermeyer, Minister for Police and Emergency Services).

100 This issue is discussed in more detail in Chapter 9.

## The shift in focus to protecting children

- 2.70 The primary reason for introducing the Sex Offenders Registration Act was to protect the community, and particularly children. This was clear at every step leading to the passage of the legislation, and it remains so today. It is also clear that the scheme was designed to be a law enforcement resource.
- 2.71 The scheme appears to be based on two premises. First, that the police would be better able to investigate child sexual offences if they had up to date information about people who have been convicted of offences of that nature and, second, that sex offenders would be discouraged from committing further offences because of the knowledge that their personal details were included in the Register and known to police.
- 2.72 The legislation regulates the collection and storage of information about registered sex offenders. It restricts who may have access to the information other than the police, but does not venture into police operational decisions about how the information is used.
- 2.73 Over time, the scheme has become a child protection tool, as illustrated in the Ombudsman's report on the management of sex offenders. In the report, the Ombudsman criticised the key agencies for failing to 'share responsibility for ensuring the sex offenders register contributed to the protection of children'.<sup>101</sup> He observed that Victoria Police members had been instructed to notify the Department of Human Services whenever a registered sex offender reports unsupervised contact with a child, but had failed to do so.<sup>102</sup>
- 2.74 While reports by registered sex offenders remain a source of information to the police and other law enforcement agencies, and the Sex Offenders Register remains under the control of Victoria Police, the collection of information by the police has become a means of contributing to child protection programs.
- 2.75 The shift in focus to child protection is one of degree. The statutory purpose does not mention child protection, yet the Act establishes mandatory registration of all adult child sex offenders and requires them to report unsupervised contact with children. Although the Act does not prescribe how the police may use the information, the policy of the legislation makes clear that they are expected to use it to protect children from harm. Protecting children includes working with child protection authorities where necessary, but the Act does not require the police to share the information with them.
- 2.76 In practice, the police now have a duty to pass information that they receive from registered sex offenders to child protection authorities if it concerns contact with a child. This shift in the purpose of the scheme finds no support in the legislation. As will be discussed in Chapter 9, the Sex Offenders Registration Act does not give the police the authority to disclose information routinely to the Department of Human Services.
- 2.77 Later chapters of this report discuss changes to the legislation that the Commission recommends in order to strengthen the scheme. The amendments would allow Victoria Police to better manage offenders who could pose a risk of harm to children and to provide child protection authorities with timely information about children who might experience risk so that those authorities and the children's parents can take action to safeguard the child.
- 2.78 As a starting point, the Commission considers that the statutory purposes of the Sex Offenders Registration Act should be replaced with a provision that describes the purpose that the registration scheme is now expected to fulfil. It will then be much easier to refine the scheme if it is designed with that purpose clearly in mind.

101  
102

Ombudsman Victoria, above n 2, 7.  
Ibid.

## Recommendation

1. The purpose of the *Sex Offenders Registration Act 2004* (Vic) should be amended as follows:
  - The purpose of the legislation is to protect children against sexual abuse from people who have been found guilty of sexually abusing children.

## Other protective legislative responses to sex offenders

- 2.79 In refining the Sex Offenders Registration Act to strengthen the contribution it makes to the protection of children, it is necessary to take into account the other protective legislative responses to sex offenders.
- 2.80 The Sex Offenders Registration Act was the first step in a suite of Victorian legislation passed in 2004 and 2005 that established schemes to reduce the risk of convicted sex offenders re-offending and to restrict their access to children.
- 2.81 Earlier legislation dealt with sentencing for sexual offences. The *Sentencing Act 1991* (Vic) was amended twice, once in 1993 to provide for indefinite sentences,<sup>103</sup> and again in 1997 to change sentencing practices for serious violent and sexual offenders.<sup>104</sup>
- 2.82 Three post-sentence preventative measures were introduced by legislation passed in 2004 and 2005. The Sex Offenders Registration Act, the *Working with Children Act 2005* (Vic) and the *Serious Sex Offenders Monitoring Act 2005* (Vic) (later replaced by the *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic)), all established preventative schemes. However, the Sex Offenders Registration Act—the first comprehensive legislative scheme to take a preventative approach to sexual offending—was clearly not designed with other schemes in mind and as part of an integrated preventative approach to child sexual offending.
- 2.83 At the same time that the post-sentence preventative schemes were being introduced, the *Children, Youth and Families Act 2005* (Vic) also commenced. Although it now provides the basis for Victoria Police and the Department of Human Services to share information about registered sex offenders, the significance of this Act for the operation of the registration scheme does not appear to have been anticipated.<sup>105</sup>

### ***Sentencing (Amendment) Act 1993* (Vic)**

- 2.84 This Act introduced section 18B of the Sentencing Act, which empowers the County and Supreme Courts to impose an indefinite sentence on an offender for a ‘serious offence’, including a number of sexual offences.<sup>106</sup> The court must be satisfied, to a high degree of probability, that the offender is a serious danger to the community by reference to a number of factors including their character, past history and the nature of the offence.<sup>107</sup> In determining the question of danger to the community, the court must consider:
- whether the nature of the serious offence is exceptional
  - medical or psychiatric material received by the court, and
  - the risk of serious danger to the community if an indefinite sentence were not imposed.<sup>108</sup>

103 *Sentencing (Amendment) Act 1993* (Vic) s 9.

104 *Sentencing and Other Acts (Amendment) Act 1997* (Vic) pt 2.

105 Information sharing between Victoria Police and the Department of Human Services is discussed in Chapter 9.

106 For the purposes of indefinite sentences, ‘serious offence’ means murder, manslaughter, child homicide, defensive homicide, causing serious injury intentionally, threats to kill, rape, assault with intent to rape, incest, sexual penetration of a child under 16, abduction or detention, abduction of a child under the age of 16, kidnapping, armed robbery, sexual penetration of a child under the age of 10, sexual penetration of a child aged between 10 and 16, various historical offences and conspiracy, incitement or attempt to commit any of these offences: *Sentencing Act 1991* (Vic) s 3 (definition of ‘serious offence’).

107 *Sentencing Act 1991* (Vic) s 18B(1).

108 *Ibid* s 18B(2).

## **Sentencing and Other Acts (Amendment) Act 1997 (Vic)**

- 2.85 Part 2 of this Act introduced the serious offender provisions that are now found in Part 2A of the Sentencing Act. These provisions characterise certain offenders as serious sexual or violent offenders. The Act provides that an offender is considered a ‘serious offender’ upon conviction and imprisonment either for a second sexual and/or violent offence, or for persistent sexual abuse.<sup>109</sup> This means that, in sentencing the offender, the court must regard protection of the community as the principal purpose of the sentence. In order to achieve that purpose the court may impose a sentence longer than that which is proportionate to the offending.<sup>110</sup> The Act also provides that, unless otherwise directed by the court, each term of imprisonment imposed must be served cumulatively on any other term imposed.<sup>111</sup>

## **Working with Children Act 2005 (Vic)**

- 2.86 The Working with Children Act takes a preventative approach to sexual offending by regulating child-related employment. Its primary purpose is

to assist in protecting children from sexual or physical harm by ensuring that people who work with, or care for, them have their suitability to do so checked by a government body.<sup>112</sup>

- 2.87 When introducing the Working with Children Bill to Parliament, the Attorney-General said that it represented a significant change in the way Victoria treats the care of children.<sup>113</sup> The legislation established a government vetting system for people who are entrusted with the care of children by their parents or guardians.

- 2.88 In creating the scheme, the government acknowledged that it was not targeting the source of the greatest risk of child sexual offending—family members and friends:

We are aware that most abuse of children happens within a child’s immediate circle of family and friends. The Working with Children Bill does not alter the way in which the government tackles this problem. Rather, our child protection system provides child-centred, family-focused services to protect children and young people from significant harm as a result of abuse or neglect within the family. It also works to help children and young people deal with the impact of abuse and neglect.<sup>114</sup>

- 2.89 Under the Working with Children Act, anyone wanting to engage in ‘child-related work’<sup>115</sup> must apply to the Secretary of the Department of Justice for a working with children check and an assessment notice.<sup>116</sup> The assessment notice is in the form of a Working with Children Check Card. Employers, volunteer organisations and employment agencies must not engage anyone in child-related work without a current Working With Children Check Card.<sup>117</sup>

- 2.90 The opposition parties supported the underlying principle but opposed the Bill. They called for a different mechanism to be put in place to achieve the purpose.<sup>118</sup> The Leader of the Nationals expressed concern about the reach of the legislation:

There is material replete to indicate that something of the order of 80 per cent of the offences that are committed upon children are committed by those within their close circle, be they friends or family.

The fact is that this legislation is going to exclude for the main part that very group who are the main proponents of the problems which this legislation seeks to avoid.<sup>119</sup>

- 2.91 He also said that the scheme had to be secure, work properly and deliver the proposed outcome because it was so broadly based:

109 Ibid s 6B(2). Sexual offences are defined in the *Sentencing Act 1991* (Vic) sch 1 cl 1.

110 *Sentencing Act 1991* (Vic) s 6D(a)–(b).

111 Ibid s 6E.

112 *Working with Children Act 2005* (Vic) s 1(1).

113 Victoria, *Parliamentary Debates*, Legislative Assembly, 21 July 2005, 1997 (Rob Hulls, Attorney-General).

114 Ibid.

115 *Working with Children Act 2005* (Vic) s 9.

116 Ibid s 33(1).

117 Ibid s 35.

118 Victoria, *Parliamentary Debates*, Legislative Assembly, 10 August 2005, 142 (Andrew McIntosh; Peter Ryan, Leader of the Nationals). One of the concerns raised was that the requirement for all applications from registered sex offenders to be refused was unfair: 141 (Andrew McIntosh). The legislation was subsequently amended to prohibit registered sex offenders from applying for Working with Children Checks: *Working with Children Act 2005* (Vic) s 39A.

119 Victoria, *Parliamentary Debates*, Legislative Assembly, 10 August 2005, 145 (Peter Ryan, Leader of the Nationals).

Why is this so important? Because this legislation by its nature focuses on the innocents. It is putting 670,000 people to the test in an environment where the probability is the names of about 0.5 per cent, or 3350, of them will ultimately turn up in this system. I do not believe you can have a position apply as this legislation contemplates, which in our view will involve plenty of trial and error.<sup>120</sup>

- 2.92 The Working with Children Act scheme was phased in over a five year period, from 1 July 2006<sup>121</sup> to 1 July 2011.<sup>122</sup> By 1 December 2011, 845,291 assessment notices had been issued.<sup>123</sup> A total of 482 people had been refused a Working with Children Check Card because of the nature of their prior offending,<sup>124</sup> and 382 people had their cards revoked as a result of offending that was detected by the Department's ongoing monitoring of card holders.<sup>125</sup>

### Interaction with the Sex Offenders Registration Act

- 2.93 Both the Sex Offenders Registration Act and the Working with Children Act seek to prevent registered sex offenders from working with children. They use slightly different means to achieve the same outcome.
- 2.94 The Sex Offenders Registration Act prohibits any registered offender from working with children or applying to do so.<sup>126</sup> The Working with Children Act prohibits registered sex offenders from applying for a working with children check.<sup>127</sup> The maximum penalty in each case is 240 penalty units or imprisonment for two years.<sup>128</sup>
- 2.95 The Chief Commissioner of Victoria Police is authorised to notify the Secretary of the Department of Justice of the name, date of birth and address of any registered sex offender for the purpose of administering the Working with Children Act.<sup>129</sup> Anyone who has a current Working with Children Check Card, or is applying for one, and subsequently becomes a registered sex offender must notify the Secretary of the Department of Justice, their employer, and any agency with which the offender is listed.<sup>130</sup>
- 2.96 As co-existing legislation, the relevant provisions in the two Acts are similar but they diverge in subtle and significant ways. Both regulate access to employment with children. The 'child-related employment' from which registered sex offenders are prohibited by the Sex Offenders Registration Act is similar to, but broader than, the 'child-related work' for which a Working with Children Check must be sought.
- 2.97 Unlike 'child-related work' for the purposes of the Working with Children Act, 'child-related employment' under the Sex Offenders Registration Act contains no exemptions and extends to people who are self-employed.<sup>131</sup> Both definitions refer to contact with children but what this means in each case differs.
- 2.98 The Commission considers that, now that the Working with Children Act is fully operational, the provisions in Part 5 of the Sex Offenders Registration Act should be incorporated into it. This would consolidate the protective legislative response to the risk of children being exposed to harm by adults who work with them in a paid or voluntary capacity. It would also excise from the Sex Offenders Registration Act provisions which do not concern the management of the registration scheme.

120 Ibid 144.

121 *Working with Children Act 2005* (Vic) s 2(2).

122 Victorian Government, *Phasing in the Check* (30 August 2011) Department of Justice <<http://www.justice.vic.gov.au/wps/wcm/connect/justlib/Working+With+Children/Home/Protecting+Our+Children/Phasing+in+the+Check>>.

123 Statistics provided by the Department of Justice, 8 December 2011. This figure equates to approximately 15 per cent of Victoria's estimated resident population, which was 5,605,600 at March 2011: Australian Bureau of Statistics, *Australian Demographic Statistics* (29 September 2011) <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/3101.0>>. However, this figure might be inflated because some people may have had more than one check.

124 Statistics provided by the Department of Justice, 8 December 2011.

125 Ibid.

126 *Sex Offenders Registration Act 2004* (Vic) s 68(1). This provision criminalises this conduct.

127 *Working with Children Act 2005* (Vic) s 39A.

128 *Sex Offenders Registration Act 2004* (Vic) s 68(1); *Working with Children Act 2005* (Vic) s 39A.

129 *Sex Offenders Registration Act 2004* (Vic) s 63(1B). This provision was inserted into the Sex Offenders Registration Act by amendment in 2009: *Justice Legislation Further Amendment Act 2009* (Vic) s 47.

130 *Working with Children Act 2005* (Vic) s 20(2)(c).

131 The following exemptions apply to Working with Children Checks: a parent engaging in work as a volunteer in relation to an activity in which their child is participating; a person engaging in child-related work that involves direct contact with a child who is closely related to them; children and students under the age of 20 volunteering at, or under an arrangement made by, their educational institution; non-Victorian residents; teachers; police officers; and accredited drivers: *Working With Children Act 2005* (Vic) ss 27–32B.

## Recommendation

2. Part 5 of the *Sex Offenders Registration Act 2004 (Vic)*, concerning child-related employment, should be removed from that Act and integrated with the *Working with Children Act 2005 (Vic)*.

### ***Serious Sex Offenders (Detention and Supervision) Act 2009 (Vic)***

- 2.99 Offenders who have served custodial sentences for certain sexual offences and present an unacceptable risk of harm to the community may be subject to ongoing detention or supervision under the *Serious Sex Offenders (Detention and Supervision) Act*.<sup>132</sup> The Act is intended to 'enhance the protection of the community'<sup>133</sup> and came into force on 1 January 2010. It replaced the *Serious Sex Offenders Monitoring Act 2005 (Vic)*, which had introduced extended supervision orders to Victoria.<sup>134</sup> The introduction of the new legislation followed an extensive report by the Sentencing Advisory Council on detention and supervision schemes.<sup>135</sup>
- 2.100 The Act permits the Secretary of the Department of Justice to apply to the County Court or Supreme Court for a post-release supervision order for a period of up to 15 years.<sup>136</sup> The Director of Public Prosecutions may apply to the Supreme Court for a detention order for a period of up to three years.<sup>137</sup>
- 2.101 The Detention and Supervision Order Division of the Adult Parole Board supervises the operation of any orders made by the courts on an ongoing basis. Its responsibilities are to:
- monitor compliance with and administer the conditions of supervision orders, and make recommendations to the Secretary of the Department of Justice to review them
  - give directions and instructions to an offender as authorised by a supervision order
  - review and monitor progress of offenders on supervision and detention orders
  - inquire into breaches of orders, and recommend actions to the Secretary of the Department of Justice.<sup>138</sup>
- 2.102 As at 5 December 2011, there were 58 offenders on supervision orders under the *Serious Sex Offenders (Detention and Supervision) Act* and three on interim supervision orders. A further 14 offenders were on extended supervision orders under the earlier legislation.<sup>139</sup> No detention orders have been made.
- 2.103 Before making a supervision order, the court must be satisfied 'by acceptable, cogent evidence' and 'to a high degree of probability' that 'the offender poses an unacceptable risk of committing a relevant offence if a supervision order is not made and the offender is in the community'.<sup>140</sup>

132 *Serious Sex Offenders (Detention and Supervision) Act 2009 (Vic)* s 1(1)–(2). The offences which attract the provisions of the Act are set out in Schedule 1 and mirror those to which the *Sex Offenders Registration Act 2004 (Vic)* pertains.

133 *Serious Sex Offenders (Detention and Supervision) Act 2009 (Vic)* s 1(1).

134 Despite the repeal of the 2005 Act, extended supervision orders made under that Act continue to apply and, upon review, come under the *Serious Sex Offenders (Detention and Supervision) Act 2009 (Vic)*: ss 3–4.

135 Sentencing Advisory Council, *High-Risk Offenders: Post-Sentence Supervision and Detention*, Final Report (2007).

136 *Serious Sex Offenders (Detention and Supervision) Act 2009 (Vic)* ss 7(1), 12(1). The application may be made to the sentencing court if the sentencing court was either the County or Supreme Court, or to the County Court if the sentencing court was the Magistrates' Court: s 7(3). In practice, the application is usually made to the County Court.

137 *Serious Sex Offenders (Detention and Supervision) Act 2009 (Vic)* ss 33, 35.

138 *Ibid* s 118.

139 Information provided by Corrections Victoria, 9 December 2011. Six offenders subject to supervision orders, and three of those subject to extended supervision orders, were in prison custody.

140 *Serious Sex Offenders (Detention and Supervision) Act 2009 (Vic)* s 9. A 'relevant offence' is an offence listed in Schedule 1 of the Act. The offences in Schedule 1 mirror those to which the *Sex Offenders Registration Act 2004 (Vic)* applies. An offender can be deemed to pose an unacceptable risk of committing a relevant offence even if the likelihood of them committing a relevant offence is 'less than a likelihood of more likely than not': *Serious Sex Offenders (Detention and Supervision) Act 2009 (Vic)* s 9(5).

- 2.104 The court usually has access to extensive psychiatric or psychological assessment reports, obtained by the Department of Justice and the offender's solicitors, which address the risk of the offender committing further sexual offences.
- 2.105 Supervision orders require the offender to comply with core conditions, such as not committing a relevant offence and not leaving Victoria without the permission of the Adult Parole Board.<sup>141</sup> The court may impose a number of other conditions, including where the offender may reside and requirements to participate in treatment or rehabilitation programs or other activities, abide by a curfew, refrain from the use of alcohol, and not attend certain places.<sup>142</sup>
- 2.106 Supervision orders also compel the offender to notify the Adult Parole Board of any change of employment or new employment two days before starting work.<sup>143</sup> The Working with Children Act prohibits a person subject to an extended supervision order or a supervision or detention order (or an interim order) from applying for a working with children check.<sup>144</sup>
- 2.107 Although the maximum period of supervision orders is 15 years, they may be renewed.<sup>145</sup> In any event, they must be reviewed regularly by the court. The Secretary of the Department of Justice must apply for a review at least every three years unless the court requires more frequent reviews or the offender is given a detention order.
- 2.108 The effect of a detention order is to commit the offender to detention in a prison for the period of the order.<sup>146</sup> The Supreme Court can make a detention order only if satisfied that 'the offender poses an unacceptable risk of committing a relevant offence if a detention order is not made and the offender is in the community'.<sup>147</sup> In determining whether there is an unacceptable risk, the court must consider those matters that are relevant when deciding whether to make a supervision order. If it concludes that a detention order is inappropriate, the court may make a supervision order instead.<sup>148</sup>
- 2.109 Like supervision orders, detention orders must be regularly reviewed by the court and may be renewed at the end of the period.<sup>149</sup> The Director of Public Prosecutions must apply for review at least annually, and may be ordered to apply more frequently.<sup>150</sup>

### Interaction with the Sex Offenders Registration Act

- 2.110 The manner in which the Serious Sex Offenders (Detention and Supervision) Act and the Sex Offenders Registration Act interact is unclear. There is no indication that the two Acts have been designed to operate together as parts of an integrated preventative approach to sexual offending. While the Serious Sex Offenders (Detention and Supervision) Act is concerned with individual judicial assessment of a relatively small group of sex offenders who appear to pose a high risk of re-offending, the Sex Offenders Registration Act proceeds on the assumption that all people convicted of the same offence pose the same risk of re-offending and should have the same reporting obligations for the same period.

### **Children, Youth and Families Act 2005 (Vic)**

- 2.111 The *Children, Youth and Families Act 2005* (Vic) is the principal legislation under which services to support and protect children are provided. It also provides the framework for youth justice services and for the many functions of the Children's Court.
- 2.112 The Children, Youth and Families Act seeks to protect children from sexual abuse, and other types of abuse and neglect, by establishing mechanisms for the Department of Human Services

141 *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) s 16.

142 *Ibid* ss 15–17. This can include an order that the offender reside in a contained residential facility established pursuant to s 133. Corella Place, near Ararat Prison, is such a facility.

143 *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) s 16(2)(d).

144 *Working with Children Act 2005* (Vic) s 39A.

145 *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) ss 12(1), 28.

146 *Ibid* s 42.

147 *Ibid* s 35(1).

148 *Ibid* s 36(4).

149 *Ibid* ss 45, 66.

150 *Ibid* s 66.

to receive reports from concerned members of the community<sup>151</sup> and mandatory reporters.<sup>152</sup> If the Secretary of the Department of Human Services or a delegate<sup>153</sup> determines that a child is in need of protection, they may classify such reports as 'protective intervention reports'.<sup>154</sup>

- 2.113 This classification has implications for how the case progresses through the child protection system. Once the Secretary of the Department of Human Services or a delegate has determined that a report is a protective intervention report, it is moved to the investigation and assessment phase<sup>155</sup> and may result in a protection application being made and a child protection order being sought from the Children's Court.<sup>156</sup>
- 2.114 Alternatively, the Secretary or a delegate may provide advice to the person who made the report, provide advice and assistance to the child or family, or refer the matter to a community-based service.<sup>157</sup>

## Interaction with the Sex Offenders Registration Act

- 2.115 In his report, the Ombudsman referred to a lack of collaboration between Victoria Police and the Department of Human Services in protecting children from the risk of harm from registered sex offenders with whom they have unsupervised contact.<sup>158</sup>
- 2.116 Under the Children, Youth and Families Act, all members of Victoria Police are mandatory reporters.<sup>159</sup> Police officers who, in the course of their employment, form the belief on reasonable grounds that a child is in need of protection, must report that belief and the reasonable grounds for it to the Secretary of the Department of Human Services.<sup>160</sup>
- 2.117 The Sex Offenders Registration Act authorises the police to disclose information about a registered sex offender where 'required by or under any Act or law'. Although this would permit disclosure of mandatory reports to the Department of Human Services under the Children, Youth and Families Act, it does not authorise the routine disclosure of information about all registered sex offenders who report unsupervised contact with children.<sup>161</sup>
- 2.118 Disclosure issues, and the interaction between the Children, Youth and Families Act and the Sex Offenders Registration Act, are discussed in Chapter 9.

## Refining the Act

- 2.119 As the first comprehensive legislative scheme to take a preventative approach to sexual offending in Victoria, the Sex Offenders Registration Act was a step into uncharted territory.
- 2.120 The passage of the Sex Offenders Registration Act was soon followed by other protective legislative responses to the risk of recidivism among sex offenders. The Working with Children Act addresses the risk of harm from any sex offenders who would target and abuse children through their paid or voluntary work, and the Serious Sex Offenders (Detention and Supervision) Act addresses the risk posed by serious sex offenders. These schemes augment and partly supplant the registration scheme. They should be considered when refining that scheme.

151 *Children, Youth and Families Act 2005 (Vic)* ss 28, 183.

152 *Ibid* ss 182, 184. Certain professionals, including doctors, nurses, principals, teachers and police officers are 'mandatory reporters': s 182. These people must report to the Department of Human Services beliefs they hold on reasonable grounds that a child is in need of protection from significant harm as a result of physical or sexual abuse, and that the child's parents are unlikely to protect the child from that harm: ss 184(1), 162(1)(c)–(d).

153 Many of the Secretary's functions, including those under ss 30, 34 and 187, have been delegated to employees of the Department of Human Services: *Instrument of Delegation*, signed 26 August 2009, 117–19, copy provided by email from the Department of Human Services on 24 March 2010.

154 *Children, Youth and Families Act 2005 (Vic)* ss 30, 34, 187.

155 Department of Human Services, *Protecting Victoria's Children: Child Protection Practice Manual*, 'Receiving and processing reports', Advice No 1154 (8 December 2008) 9–10, accessed 14 June 2011 at <<http://www.dhs.vic.gov.au/office-for-children/cpmanual>>.

156 *Children Youth and Families Act 2005 (Vic)* pt 4.9. The Court may make any one of the following protection orders: an order requiring a person to give an undertaking; a supervision order; a custody to third party order; a supervised custody order; a custody to Secretary order; a guardianship to Secretary order; a long-term guardianship to Secretary order; or an interim protection order: s 275(1).

157 *Children Youth and Families Act 2005 (Vic)* ss 30, 187. Community-based services include organisations such as Anglicare Victoria and Berry St Victoria Inc: Department of Human Services, *The Register: Community Service Organisations* (June 2011) <[http://www.dhs.vic.gov.au/\\_data/assets/excel\\_doc/0012/586659/register-of-agencies-2011-07-01.xls](http://www.dhs.vic.gov.au/_data/assets/excel_doc/0012/586659/register-of-agencies-2011-07-01.xls)>.

158 Ombudsman Victoria, above n 2, 8.

159 *Children, Youth and Families Act 2005 (Vic)* s 182(1)(e).

160 *Ibid* s 184(1).

161 Ombudsman Victoria, above n 2, 25.

- 2.121 Importantly, the focus of the registration scheme has shifted from providing a law enforcement tool to protecting children. The Sex Offenders Registration Act was not designed for this purpose and needs systemic reform to underpin a stronger contribution to child protection.
- 2.122 At the same time, it is essential to preserve and improve the contribution that the scheme makes to law enforcement. As will be discussed in Chapter 9, the Sex Offenders Registration Act does not adequately support collaboration between the police and other agencies, including by sharing information from the Register with other law enforcement agencies through CrimTrac.
- 2.123 In this report, the Commission makes a series of recommendations to strengthen the registration scheme by enabling police to:
- better manage those offenders who could pose a risk of harm to children and
  - provide child protection authorities with timely information about children who might be at risk unless those authorities and the children's parents take action to safeguard the child.
- 2.124 In identifying refinements to the scheme, the Commission has been mindful of the national and international dimensions of sexual offending. The schemes in Australia differ from one jurisdiction to the next, and increasingly so, but the mutual recognition of reporting obligations is a core strength that they share and which should be preserved.
- 2.125 In keeping with modern drafting practices, it would be of assistance to all of those people involved in the administration of the legislation if the Sex Offenders Registration Act contained a provision which explained in some detail how it is designed to achieve its purpose. The following recommendation describes the operation of the refined scheme as proposed in this report.

## Recommendation

3. The *Sex Offenders Registration Act 2004 (Vic)* should outline the way it seeks to achieve the revised purpose, including by:
- (a) providing for the registration of offenders who have been found guilty of committing sexual offences against children and who pose a risk of committing further sexual offences against children
  - (b) requiring registered sex offenders to inform police of their whereabouts and other specified personal information in order to facilitate the investigation and prosecution of any future offences that registered offenders may commit
  - (c) requiring registered sex offenders to report specified contact with children to the police in order to enable protective action to be taken should the children be at risk of harm
  - (d) permitting the disclosure of some information about registered sex offenders to agencies and individuals in order to protect children from harm
  - (e) permitting the Magistrates' Court or the Children's Court to make a child protection prohibition order that restricts the activities of a registered sex offender
  - (f) supporting the rehabilitation of those registered sex offenders who seek assistance
  - (g) complementing the protective mechanisms provided for in the *Children, Youth and Families Act 2005 (Vic)*, the *Working with Children Act 2005 (Vic)* and the *Serious Sex Offenders (Detention and Supervision) Act 2009 (Vic)*
  - (h) recognising the reporting obligations imposed by the registration schemes in other jurisdictions
  - (i) providing for monitoring and review of the operations of the sex offenders registration scheme and of this Act in order to assess whether the purpose is being achieved.