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Background

1.1 On 21 April 2011, the Attorney-General asked the Victorian Law Reform Commission to review the registration of sex offenders under the Sex Offenders Registration Act 2004 (Vic) and, in particular, the management and use of information about them by law enforcement and child protection agencies.

1.2 The purpose of the review is to ensure that the legislation assists those agencies to assess the risk of re-offending, prevent further offences, and protect children from harm. The terms of reference are set out on page vi.

The Ombudsman’s report

1.3 On 9 February 2011, a report arising from an anonymous disclosure to the Victorian Ombudsman under the Whistleblowers Protection Act 2001, titled Investigation into the Failure of Agencies to Manage Registered Sex Offenders,1 was tabled in Parliament.2 The whistleblower had alleged that, due to an administrative error, Victoria Police had failed to inform the Department of Human Services of more than 300 registered sex offenders who were living with children or had unsupervised contact with them.3

1.4 In the report, the Ombudsman referred to concerns held by various senior public officials4 about the limitations of the Sex Offenders Registration Act. He concluded that ‘the current legislative arrangements require review to ensure the obligations on both registered sex offenders and the registry are balanced with the need to protect children from harm’.5

1.5 The Ombudsman recommended that the Attorney-General ask the Commission to review the Sex Offenders Registration Act, considering both broad structural issues and some identified matters of detail.6 He proposed that the Commission consider ‘the legislative arrangements in place for the registration of sex offenders and the management of the information’ they are required to provide.7 He also proposed that the Commission examine two specific issues: the meaning of the requirement that registered sex offenders report ‘regular unsupervised contact’ with children; and the power of police officers to test the veracity of the information that registered sex offenders provide.8

1.6 The Attorney-General accepted the Ombudsman’s recommendation, and the terms of reference of the Commission’s review reflect the matters raised in his report.

The Sex Offenders Registration Act

1.7 The Sex Offenders Registration Act established a comprehensive registration scheme for sex offenders which has operated since October 2004. Under this legislation, all adults who are sentenced for committing sexual offences involving a ‘child’—defined as anyone under the age of 18 years9—are automatically included in the Sex Offenders Register. Sex offenders who are under the age of 18 years, and adults who commit sexual offences against adults, may be included in the Register at the discretion of the sentencing court.10

1.8 Registered sex offenders living in the community are required to keep the police informed about their personal details and whereabouts for a period of time determined by the Act.

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1 Ombudsman Victoria, Whistleblowers Protection Act 2001: Investigation into the Failure of Agencies to Manage Registered Sex Offenders (2011).
3 Ombudsman Victoria, above n 1, 6.
4 The Chief Commissioner of Police, Secretary of the Department of Justice, Secretary of the Department of Human Services, and the Director, Police Integrity: Ombudsman Victoria, above n 1, 31–2.
5 Ibid 36.
6 Ibid 38, recommendation 10.
7 Ibid.
8 Ibid.
9 Sex Offenders Registration Act 2004 (Vic) s 3.
10 Ibid ss 6(3)(a), 11. The operation of the scheme is described in more detail in Chapter 3.
1.9 Registration is not a punishment for past crimes. It is not part of the offender’s sentence. Rather, the Sex Offenders Registration Act is a form of preventative legislation. It seeks to protect the community from the risk that those who have been sentenced for sexual offences in the past may re-offend in the future.11

1.10 Victoria was the second Australian state to introduce a scheme of this type. Four years earlier, New South Wales had legislated to register a narrow class of offenders automatically under the Child Protection (Offenders Registration) Act 2000 (NSW).12

1.11 The New South Wales scheme formed the basis of model legislation that was agreed by the Australasian Police Ministers’ Council in 2004.13 The Sex Offenders Registration Act is broadly consistent with the model and all other Australian jurisdictions have since introduced similar laws.14

1.12 Sex offender registers were first created in the United States. They developed incrementally state by state until national legislation mandating state registration of sex offenders was introduced in 1994.15 However, in framing its legislation, New South Wales looked more to the United Kingdom, which had established a registration scheme for sex offenders in 1997. The United Kingdom scheme was informed by the experience in the United States and, notably, did not introduce community notification mechanisms. Many features of the Sex Offenders Act 1997 (UK) were adopted by New South Wales and later incorporated into the model legislation.

The Commission’s process

1.13 The Commission was initially required to deliver a report by 4 November 2011. The Attorney-General subsequently agreed to a later reporting date of 22 December 2011 to allow more time for consultation about law reform options.

1.14 On 22 June 2011, the Commission published an information paper that described the operation of the Victorian sex offender registration scheme and posed a number of questions about ways in which it could be improved. The Commission received 32 written submissions in response, of which 27 are available to the public on the Commission’s website.16 Although the deadline for submissions was 29 July 2011, the Commission continued to accept them until the report was finalised.

1.15 The Commission’s usual practice after publishing an information paper and receiving submissions is to release a comprehensive consultation paper that examines the major issues, discusses developments in other jurisdictions and seeks comments on reform options. In this case, the reporting deadline did not allow sufficient time for a consultation paper to be prepared. The Commission instead relied on the opportunities provided during its consultations to develop and explore ideas for reform.

1.16 The Commission met a number of times with the key government agencies with responsibility for managing sex offenders and protecting children: Victoria Police, the Department of Justice and the Department of Human Services. The Commission also consulted widely with others who have studied sexual offending or who have been affected by the sex offender registration scheme. They included leading academics, forensic psychologists, forensic psychiatrists, lawyers,
judges, researchers, public officials, registered offenders and members of their families, and victim advocacy organisations.

1.17 To broaden the reach of the consultations, on 28 July 2011 the Commission hosted an open day during which members of the public could make individual appointments with Commission staff to discuss the operation of the scheme. The Commission also spoke with registered sex offenders at HM Ararat Prison and living nearby at the supervised residential facility at Corella Place.

1.18 A list of the submissions received is at Appendix A, and the consultations conducted are shown at Appendix B.

Expert consultants

1.19 The Commission engaged the Hon John Coldrey QC, a retired Supreme Court judge and former Director of Public Prosecutions, as a consultant for this reference. He has written numerous major conference papers and legal publications relating to the operation of the criminal law and has been a member of various committees and councils including chairing the Consultative Committee on Police Powers of Investigation. He is currently a judicial member of the Adult Parole Board and chairs the Victorian Institute of Forensic Medicine council.

1.20 The Commission also engaged forensic psychiatrist Dr Bill Glaser as a clinical consultant to provide expert advice about treatment programs for child sex offenders, risk assessment tools and the transmission of clinical information to child protection authorities. Dr Glaser is a Consultant Psychiatrist to the Disability Forensic Assessment and Treatment Service, Department of Human Services. He has treated sex offenders for many years and has published extensively in the areas of assessment and treatment of sex offenders, mental health legislation, psychiatric problems of civil litigants, mental health of prisoners and the problems of offenders with an intellectual disability.

Related projects

Protecting Victoria’s Vulnerable Children Inquiry

1.21 An inquiry into systemic problems in Victoria’s child protection system, launched on 31 January 2011, will be making recommendations to the Minister for Community Services to strengthen and improve the protection and support of vulnerable young Victorians.

1.22 The inquiry is being conducted by a panel comprising former Supreme Court judge the Hon Philip Cummins (Chair), Emeritus Professor Dorothy Scott OAM and Bill Scales AO. It has broad terms of reference that extend to an examination of existing child protection systems, processes and services.

1.23 Recognising the potential for overlap, the Commission has consulted with the Hon Philip Cummins during the course of this review. The Protecting Victoria’s Vulnerable Children Inquiry will report to the Minister for Community Services by 27 January 2012.

Parliamentary Law Reform Committee

1.24 On 1 September 2011, the Legislative Assembly referred to the Parliamentary Law Reform Committee an inquiry into the creating, sharing, sending or posting of sexually explicit messages or images via the internet, mobile phones or other electronic devices by people, especially young people, (known as ‘sexting’).

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17 HM Ararat Prison is 200 km west of Melbourne. It provides accommodation for prisoners with low to medium security protection requirements, including a high proportion of sex offenders (50 per cent) and protection or special needs prisoners (50 per cent).

18 Corella Place is a purpose-built residential facility that provides transitional accommodation for sex offenders on post-sentence orders where appropriate housing has not been found elsewhere in the community.

1.25 The terms of reference require the Committee to consider, among other issues, the application of the Sex Offenders Registration Act to the practice of sexting. A person who engages in sexting may be committing a child pornography offence if the images portray a child in a particular way.20 For the purposes of child pornography, a child is someone who is, or appears to be, under the age of 18.21

1.26 The production, procurement, possession and dissemination of child pornography are registrable offences that currently may lead to automatic inclusion in the Sex Offenders Register.22

1.27 The Commission understands that the Committee will commence its inquiry early in 2012.23 It is required to report by 30 June 2012.

Compliance review by Commissioner for Law Enforcement Data Security

1.28 In connection with his ongoing responsibility for promoting the use by Victoria Police of appropriate and secure management practices for law enforcement data, the Commissioner for Law Enforcement Data Security commenced an information security review of the Sex Offenders Register during 2011. The purpose of the review was to assess the extent to which the Register complies with the information security requirements established under the Commissioner’s Standards for Victoria Police law enforcement data security. The report of the review will be given to the Chief Commissioner of Police early in 2012.

1.29 The Commissioner for Law Enforcement Data Security explored with the Commission the legislative framework applicable to the Register and assisted in identifying information flows.

Reviews of sex offender registration in Western Australia

1.30 Two reviews of the Western Australian registration scheme were underway during the course of this reference.

1.31 The Western Australian scheme is established by the Community Protection (Offender Reporting) Act 2004 (WA). Unlike the Victorian scheme, which applies automatically to all adults who commit sexual offences against children and to younger offenders only at the discretion of the Children’s Court, the Western Australian scheme automatically applies to all offenders convicted of committing a sexually based offence involving a child.24 The Law Reform Commission of Western Australia has been examining the application of the Western Australian scheme to younger offenders and to adult offenders in exceptional circumstances.25 It intends to report to the Western Australian Attorney-General by the end of 2011.

1.32 At the same time, the Western Australia Police Service has conducted a broader review of the Western Australian scheme. Section 115 of the Community Protection (Offender Reporting) Act 2004 (WA) requires the responsible Minister to review the operation and effectiveness of the Act as soon as practicable after five years of operation. This review is expected to be completed early in 2012.

1.33 Both the Law Reform Commission of Western Australia and the Western Australia Police Service are considering issues that align with the Commission’s terms of reference and have provided valuable information and assistance.

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20 The state offences of producing and possessing child pornography are relevant to ‘sexting’: Crimes Act 1958 (Vic) s 68(1) (production of child pornography), s 70(1) (possession of child pornography). There are also Commonwealth child pornography offences that may be committed when engaging in ‘sexting’: Criminal Code Act 1995 (Cth) s 474.19(1) (using a carriage service to access, transmit or solicit child pornography material), s 474.20(1) (possessing, controlling, producing, supplying or obtaining child pornography material with the intention of committing an offence under s 474.19(1)). At the state level, ‘child pornography’ is a film, photograph, publication or computer game that describes or depicts a person who is, or appears to be, a minor engaging in sexual activity or depicted in an indecent sexual manner or context: Crimes Act 1958 (Vic) s 67A (definition of ‘child pornography’). At the Commonwealth level, there is a similar, but more expansive, definition: Criminal Code Act 1995 (Cth) s 473.1 (definition of ‘child pornography material’).

21 Crimes Act 1958 (Vic) s 67A (definition of ‘minor’); Criminal Code Act 1995 (Cth) s 473.1 (definition of ‘child pornography material’).

22 Sex Offenders Registration Act 2004 (Vic) s 7, sch 2. For a useful discussion of the practice of ‘sexting’, see Submission 28 (Monash Law Students’ Society’s Just Leadership Program).

23 Advice given by the Committee Secretariat on 12 October 2011.

24 Unless the person, as a child, was sentenced for a single child pornography offence: Community Protection (Offender Reporting) Act 2004 (WA) s 64(4); Community Protection (Offender Reporting) Regulations 2004 (WA) reg 8.

1.34 There are also two bills currently before the Parliament of Western Australia to amend the Community Protection (Offender Reporting) Act 2004 (WA). One seeks to broaden the operation of orders to restrict the conduct of registered sex offenders;26 and the other will, if passed, permit publication of information about some registered sex offenders.27 Debate on both bills will resume in 2012.

Overview of the report

Terminology

Registered sex offenders

1.35 The Sex Offenders Registration Act refers to a person who is required to comply with the reporting obligations of the Act as both a ‘registrable offender’ and a ‘registered sex offender’.28 Both terms refer to an offender who has been sentenced for an offence that resulted in registration under the Act, either automatically or because the sentencing court made a sex offender registration order.29

1.36 In effect, there is no distinction between a ‘registrable offender’ and a ‘registered sex offender’. Although the term ‘registrable offender’ may suggest that the offender is eligible for registration but not yet registered, it is predominantly used to describe an offender whose details are held in the register.

1.37 To avoid possible confusion, the term ‘registered sex offender’ is used exclusively in this report to refer to any offender to whom the Sex Offenders Registration Act applies.30

Different categories of offenders

1.38 How the Sex Offenders Registration Act applies to a person who has been sentenced for a registrable offence depends on the offender’s age and the age of the victim. In this report, the following terms are used. They reflect common usage and are drawn from the terminology adopted by the Law Reform Commission of Western Australia in its review of the Community Protection (Offender Reporting) Act 2004 (WA).31

Child sexual offence: a sexual offence against or involving a person under the age of 18 years.

Child sex offender: an offender who has committed a child sexual offence.

Adult sex offender: an offender who has committed a sexual offence against a person who was 18 years of age or older.

Youth child sex offender: a child sex offender who is under the age of 18 years.32

Adult child sex offender: a child sex offender who is 18 years of age or older.

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26 The Community Protection (Offender Reporting) Amendment Bill 2011 (WA). The relevant orders, called child protection prohibition orders, are discussed in Chapter 8.
27 Community Protection (Offender Reporting) Amendment Bill (No 2) 2011 (WA). The bill has passed through the Legislative Assembly and is awaiting debate by the Legislative Council.
28 ‘Registrable offender’ appears throughout the Act except in part 5. ‘Registered sex offender’ is used in part 5.
29 A ‘registrable sex offender’ is defined in s 67(1) for the purpose of part 5 as ‘a registrable offender or a person subject to a sex offender registration order’. A ‘registrable offender’ is defined in s 67(1) as ‘a person whom a court has at any time ... sentenced for a registrable offence’. A ‘registrable offence’ is defined in s 7 to include ‘an offence that results in the making of a sex offender registration order’.
30 Occasionally, when discussing the registration schemes in other Australian states and territories, the term ‘registered offender’ is used rather than ‘registered sex offender’, as some states and territories register offenders for non-sexual offences, such as child homicide and kidnapping. See Appendix E for a comparison of other states’ and territories’ registrable offences.
31 Law Reform Commission of Western Australia, above n 25, 15.
32 The Sex Offenders Registration Act 2004 (Vic) currently distinguishes between offenders who are under the age of 18 years when the crime was committed, and those who were older. In Chapter 5, the Commission recommends distinguishing on the basis of the age of the offender at the time they are found guilty of the offence.
Summary of chapters

1.39 The Sex Offenders Registration Act 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. The purpose of the scheme as set out in the legislation does not clearly describe a primary function that it serves today, which is to protect children against sexual abuse from people who have been found guilty of child sexual offences in the past. In Chapter 2, the origins and evolving purpose of the Sex Offenders Registration Act are discussed. The Commission recommends refining the purpose specified in the Act so that it reflects current expectations.

1.40 Chapter 3 describes how the registration scheme operates. The effect of the Act is commonly misunderstood because the regime it creates is exceedingly complex and the drafting is dense. Chapter 4 discusses the incidence of sexual offending in the community, the recidivism rates of sex offenders and the evidence base for whether registration schemes are an effective means of reducing the incidence of child sexual abuse by deterring re-offending.

1.41 Chapters 5 and 6 turn to the need to strengthen the scheme by sharpening its focus in protecting children from sexual abuse. The automatic registration of all adult child sex offenders for long periods—referred to as statutory inclusion—is affecting the ability of police and child protection workers to focus on those offenders who might pose a risk of harm to children.

1.42 In Chapter 5, the Commission recommends extending court-ordered registration and re-organising the classification of offences that lead to registration. The existing two categories of child sexual offences and two categories of adult sexual offences would be replaced with three categories of child sexual offences. The sentencing court would decide whether to make a registration order in accordance with a different test for each category of offence. The proposed approach would convey the intention that the higher the category of the offence, the more likely it is that the offender will be registered.

1.43 In Chapter 6, the Commission recommends retaining the existing reporting obligations, and creating additional obligations that the court may impose. The Commission also recommends reducing the length of reporting periods, with the option for the Chief Commissioner of Police to apply for an extension if the Chief Commissioner believes that a protective purpose would continue to be served by the offender being registered. Amendments to the mechanisms for suspension of reporting obligations and to the offences of failure to comply with reporting obligations and furnishing false and misleading information are also recommended. The Commission proposes changes to police powers of entry and search when investigating these offences.

1.44 Chapter 7 discusses problems, identified by the Ombudsman, in relation to the current requirement that registered sex offenders report ‘regular unsupervised contact’ with a child. The Commission recommends clear, legislative definition of the type of contact with children that registered sex offenders are required to report.

1.45 In Chapter 8, the Commission recommends a new type of order—the child protection prohibition order—for restricting particular conduct of registered sex offenders that is of concern to police and child protection authorities. These orders already exist in most other Australian jurisdictions.

1.46 Chapter 9 recommends mechanisms to ensure the timely flow of relevant information about registered sex offenders’ contact with children to the Department of Human Services. The Commission proposes information sharing provisions and a new form for registered sex offenders’ reports of contact with children.

1.47 In Chapter 10, the Commission discusses the need for greater accountability and review under the Sex Offenders Registration Act. Recommendations are made to broaden the compliance monitoring role currently performed by the Director, Police Integrity, and for the compliance reports to be tabled in Parliament. It is also recommended that Parliament receive statistical information provided by the Chief Commissioner of Police on the operation of the registration scheme each year, and a report on the operation and effectiveness of the Act every five years.

Sex Offenders Registration Act 2004 (Vic) s 1(1)(a).
As there has been very little research into the area, the Commission recommends further research into the extent to which sex offender registration schemes discourage re-offending. As all other jurisdictions in Australia have registration schemes, the Commission considers that there would be benefits to state and territory governments if the research were conducted as a national project under the auspices of police ministers.

Chapter 11 addresses how those who are subject to the existing registration scheme should be dealt with under the new provisions proposed in this report. The Commission recommends that a Sex Offenders Registration Review Panel, constituted by a number of relevant experts, be established to review the registration of those who are already registered.