

Victorian  
Law Reform  
Commission

# Sex offenders registration



**FINAL REPORT**

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## Terms of reference

The Victorian Law Reform Commission is to review and report on the registration of sex offenders under the *Sex Offenders Registration Act 2004* (Vic) as well as the management and use of information about registered sex offenders by law enforcement and child protection agencies.

The purpose of the review is to ensure that the legislative arrangements for the collection and use of information about registered sex offenders enable law enforcement and child protection agencies to assess the risk of re-offending, prevent further offence and protect children from harm.

In particular, the Commission should consider:

- the powers and obligations of the Chief Commissioner of Police under the *Sex Offenders Registration Act 2004* (Vic) to collect information from registrants and relevant agencies and for the Chief Commissioner and those agencies to exchange that information for law enforcement purposes and for assessing the risks posed by registrants to children and the broader community
- the powers of the Chief Commissioner to assess the veracity of information provided by registrants for the purposes of enforcing the *Sex Offenders Registration Act 2004* (Vic) and managing risks posed by registrants to children and the broader community, and
- the definition of unsupervised contact including whether this be broadened to include non-physical contact.

In conducting the review, the Commission should have regard to:

- the report and recommendations of the Ombudsman's report *Whistleblower's Protection Act 2001: Investigation into the Failure of Agencies to Manage Registered Sex Offenders*
- the purposes of maintaining a register for sex offenders
- risk assessment processes employed by law enforcement and child protection agencies
- legislative arrangements in Victoria, other Australian jurisdictions and overseas to foster inter-agency collaboration in child protection
- the desirability of nationally consistent legislation.

In making its report, the Commission should consider the interaction between the *Sex Offenders Registration Act 2004* (Vic), the *Children, Youth and Families Act 2005* (Vic) and other legislation relevant to the management of sex offenders and the protection of children.

Issues associated with the operation of the *Working with Children Act 2005* (Vic) are not within the scope of the review.

The Commission is to report on 4 November 2011.<sup>1</sup>

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# Preface

In April 2011, the Attorney-General asked the Commission to review the registration of sex offenders under the *Sex Offenders Registration Act 2004* (Vic) following a report by the Ombudsman, which revealed that Victoria Police had not informed the Department of Human Services of more than 300 registered sex offenders who were living with children or had unsupervised contact with them.

The Sex Offenders Registration Act established the first of three statutory schemes in Victoria that seek to protect children from exposure to people who are living in the community after completing a sentence for sexual offending. The Act took Victorian law into the largely uncharted territory of preventative responses to sexual offending. The other two statutory schemes designed to protect children from convicted sex offenders are the Working with Children Checks and legislation that permits the detention and supervision of serious sex offenders after they have completed their sentences.

The Ombudsman referred in his report to concerns held by various senior office holders about the limitations of the Sex Offenders Registration Act. The Commission found that others who have direct experience in the operation of the scheme and the management and treatment of sex offenders share their concerns. This report examines the issues they raised and proposes systemic reform to the registration scheme to strengthen its focus on protecting children from those who may harm them and to enable Victoria Police and the Department of Human Services to direct their resources more effectively to that purpose.

The Hon John Coldrey QC, a retired Justice of the Supreme Court of Victoria and former Director of Public Prosecutions, has assisted in the preparation of this report as a consultant to the Commission. Mr Coldrey is also a judicial member of the Adult Parole Board and chairs the Victorian Institute of Forensic Medicine council. The Commission has benefited greatly from his extensive experience and deep understanding of the criminal law, and I extend to him my thanks for his contribution to our work.

Dr Bill Glaser, a forensic psychiatrist of many years standing, was engaged as a clinical consultant. Dr Glaser has published extensively on the assessment and treatment of sex offenders, mental health legislation, psychiatric problems of civil litigants, mental health of prisoners and the problems with offenders with an intellectual disability. I thank him for his perceptive and practical insights into the complexities of preventative responses to sexual offending.

Throughout the reference, senior officers of the key agencies gave generously of their time to provide the Commission with information about the registration scheme, sex offender treatment and management programs and child protection policies and practices. I thank in particular the Chief Commissioner of Police, the Secretary of the Department of Justice and the Secretary of the Department of Human Services. My thanks go also to the members of their executive teams who provided the Commission with information and insights that contributed to our reform proposals.

In addition, members of the Adult Parole Board assisted the Commission by sharing their experience and specialist knowledge in managing sex offenders. I thank the Hon David Jones AM, Chairperson of the Detention and Supervision Order Division of the Adult Parole Board, and Anthony Vitale, the Manager of the Division, for their assistance.

There has been little Australian research into the effect of sex offender registration schemes. The contributions made by all those who made submissions or participated in consultations greatly enhanced the Commission's understanding of the Victorian scheme and of the need for reform. I thank them all.

I would like to acknowledge in particular the contributions made by two of the country's leading scholars in the field of child sexual offending—Professor Stephen Smallbone and Emeritus Professor Paul Mullen—who generously shared their expertise with the Commission and assisted us in exploring how to improve the sex offender registration scheme.

I express my thanks to the members of the Division of the Commission who worked with me on this reference: Magistrate Mandy Chambers, Justice Karin Emerton and Judge Felicity Hampel.

The Commission team allocated to the reference have worked tirelessly to produce this report. The team was very ably led by Lindy Smith, who brought a wealth of policy experience to this role. The Commission engaged Laura McDonough, an experienced Victoria Legal Aid (VLA) solicitor, accredited criminal law specialist and manager of the VLA sexual offences team, to work on this project. Her knowledge of criminal law and practice was invaluable. Mia Hollick completed the research and policy team, contributing her excellent legal research skills and remarkable attention to detail.

Sarah Krasnostein, who was engaged to assist in organising consultations, supported the research and policy team. Natalie Lilford, Jessica Saunders and Julie Bransden provided research assistance, Carlie Jennings managed the production of this report, and Kathy Karlevski, Vicki Christou and Failelei Siatua provided administrative services. The Commission's Chief Executive Officer, Merrin Mason, supported the entire team in many ways. My thanks go to all of them for their professionalism.



Professor Neil Rees  
Chairperson  
22 December 2011

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# Glossary

<b>ANCOR</b>	Australian National Child Offender Register.
<b>Corresponding registrable offender</b>	A person who would be required to report under a sex offender registration scheme in another state or territory if they had not moved to Victoria.
<b>Compliance manager</b>	A member of Victoria Police who has been approved by the Chief Commissioner to receive reports from registered sex offenders.
<b>Department of Human Services</b>	This term is used throughout the report to refer to the Children, Youth and Families Division of the Department of Human Services. This Division of the Department is responsible for child protection in Victoria.
<b>Police officer</b>	This generic term is used throughout the report to describe a member of Victoria Police, with the acknowledgement that, technically, not all members of Victoria Police are police officers.
<b>Registered sex offender</b>	<p>Someone who has been convicted and sentenced for a registrable offence and is placed on the Sex Offenders Register. The term 'registrant' is used interchangeably with 'registered sex offender'.</p> <p>The <i>Sex Offenders Registration Act 2004</i> (Vic) uses the terms 'registrable offender' and 'registered sex offender'. In this report the term 'registered sex offender' is used for ease of expression.</p>
<b>Registrable offence</b>	An offence that results in registration as a sex offender on conviction and sentence. A registrable offence under the <i>Sex Offenders Registration Act 2004</i> (Vic) includes an offence listed in schedule 1 or schedule 2 of the Act and an offence that results in the making of a sex offender registration order.
<b>Registration order</b>	An order made by a court that an offender must comply with the reporting obligations of the <i>Sex Offenders Registration Act 2004</i> (Vic). Currently, the court may make the order under section 11 of the Act.
<b>Reportable information</b>	Information that a registered sex offender must report to the police and keep up to date for the duration of their reporting period. It includes information about their identity, where they live and work, their contact details, children they have unsupervised contact with, travel arrangements and the car they drive.
<b>Reporting obligation</b>	The obligation imposed on registered sex offenders to provide particular details about themselves (reportable information) to the police in certain ways within specified times and for a specified period (the reporting period).
<b>Reporting period</b>	The period for which registered sex offenders must report information about themselves to the police in accordance with their reporting obligations. The length of the reporting period depends on the offence committed and the age of the offender at the time. For adults, it is eight years, 15 years or life. For minors it is four years or seven and a half years.

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# Executive summary

## Introduction

1. This report is concerned with strengthening Victoria’s sex offenders registration scheme so that it plays a more effective role in protecting children from sexual abuse.
2. The Attorney-General asked the Victorian Law Reform Commission to review the registration of sex offenders in response to a report by the Ombudsman on a whistleblower’s complaint. The whistleblower had alleged that Victoria Police 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. In his report, the Ombudsman was critical of the key agencies for failing to share responsibility for ensuring that the Sex Offenders Register contributed to the protection of children. He referred to concerns held by various senior public officials about the limitations of the *Sex Offenders Registration Act 2004 (Vic)* and recommended that the Commission consider the legislative arrangements in place for the registration of sex offenders.

## The sex offenders registration scheme

4. The Sex Offenders Registration Act established a mandatory registration scheme that has operated since October 2004. All adults sentenced for committing sexual offences involving a child are automatically included in a register of sex offenders. Sex offenders under the age of 18 years and adults sentenced for sexual offences against an adult may also be included in the Register by court order.
5. Registered sex offenders living in the community are required to keep the police informed about their personal details and whereabouts for a period determined by the Act. They are also required to report the names and ages of children with whom they live or have had ‘regular unsupervised contact’.
6. Adult offenders are required to report for eight years, 15 years or life, depending on the offences for which they have been sentenced. Young offenders report for four years or seven and a half years. There is no scope for the period of registration to be extended.
7. Apart from requiring offenders to meet their reporting obligations, the Sex Offenders Registration Act also prevents them from engaging in child-related employment in any capacity.

## The evolving purpose of the scheme

8. The purpose of the scheme—as set out in the first section of the Act—is to require sex offenders to provide information to the police on a regular basis in order to reduce the likelihood that they will re-offend and to facilitate the investigation and prosecution of future offences. The information was to be stored in a register that could be used as a law enforcement resource. Over time, the purpose of the scheme has evolved. Now, as the Ombudsman’s report shows, one of its primary

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functions is to operate as a source of information for child protection authorities about children who may be at risk of harm.

9. The shift in focus to child protection is one of degree. The specified purpose does not mention child protection, yet the Act requires all adult child sex offenders to report 'regular unsupervised contact' with children. Although the Act does not indicate how the police are expected to use this information, the policy of the legislation makes clear that it is gathered in order to protect children from potential harm. The police have no clear power, however, to share the information with child protection authorities.
10. In this report, the Commission makes a series of recommendations to strengthen the registration scheme by sharpening its focus on the protection of children. The recommendations will enable 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.

## Interaction with other post-sentence schemes

11. The Sex Offenders Registration Act is one of three statutory post-sentencing schemes that seek to protect children from exposure to convicted sex offenders who are living in the community. As the first comprehensive legislative scheme to take a preventative approach to sexual offending in Victoria, the Act led the government into uncharted territory.
12. It was soon followed by the *Serious Sex Offenders Monitoring Act 2005 (Vic)* and the *Working with Children Act 2005 (Vic)*. This later legislation has contributed to the evolving purpose of the registration scheme, because it has provided additional ways of taking preventative action when responsible authorities fear that a particular convicted sex offender might pose a risk to the safety of children.
13. These later schemes have taken over and refined some of the preventative expectations of the registration scheme. The *Serious Sex Offenders (Detention and Supervision) Act 2009 (Vic)*—which replaced the *Serious Sex Offenders Monitoring Act*—permits a targeted response when there is evidence to suggest that an offender should be detained in custody, or subjected to close supervision while living in the community, because of an unacceptable risk of re-offending. The *Working with Children Act* addresses the risk of harm from any sex offenders targeting and abusing children through their paid or voluntary work.
14. The three statutory schemes have not been designed as part of a fully integrated response to sexual offending against children. This review provides an opportunity for greater integration. The Commission recommends that the provisions in the Sex Offenders Registration Act prohibiting registered sex offenders from engaging in child-related employment should be incorporated into the *Working with Children Act* now that it is fully operational. This would rationalise and 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.

## The risk of harm from sex offenders

15. The Sex Offenders Registration Act is based on two premises. They are, first, that the incidence of child sexual abuse in the community requires the existence of a regime to monitor people who have prior convictions for child sexual offences and, second, that a registration scheme deters and reduces re-offending by those people.
16. In order to test these premises, the Commission consulted reports on the incidence of child sexual abuse in the community, rates of recidivism among sex offenders, and the results of research into the effect of registration on the risk of re-offending.
17. Most victims of child sexual abuse are girls, and they are most likely to be abused by a male relative. There is no compelling evidence as to whether there has been a significant increase in child sexual abuse in Victoria in recent years, as distinct from an increase in prosecutions for child sexual offences.

18. Existing research indicates that child sex offenders do not comprise a homogenous group. For example, commonly held assumptions that child sex offenders have high rates of recidivism and predominantly prey upon children who are unknown to them are not supported by evidence.
19. On the other hand, criminological studies demonstrate the existence of a subset of child sex offenders who do re-offend frequently and who target extra-familial male children. There is empirical evidence that these offenders abuse a high number of victims. The Commission considers that the registration scheme should be refined and strengthened in order to concentrate upon those people who pose the most risk to children.
20. There is little evidence to suggest that registration schemes are an effective means of reducing child sexual abuse because they deter re-offending. Although the Australian research is very limited, many studies have been completed overseas and most have failed to find that registration laws reduce recidivism.
21. In any event, the contribution that a registration scheme can make to the incidence of child sexual offending needs to be seen in the context of the fact that most child sexual offences are committed by persons without prior convictions for this type of offending and who are known to the victim. Of the 1000 victims of sexual assault in Victoria in 2010 who were under the age of 15, 399 (40 per cent) were assaulted by family members and 499 (50 per cent) by someone else they knew. Assaults by strangers accounted for 67 (7 per cent) of the cases.
22. Most sexual offences are committed by people with no previous convictions for offences of this type. For example, over the period 2006–07 to 2007–08, 93.1 per cent of the charges in Victoria for sexual penetration of a child aged 10 to 16 were against defendants with no prior sexual offence convictions. The highest proportion of defendants with a prior sexual offence conviction occurred in cases with charges of sexual penetration of a child aged under 10 (22.5 per cent).

## Refining the scheme by strengthening its focus

23. As not all sex offenders present the same risk of re-offending, the automatic registration of every adult who commits a sexual offence against a child has extended the reach of the scheme to offenders who are highly unlikely, based on any reasonable assessment, to offend again. In practice, it has not been apparent to people who witness the scheme in operation, such as judges, magistrates, legal practitioners and police officers, why reporting obligations are imposed on an offender who is highly unlikely to re-offend.
24. The Sex Offenders Registration Act proceeds on the assumption, however, 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. The current undifferentiated method of selecting who should be registered solely by reference to the number and type of offences for which they have been convicted has led to a register which appears to have outstripped initial estimates of size. The Register, which is becoming increasingly expensive to maintain, contains a vast amount of information of variable usefulness. It is time to assess whether the benefits of the scheme in its current form justify its escalating cost, especially as there are approximately 50 new registrants each month.
25. As at 1 December 2011, 4165 people had been included in the Sex Offenders Register in the seven years since the scheme commenced. At the current rate of increase, there will be approximately 10,000 registrations by 2020. As details are collected from all registered offenders for many years—and from some for life—the value of the information that is collected is highly likely to decline as the Register continues to expand. Details about people who might be potentially dangerous re-offenders sit alongside those of offenders who pose no risk of harm, with police and child protection authorities having no reasonable means of allocating risk ratings, and investigative resources, to particular offenders.
26. The long reporting periods impose a significant burden on the police to compile and manage information that may be of little operational value in many instances. Demands on the time of child protection workers at the Department of Human Services are also building as the number of reports of contact between registered sex offenders and children continues to rise. Understandably, all of these reports are investigated regardless of the risk of re-offending posed by a particular offender, unless there is compelling evidence of the child's safety.

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## Individual assessment instead of automatic inclusion

27. The Commission considers that if registration were more closely aligned with the risk of harm to children, the rate of growth in numbers of registered offenders might be manageable. The police and child protection resources allocated to administering the scheme and taking protective action could be directed to those people who are more likely to re-offend. Replacing automatic inclusion in the Register with a process that allows for individual assessment of the offender is highly likely to enhance the effectiveness of a scheme that places a great strain on the resources of Victoria Police and the Department of Human Services without, as yet, any clear evidence of its success in reducing child sexual abuse.

## Revised registrable offences

28. Another important means of strengthening the scheme's contribution to child protection is by revising the character and categorisation of the offences that lead to registration. The Commission has devised a refined list of offences which will assist in focusing the scheme on offenders who pose a risk of harming children.
29. In place of the existing two classes of child sexual offences set out in the Sex Offenders Registration Act, the Commission recommends re-ordering them into three categories according to the type of offending. The categories seek to reflect, in very broad terms, the risk of harm from re-offending.
30. The Commission proposes that the courts would be given clear legislative guidance when making individual assessments of the need for offenders in each category to be registered. They would be required to apply a different test for each category. The policy underpinning these tests is clear: the higher the category of offence, the higher the expectation that the court will make a registration order.
31. The proposed changes seek to ensure that the court assesses whether the individual offender poses a risk of harm to children. By directing courts to consider whether registration will serve a useful protective purpose, the new system should avoid the over-inclusiveness of the current scheme, which has led to unnecessary diversion of police and child protection resources from dealing with people who pose some risk of re-offending.
32. The practical outcome will be that most adults who commit penetrative sexual offences against children will be registered, and all other child sexual offenders will be registered only if the court finds that this step will serve a useful protective purpose.

### Category 1

33. Category 1 offences involve, or may involve, the sexual penetration of a child by the offender. The offender should be registered in all but exceptional circumstances for these offences. The fact that the offender has committed an offence of this nature is sufficient reason in most cases to take the protective measure of imposing reporting obligations because the consequences of any re-offending are profound.
34. However, a clear exception is a young person who is involved in an ongoing, sexual relationship that would not have constituted sexual offending but for the age of one of the parties involved. In such cases, the court would make an individual assessment.

### Category 2

35. Category 2 offences are the offences, other than those in Category 1, that involve, or may involve, the perpetrator taking part in sexual activity with a child. As with Category 1, many offenders who commit these crimes should be monitored for a reasonable time because they might pose an ongoing risk to children.
36. The Commission believes that there should be a presumption that a person found guilty of a Category 2 offence will be included in the Register unless the offender can satisfy the court on the balance of probabilities that making an order would serve no useful protective purpose.

37. To ensure that courts consider appropriate expert evidence before making decisions about Category 2 offenders, they should consider a risk assessment report from a suitably qualified psychiatrist or psychologist unless there are exceptional circumstances that justify making an order without a report.

### Category 3

38. Category 3 offences are non-contact offences where the principal offender does not actually participate in sexual activity with a child. They include child pornography offences and other offences that are often committed for commercial purposes. While these offences are serious and merit appropriate penalties, the offenders do not actually engage in sexual contact with the victim and might not pose a risk of committing contact offences.
39. In view of the need to ensure that the registration scheme uses police and child protection resources effectively, the Commission believes that a registration order should only be made in these cases where the court considers that it is necessary to protect children from the risk of sexual abuse.
40. Some of the offences in Category 3, such as possessing child pornography, can occur in a diverse range of circumstances. The offence of possessing child pornography applies to young people who take photographs of naked, underage partners with their permission, and to members of paedophile rings that collect graphic child abuse and child pornography material. Registering the former offenders might be of little benefit, while registering the latter might assist in protecting children from the risk of sexual abuse.
41. The Commission believes that the prosecution should bear the burden of satisfying a court on the balance of probabilities that it is necessary to make a registration order for a person found guilty of a Category 3 offence. As with Category 2 offences, courts should consider a risk assessment report from a suitably qualified psychiatrist or psychologist unless there are exceptional circumstances that justify making an order without a report.

### Related recommendations

42. The Commission believes that children and young people should be included in the Register in exceptional circumstances only, because there are other mechanisms that can be used to protect children from the risk of sexual abuse and because of the impact of registration on a young person. It recommends that the court not make a registration order for a child or young person unless it is satisfied that it would serve a useful purpose and all other reasonable protective responses have been exhausted.
43. In relation to all child sex offenders, there may also be some limited situations where a sex offender registration order would not be appropriate because of the inability of the offender to comply with the reporting obligations or because of the very unusual nature of the offending. The Commission recommends that the court should be permitted to decline to make a registration order if satisfied on the balance of probabilities that the person would be unable to comply due to physical or cognitive impairment, or where the offence was an isolated event that occurred a long time ago and no useful purpose is served by registration.
44. In the Commission's view, it is no longer necessary to register offenders who have committed sexual offences against adults. They currently account for less than three per cent of all registered offenders and the Serious Sex Offenders (Detention and Supervision) Act provides a more suitable protective legislative response to the risk of harm these offenders pose to the community.

### Reporting obligations

#### Special conditions

45. All registered sex offenders have the same reporting obligations regardless of their risk of re-offending or their need for assistance to avoid offending behaviour. There is no capacity for individual assessment that takes into account the needs of the community or the offender. Consequently, there is no opportunity to include any components that may assist the offender to

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comply with their reporting obligations or which could reduce the risk of re-offending. There is no scope to impose any additional preventative measures that may assist child protection authorities to safeguard particular children from harm or permit the police to monitor a particular offender more closely than others.

46. The Commission believes it should be possible to tailor reporting conditions to support registered offenders in functioning successfully in the community and to better manage the risk of harm to children when there are heightened concerns about the likely behaviour of a particular individual. It recommends that courts should be permitted to impose special conditions that:
- provide for offenders who are of particular concern to report more frequently than annually and whenever personal details or contact with children change
  - require an offender with a cognitive disability or mental illness to be accompanied by an independent third person, assigned by the Office of the Public Advocate, when making a report in person
  - direct an offender to attend and participate in rehabilitation programs that provide behavioural guidance and assist with integration into the community
  - authorise a representative of the Department of Human Services to be present when a registered sex offender is reporting information about their contact with a child or children to the police.

### Duration and extension

47. The duration of a registered sex offender's reporting obligations depends upon the nature of the offences for which the offender was sentenced, and whether the offender was an adult or a child at the time of committing the offences.
48. As at 1 December 2011, 711 of the 2830 registered sex offenders who were living in the community faced lifetime reporting obligations. Another 1178 were required to report for 15 years, while 912 registrants were required to report for eight years. A person who faces lifetime registration can apply to the Supreme Court for removal after 15 years. It will not be possible for anyone to make an application of this nature until 1 October 2019. The Chief Commissioner's power to apply to the Supreme Court at any time for the suspension of a registered offender's reporting obligations has not been used.
49. The Commission believes that the current reporting periods should be reconsidered because they are producing spiralling workloads for Victoria Police and the Department of Human Services without any evidence of the benefits that such lengthy registration produces.
50. Shorter initial reporting periods for the proposed three new categories of offenders are recommended. Category 1 and Category 2 offenders should be registered for five years, while Category 3 offenders should be registered for three years.
51. However, the total period for which a registered sex offender may be required to report could be longer. It should be possible for the Chief Commissioner of Police to apply to a court to extend a registration order (and the associated reporting period) for all three categories of offenders. There should be no limit to the number of extensions that can be made in relation to a particular offender.
52. The reviewing court should consider whether further monitoring would be useful and whether additional assistance such as ongoing participation in rehabilitation programs is desirable. A person's registration should cease if no useful protective purpose would be served by ongoing reporting obligations.
53. As the performance of the person on the order would be a relevant factor in considering an extension, regular review would provide an incentive to the person to adhere with conditions such as rehabilitation programs, and to seek reintegration into the community.
54. Regular review of the need for continuing registration should make the allocation of police and Department of Human Services resources more effective by enabling them to focus on those offenders who pose a real risk of harm.

## Suspension

55. There are only a few circumstances in which reporting obligations may be suspended under the Sex Offenders Registration Act. The Commission understands that the reporting obligations of some registered sex offenders are currently suspended for medical reasons, even though there is no provision under the Act to deal with these situations.
56. The Commission recommends permitting the Chief Commissioner of Police to suspend the reporting obligations for up to 12 months if satisfied that the offender is no longer able to comply with them due to physical or cognitive impairment. A registered sex offender who unsuccessfully applies for suspension on these grounds should be permitted to seek a review of the Chief Commissioner's decision in the court that made the registration order.
57. Where the registered sex offender is in government custody or under government supervision, no protective purpose is served by requiring them to comply with reporting obligations. The Act provides for the suspension of the reporting obligations when the offender is in government custody, but the definition does not extend to all relevant circumstances and the Commission recommends expanding it.
58. In all cases, time would continue to run during the period of suspension.

## Transitional arrangements

59. Implementation of the Commission's proposed changes to the sex offenders registration scheme would result in two very different schemes for two groups of people—those already on the Sex Offenders Register and those placed on the Register by a court order under the revised scheme—unless the new arrangements can be applied to those people now on the Register.
60. There is a need for consistency in the way sex offenders are managed under a registration scheme, regardless of the time at which they were registered.
61. The absence of appropriate transitional arrangements would prolong the inefficiency and expense caused by the current undifferentiated approach to the selection of offenders for inclusion in the Register. These arrangements are also necessary as a matter of fairness to existing registered sex offenders so that they are treated in the same way as later registered sex offenders.
62. After considering various options, the Commission believes that a rigorous, efficient, transparent and fair process would be to establish a panel of experts to review the circumstances of each existing registered sex offender in order to determine how that person should be dealt with under the proposed new scheme.
63. The Commission proposes that the panel comprise a retired judge, a health professional who is experienced in treating child sex offenders, and at least one other person with experience in making decisions about the management of offenders, such as a current or former member of the Adult Parole Board. A panel of this nature should bring appropriate experience to the task of making transitional decisions.
64. The primary aim of the transitional arrangements should be to ensure that the child protection benefits that result from strengthening the scheme are not lost by continuing with an unmanageably large register that is not sufficiently focused on those offenders who pose the greatest risk of harm to children. These proposed panel reviews will remove people from the Register who do not present a risk.
65. The panel must be given an appropriate range of powers when reviewing offenders who are already on the Register. The panel should be permitted to:
  - reduce the length of existing registration periods to bring them into line with the duration of orders under the three revised categories
  - impose any additional conditions upon a registrant that a court could impose under the proposed revised arrangements
  - terminate an offender's reporting obligations if they would have expired under the proposed revised arrangements or when the panel is of the view that no useful protective purpose is served by requiring an offender to continue to report.

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66. Those young people who are currently subjected to lengthy reporting obligations after being found guilty of 'sexting', or of having a sexual relationship with an underage partner that would otherwise have been lawful, could be eligible for termination by the panel.
  67. The jurisdiction of the review panel should not extend to interstate, corresponding registered offenders. The Commission does not believe that interstate registrants should be encouraged to re-locate in order to benefit from any changes to Victoria's legislation. Victoria should continue to require interstate offenders who re-locate to Victoria to remain on the Register for the period determined by the law in the original jurisdiction.

## **Police powers and breaches of reporting obligations**

68. The Commission's terms of reference require consideration of the powers of the Chief Commissioner to assess the veracity of information provided by registered sex offenders. Although the police have no special powers to do this under the Sex Offenders Registration Act, general police powers of entry and search are available when the police are investigating possible breaches of the Act.
69. Failing to comply with the reporting obligations under the Sex Offenders Registration Act, for which the maximum penalty is five years imprisonment, is a 'serious indictable offence' for the purposes of section 459A of the *Crimes Act 1958* (Vic). The police have the power to enter and search any premises without a warrant when they have reasonable grounds for believing that a registered sex offender has committed this offence.
70. The same powers are not available to the police in relation to the offence of furnishing false and misleading information, for which the maximum penalty is two years imprisonment or 240 penalty units.
71. The Commission believes that this inconsistency should be remedied by giving the police specific entry and search powers when dealing with all suspected breaches of the Sex Offenders Registration Act. The Commission also proposes that the two offence provisions be combined into a single summary offence for which the maximum penalty is proportionate to the degree of wrongdoing.

## **Reportable contact with children**

72. The Commission makes a number of recommendations to enhance the timely flow of useful information from the Register to the Department of Human Services to assist it in investigating protective concerns about a registered sex offender having contact with a particular child or children. These recommendations include clearly defining the type of 'contact' with a child that registered sex offenders are required to report to police, and amending the process by which information about registered sex offenders' contact with children is collected by Victoria Police and shared with the Department of Human Services.

### **Definition of 'contact'**

73. The Commission believes that registered sex offenders should continue to be obliged to report the names and ages of any children with whom they have 'contact', as well as the addresses of those children and any other means of contacting them. The 'contact' that must be reported should include both the mode of contact—for example, whether it is face-to-face, over the telephone, or online—and the circumstances in which that contact occurs.
74. When describing the mode of contact the Commission recommends a definition based on the definition of 'contact' in Part 5 of the Sex Offenders Registration Act. This will cover particular types of physical contact, verbal communication and written communication, whether in-person, by telephone or over the internet. Physical contact should include both physical proximity and touching. The registered sex offender being present in the same dwelling as the child would constitute physical proximity.

75. Defining the circumstances of the contact that a registered sex offender must report is more difficult. The definition should include any contact, of a defined mode, where the registered sex offender is residing with, supervising, caring for, visiting or forming a relationship with the child, but exclude any incidental or one-off contact the offender may have with a child, for example, on public transport or in the street. There would no longer be any need for a distinction between 'contact with a child' and 'residing with a child'.
76. The Commission recommends retaining the requirement for registered sex offenders to notify police that information about their contact with a child has changed, within one day of the contact occurring. This notification would not be a detailed report of the mode and circumstances of the contact, but simply an indication that the registered sex offender intends to make a full child contact report within seven days. Requiring this notification to be made within one day of the contact occurring is not particularly onerous, as the notification may be made by telephone. A more detailed child contact report form would need to be submitted in person within seven days of the contact occurring. The Commission considers that these short time frames for reporting contact with a child are necessary to enable the police and child protection to conduct their investigations as soon as possible after the contact occurring.

## Contact reports

77. The Commission has been told by the Department of Human Services that the information it receives about registered sex offenders' contact with children is sometimes not detailed enough, and may not include the nature of the contact, or the identity or whereabouts of the children. The Department has indicated a desire for more targeted information.
78. The current policy for all reports of unsupervised contact to be passed from Victoria Police to the Department of Human Services without filtering also means that the Department receives a large amount of information, not all of which will be relevant to investigating protective concerns. The Commission understands that this practice has had significant resource implications for the Department.
79. A new mechanism for collecting information from registered sex offenders is required to improve the varying quality of information currently provided to the Department of Human Services by Victoria Police about contact between registered sex offenders and children.
80. The Commission recommends that a new child contact report form should be devised by the key agencies after consulting organisations with relevant experience working with offenders. Both Victoria Police and the Department of Human Services should be responsible for designing the form, as police compliance managers will have primary responsibility for ensuring that registered sex offenders complete it appropriately and the Department of Human Services will use the information it contains to inform its protective investigations.

## Child protection prohibition orders

81. Sometimes a person who has completed a sentence following a conviction for a sexual offence involving a child might behave in a way that is lawful but of concern to the police or child protection authorities. Such behaviour could include contacting a child against whom the person has previously committed offences, or frequenting a place where grooming or other offending previously occurred, such as a municipal swimming pool or park. Other Australian jurisdictions have introduced child protection prohibition orders to enable a court to place restrictions upon this type of behaviour.
82. Child protection prohibition orders provide a preventative mechanism that permits a court to order that a registered offender not engage in certain types of behaviour or employment, go to certain places, or contact certain people. They are similar to other types of preventative orders made under the *Family Violence Protection Act 2008* (Vic) and *Personal Safety Intervention Orders Act 2010* (Vic).
83. The Commission recommends that child protection prohibition orders should be available in Victoria as they would enable Victoria Police to take appropriate action to protect a child who may be at risk of harm from a registered sex offender without child protection authorities having to follow the existing practice of making a protection application in relation to the child.

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## Information sharing

84. The Commission's terms of reference direct it to consider 'the management and use of information about registered sex offenders'. The Ombudsman reported that various people expressed concerns to him about the Sex Offender Registration Act's limitations concerning information sharing between Victoria Police, Corrections Victoria and the Department of Human Services.

### Sharing by Victoria Police and the Department of Human Services

85. The Commission believes that the Chief Commissioner of Police should have clear, legislative authority to pass information to the Secretary of the Department of Human Services about a registered sex offender's contact with an identified child or children.
86. The authority should be given under the *Children, Youth and Families Act 2005* (Vic). Under that Act, the Secretary of the Department of Human Services and all members of the police force are 'protective interveners'. Protective interveners have responsibility for many areas of child protection, including receiving and investigating reports that a child may be at risk of harm, and making protection applications in the Children's Court.
87. The Commission considers that it should be possible for the Chief Commissioner of Victoria Police and the Secretary of the Department of Human Services to share information about a registered sex offender as protective interveners where there is an identifiable child who has had, or may be having, contact with that offender.
88. Section 64(2)(b) of the Sex Offenders Registration Act should also be amended to extend the Chief Commissioner's disclosure power to circumstances where disclosure is 'authorised by or under any Act or law'.

### Giving information to parents and carers

89. There are no express powers in the Sex Offenders Registration Act that permit police or child protection workers to inform members of the community that a particular person is a registered sex offender. The Commission considers that, in certain circumstances, police officers and child protection workers should be permitted to disclose to a child's parent or carer that a person having contact with the child is a registered sex offender.
90. Disclosures of this nature should take place with clear statutory authorisation, but within narrowly defined circumstances only. To permit disclosure of this information on anything other than a 'need to know' basis by police and child protection officers of appropriate seniority would encourage sensationalism within some sectors of the media and facilitate vigilante action within some sectors of the community.
91. Given the sensitivity of the information that would be disclosed, the Commission recommends that the Secretary of the Department of Human Services and the Chief Commissioner of Police authorise only officers of a particular grade or rank (designated officers) to make these disclosures. Further, disclosures should only be made if the designated officer believes, on reasonable grounds, that the disclosure is necessary to ensure the safety and wellbeing of the child. The Commission's proposals draw upon guided disclosures for child protection purposes in the United Kingdom.
92. Designated officers, parents and carers must comply with suppression orders and laws concerning identification of victims of sexual offences and children who are, or have been, parties to proceedings. As unauthorised disclosure by a parent or carer of a person's status as a registered sex offender would be a matter of considerable concern, the Commission suggests that the Chief Commissioner and the Secretary of the Department of Human Services keep this matter under ongoing review. They are both well placed to recommend legislative action if unauthorised disclosures occur.
93. In order to assist the child's parent or carer to respond to a disclosure under the recommended new provisions, the designated officer should be required to refer the child's parent or carer to an appropriate counselling service. To make it clear that any disclosures made under these provisions are directed to the protection of identifiable children, they should be authorised under the *Children, Youth and Families Act*. Further, the Sex Offenders Registration Act should be amended to permit these disclosures by designated officers under the *Children, Youth and Families Act*.

94. Disclosures of this nature could have grave consequences for the registered sex offender, particularly their living arrangements and relationships. Therefore, the Commission proposes that, if a designated officer intends to make a disclosure of this kind to a child's parent or carer, the officer should be required to make all reasonable efforts to notify the registered offender prior to making the disclosure. This step will permit registered sex offenders to be involved in the process and prepare themselves for the possible effects of the disclosure. Research from the United Kingdom illustrates the need for any disclosure scheme to complement the rehabilitation of registered sex offenders.
95. However, if the designated officer believes on reasonable grounds that notifying the registered sex offender before making a disclosure to a parent or carer would endanger the life or safety of any person, they should be permitted to dispense with this requirement.

### **Sharing by Corrections Victoria and the Department of Human Services**

96. Corrections Victoria currently provides information to the Department of Human Services in accordance with an Instrument of Authority, signed by the Minister for Corrections. The Commission recommends amending the Children, Youth and Families Act to codify the Instrument of Authority. The amendment should authorise the Secretary of the Department of Justice to disclose risk summary reports or assessment reports in relation to a registered sex offender where the Secretary of the Department of Human Services holds concerns about the risk the offender poses to a particular child or children.
97. The Commission also recommends that the Secretaries of the Department of Human Services and Justice should develop protocols for this purpose.

### **Contribution to a national approach**

98. The Sex Offenders Registration Act is based on a model endorsed by all state and territory police ministers. All jurisdictions now have similar registration schemes, though they have departed from the model in different ways and are increasingly divergent. Importantly, however, registered offenders cannot avoid their obligations by moving interstate because each state and territory recognises and enforces the reporting obligations imposed in any Australian jurisdiction.
99. Underpinning the national approach to registration is a national database of registered offenders, known as the Australian National Child Offender Register, to which all police forces and other law enforcement agencies have access. CrimTrac, a Commonwealth executive agency, maintains the database.
100. Although the Act was passed in the context of building a national approach to registration, and allows Victoria Police to share information with other law enforcement agencies, it does not provide for the disclosure of information to CrimTrac. The Commission recommends that the Act be amended to rectify this anomaly.
101. The Commission is also concerned that CrimTrac is not a statutory body that is directly accountable to the Commonwealth Parliament for the management of the information it holds on offenders registered under the Act. The Commission supports moves for CrimTrac to be given legislative backing and recommends that it be brought under the jurisdiction of the Australian Commission for Law Enforcement Integrity.

### **Accountability and review**

102. This report, and the Ombudsman's report, have permitted the Victorian Parliament to receive some information about the operation and impact of the sex offenders registration scheme. Such opportunities for review are not built into the Sex Offenders Registration Act. The Director, Police Integrity has had a limited role in monitoring the management of information in the Register, but the findings are not public. There is no provision for a general review of the effectiveness of the registration scheme.

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103. The Commission considers that the damage to public confidence in the administration of the registration scheme following the Ombudsman's report is likely to be improved by introducing more transparent monitoring processes. It recommends:
- expanding the compliance monitoring role that has been performed by the Director, Police Integrity and which is expected to be transferred to the Independent Broad-based Anti-corruption Commission, and requiring compliance reports to be tabled in Parliament
  - requiring the Chief Commissioner of Police to report statistical information on the operation of the scheme to the Minister for Police annually, for tabling in Parliament
  - external review of the effectiveness of the legislation every five years.
104. The management of sex offenders is a complex and dynamic field of public policy. It is difficult to determine the impact of registration on offender behaviour, as distinct from the effect of other factors such as treatment and rehabilitation programs, sentencing practices and demographic change. Moreover, there has been very little research into this area. The Commission recommends further research that can contribute to an understanding of the extent to which sex offender registration schemes discourage re-offending.
105. As all Australian states and territories have registration schemes, and encounter similar challenges and public expectations, the research could inform legal policy in all jurisdictions and reinforce national initiatives. The Commission recommends that the research be conducted as a national project under the auspices of police ministers.

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# Recommendations

## Chapter 2—The purpose of the sex offenders registration scheme

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.
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).
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.

## Chapter 5—Strengthening the scheme by sharpening its focus— Selecting who is on the Register

4. A person should be included in the Sex Offenders Register only by order of a court. The current system of automatic inclusion of adult offenders following a finding of guilt for an offence listed in schedule 1 or 2 of the Act should be discontinued.

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5. The Class 1 and Class 2 offences currently listed in schedules 1 and 2 of the *Sex Offenders Registration Act 2004* (Vic) should be replaced with the offences that are set out in Appendix D of this report and which have been sorted into three categories: 1, 2 and 3.
  6. A person would be eligible for inclusion in the Sex Offenders Register by court order following a finding of guilt for an offence in Category 1, 2 or 3 as set out in Appendix D of this report.
  7. It should no longer be possible for a court to order that a person found guilty of a sexual offence against an adult be included in the Sex Offenders Register. Schedules 3 and 4 of the Act should be repealed.
  8. A court should be required to make a registration order in respect of a person found guilty of a Category 1 offence unless that person satisfies the court on the balance of probabilities that:
    - (a) the age difference between the person and the complainant is not significant and the complainant was at least 14 years old at the time of the offence, and
    - (b) the conduct would not have been a sexual offence but for the ages of the persons involved, and
    - (c) no useful protective purpose is served by making a registration order.
  9. A court should be required to make a registration order in respect of a person found guilty of a Category 2 offence unless that person satisfies the court on the balance of probabilities that making an order would serve no useful protective purpose.

In considering whether to make an order, the court should be required to consider a risk assessment report from a psychiatrist or psychologist with expertise in assessing an offender's risk of committing further sexual offences against children unless there are exceptional circumstances that cause a report to be unavailable or unnecessary.

10. A court should be required to make a registration order for a person found guilty of a Category 3 offence if it is satisfied on the balance of probabilities that it is necessary to do so to protect children from the risk of harm from sexual abuse.

The prosecution should bear the burden of proving that a registration order should be made for a person found guilty of a Category 3 offence.

In considering whether to make an order, the court should be required to consider a risk assessment report from a psychiatrist or psychologist with expertise in assessing an offender's risk of committing further sexual offences against children unless there are exceptional circumstances that cause a report to be unavailable or unnecessary.

11. The *Sex Offenders Registration Act 2004* (Vic) should provide that, if an adult offender is found guilty of offences in more than one category, including any offences committed as a child, the test when determining whether to make a registration order should be that of the highest category.
12. If an offender who has been found guilty of offences in more than one category does not meet the test of the most serious applicable category, the court should be permitted to consider the test for the next category if different facts and circumstances arise in relation to that offending.

Different facts and circumstances may include:

  - (a) a different complainant
  - (b) offending that is not incidental to the first category of offending.
13. The Children's Court should not make a registration order in respect of a person who is sentenced for a Category 1, 2 or 3 offence that they committed and were found guilty of as a child, unless it is satisfied that making an order would serve a useful protective purpose.

In considering whether to make a registration order, the Children's Court should be required to:

- (1) consider a risk assessment report from a forensic psychiatrist or psychologist, and
- (2) take into account:
  - (a) the nature and circumstances of the offence(s)

- (b) any prior findings of guilt in the Criminal Division of the Children’s Court or orders made by the Family Division of the Children’s Court in relation to the person
  - (c) the capacity of the person to understand and meet the requirements of a registration order
  - (d) whether the person is currently subject to any other orders that provide supervision or guidance to the person, and any orders of the Family Division of the Children’s Court
  - (e) the availability of supports to the person in the community
  - (f) whether the person can be placed on another order or program which could minimise the risk of committing a Category 1, 2 or 3 offence
  - (g) the desirability of subjecting the young person to the least invasive regime of court orders necessary, and
  - (h) section 362(1) of the *Children, Youth and Families Act 2005* (Vic), so far as it is relevant.
14. The *Sex Offenders Registration Act 2004* (Vic) should provide that, if a person is found guilty as an adult of a Category 1, 2 or 3 offence committed as a child, the court should deal with that person as an adult when determining whether to make a registration order.
15. A court should be permitted to decline to make a registration order in respect of any person found guilty of any offence at any time if that person satisfies the court on the balance of probabilities that:
- (1) the person would be unable to comply with the reporting obligations due to physical or cognitive impairment, or
  - (2) the offence occurred a long time ago, and
    - (a) it appears to have been an isolated event, and
    - (b) no useful protective purpose is served by making a registration order.
16. The *Sex Offenders Registration Act 2004* (Vic) should state that all registration orders are to be treated as sentencing orders for the purposes of appeal rights only and may be appealed pursuant to the usual sentencing appeal procedures.

## Chapter 6—Refining the reporting obligations

17. The *Sex Offenders Registration Act 2004* (Vic) should be amended to allow a court to impose any of the following conditions, in addition to the standard reporting obligations, when making a sex offender registration order for a person found guilty of a Category 1, 2 or 3 offence committed as an adult:
- (a) A requirement to report in person more frequently than as prescribed in the Act.
  - (b) Where the court is satisfied that the person has a cognitive disability or mental illness, a requirement that the person must be accompanied by an independent third person, assigned by the Office of the Public Advocate, when making a report in person.
  - (c) A requirement to attend and participate in rehabilitation programs that provide behavioural guidance and assist with integration into the community.
  - (d) Authorising the presence of a delegate of the Secretary of the Department of Human Services in her capacity as a protective intervener when a person makes a child contact report to a delegate of the Chief Commissioner of Police.
18. The Office of the Public Advocate should be funded to expand the independent third person program so that it can better assist registered offenders who have a cognitive disability or mental illness in complying with their reporting obligations.
19. The *Sex Offenders Registration Act 2004* (Vic) should be amended to enable the court to modify the reporting conditions and obligations imposed on offenders who are under the age of 18, as appropriate in the offender’s circumstances.
20. A registration order in respect of a person found guilty of a Category 1 or Category 2 offence should be of five years duration. A registration order in respect of a person found guilty of a Category 3 offence should be of three years duration.

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21. It should be possible for the Chief Commissioner of Police to apply to a court for an extension of a registration order. There should be no limit to the number of times that a registration order can be extended. The following procedures should apply when seeking an extension:
    - (a) The Chief Commissioner should be permitted to apply to a court to extend the registration order for a further period of five or three years (as the case may be) at any time before the order expires.
    - (b) The burden of proof in an extension application should rest with the Chief Commissioner.
    - (c) The court should extend the order if it finds on the balance of probabilities that it is necessary to do so to protect children from the risk of harm.
    - (d) In determining an extension application, the court should be required to consider a risk assessment report from a psychologist or psychiatrist with expertise in assessing an offender's risk of committing further sexual offences against children.
    - (e) If a court decides to extend the period of a registration order it should be able to include any of the conditions that could have been included in the original order.
  22. The *Sex Offenders Registration Act 2004* (Vic) should state that when a registration order expires, or is revoked or terminated by a court, the person who was subject to the order is no longer a registered sex offender.
  23. Interstate registrants who move to Victoria should continue to be required to report for the period for which they would have been required to report in the jurisdiction in which they were placed on a sex offenders register, regardless of whether the offence for which they were registered is a registrable offence in Victoria and the duration of reporting requirements under Victorian law.
  24. Reporting obligations should be suspended if the registered sex offender is subject to a supervision order (including an interim order) under the *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic).
  25. Reporting obligations should continue to be suspended if the registered sex offender is in government custody. The definition of 'government custody' in the *Sex Offenders Registration Act 2004* (Vic) should be updated and expanded to include all forms of government custody.
  26. The Chief Commissioner of Police should be permitted to suspend the reporting obligations of a registered sex offender for a period of up to 12 months if the Chief Commissioner is satisfied that the offender is no longer able to comply with those obligations due to physical or cognitive impairment.
  27. A registered sex offender who unsuccessfully applies to the Chief Commissioner of Police for the suspension of reporting obligations due to physical or cognitive impairment should be permitted to seek a review of the Chief Commissioner's decision in the court that made the registration order.
  28. Whenever a person's reporting obligations are suspended because the person is:
    - (a) in government custody, or
    - (b) subject to a supervision order under the *Serious Sex Offenders (Supervision and Detention) Act 2009* (Vic), or
    - (c) no longer able to comply with their reporting obligations due to physical or cognitive impairment,time on the registration order should continue to run during the period of suspension.
  29. The offences of furnishing false or misleading information and failing to comply with reporting obligations should be combined into a single summary offence. Penalty: level 7 imprisonment (two years maximum) or a level 7 fine (240 penalty units maximum) or both.
  30. If a member of the police force believes, on reasonable grounds, that a registered sex offender has:
    - (a) failed to comply with their reporting obligations without a reasonable excuse, or
    - (b) knowingly furnished false or misleading information in purported compliance with their reporting obligations,the member of the police force should be permitted to enter and search any premises where they believe the registered sex offender to be.

## Chapter 7—Reportable contact with children

31. Registered sex offenders should be required to report the names, ages and addresses of any children with whom they have 'contact', and the means of contacting those children.
32. The *Sex Offenders Registration Act 2004* (Vic) should define 'contact' with a child or children for these purposes as:
  - (a) any form of physical contact, including physical proximity or touching, or
  - (b) any form of oral communication, including face-to-face, by telephone or over the internet, or
  - (c) any form of written communication, including electronic communication,in circumstances where the registered sex offender is:
  - (a) supervising or caring for a child or children, or
  - (b) visiting or residing at a dwelling where a child or children are present, including staying overnight, or
  - (c) exchanging contact details with a child or children, or
  - (d) attempting to befriend a child or children.
33. Registered sex offenders should be required to make a child contact report when their reporting obligations commence, annually, and when any information about their contact with children changes.
34. Registered sex offenders should be required to:
  - (a) within one day of the change, notify the police of any changes to information about their contact with children, and
  - (b) within seven days of the change, provide a written child contact report to the police in person.
35. The child contact report should be required to be made in the form jointly devised by the Secretary of the Department of Human Services and the Chief Commissioner of Police, in consultation with other relevant agencies, including Victoria Legal Aid and the Public Advocate.

## Chapter 8—Child protection prohibition orders

36. The *Sex Offenders Registration Act 2004* (Vic) should be amended to permit the Chief Commissioner of Police to apply to the Magistrates' Court or the Children's Court for a child protection prohibition order in respect of a registered sex offender.
37. The court should be permitted to make a child protection prohibition order in respect of a registered sex offender if:
  - (a) having regard to the nature and pattern of the registered sex offender's conduct, the court is satisfied on the balance of probabilities that they pose an unacceptable risk to the sexual safety of one or more children or children generally, and
  - (b) making the order will reduce that risk.
38. In determining whether to make a child protection prohibition order, the court should be required to consider the following factors:
  - (a) relevant findings of guilt for sexual offences involving children
  - (b) how long ago those offences were committed
  - (c) whether the nature and pattern of behaviour that the registered sex offender is currently engaging in is similar to behaviour which was preparatory to previous, relevant sexual offences involving children
  - (d) the conditions of the registered sex offender's sex offender registration order
  - (e) any other matters that the court considers relevant.

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39. In addition to the factors referred to in Recommendation 38, if the Children’s Court is considering whether to make a child protection prohibition order in respect of a registered sex offender who is a child, the Children’s Court should be required to consider:
    - (a) the desirability of the child being supported to gain access to appropriate educational services and health services
    - (b) the desirability of allowing the education, training or employment of the child to continue without interruption
    - (c) the desirability of minimising disruption to the child and the importance of maintaining social networks and support which may be lost if the child were required to leave their place of residence, and
    - (d) section 362(1) of the *Children, Youth and Families Act 2005* (Vic), so far as it is relevant.
  40. The Children’s Court should only be permitted to make a child protection prohibition order in respect of a registered sex offender who is a child if it is satisfied that:
    - (a) all other reasonably appropriate means of managing the conduct of the child have been considered before the order was sought, and
    - (b) the child will have appropriate alternative accommodation and appropriate care and supervision.
  41. A child protection prohibition order should be able to prohibit the registered sex offender from:
    - (a) associating with or contacting specified persons
    - (b) being in specified locations
    - (c) engaging in specified behaviour, and/or
    - (d) engaging in specified employment.
  42. The maximum duration of a child protection prohibition order should be five years for adult registered sex offenders and two years for registered sex offenders who are under the age of 18. The duration of a child protection prohibition order should not exceed the period for which the sex offender registration order applies.
  43. Child protection prohibition orders should be able to be made with the consent of the Chief Commissioner of Police and the registered sex offender.
  44. The court should be permitted to make an interim child protection prohibition order in the absence of the registered sex offender if the court is satisfied, on the balance of probabilities, that an interim order is necessary to ensure the sexual safety of a child or children. If the court makes an interim child protection prohibition order, it should be required to ensure that a hearing is listed for a decision about the final order as soon as practicable.
  45. A court should be permitted to make an order restricting or prohibiting the publication of any information that might lead to the identification of a registered sex offender against whom a child protection prohibition order is sought or made.
  46. The *Sex Offenders Registration Act 2004* (Vic) should include a provision recognising child protection prohibition orders made in other states and territories.
  47. If a child protection prohibition order, whether interim or final, has been made against a registered sex offender, the registrar of the court should be required to give the registered sex offender an explanation of the order.
  48. If a registered sex offender against whom a child protection prohibition order has been made has been served with a copy of the order and the order has been explained to them, it should be an offence for the registered sex offender to contravene the order. Penalty: level 7 imprisonment (two years maximum) or a level 7 fine (240 penalty units maximum) or both.

49. If a member of the police force believes, on reasonable grounds, that a registered sex offender against whom a child protection prohibition order has been made is present at certain premises, they should be permitted to enter and search those premises without warrant if the member of the police force:
  - (a) reasonably believes that the person is on the premises in contravention of a child protection prohibition order, or
  - (b) reasonably believes that the person is on the premises and engaging in particular conduct in contravention of a child protection prohibition order, or
  - (c) has the express or implied consent of an occupier to do so.
50. The *Sex Offenders Registration Act 2004* (Vic) should set out the procedure for appealing against a decision made in relation to a child protection prohibition order.
51. The Victorian Attorney-General should request that the Commonwealth Attorney-General consider amendments to the *Family Law Act 1975* (Cth) that would treat child protection prohibition orders in the same way as family violence orders for the purposes of dealing with any conflict between orders made under Commonwealth and Victorian law.

## Chapter 9—Information sharing

52. The Chief Commissioner of Police should be permitted to disclose information from the Sex Offenders Register to the CrimTrac agency where necessary for the purpose of alerting law enforcement agencies in other jurisdictions that a registered sex offender has left, or has reported an intention to leave, Victoria either temporarily or indefinitely.
53. The Minister for Police should request the Commonwealth Attorney-General to:
  - (a) take steps to provide a statutory basis for the CrimTrac agency that establishes independent audit, investigation and complaints-handling mechanisms, and sanctions for misuse of the information it holds
  - (b) bring the CrimTrac agency within the jurisdiction of the Australian Commission for Law Enforcement Integrity, as recommended by the Commonwealth Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity in July 2011.
54. The Chief Commissioner of Police should be permitted to provide the Secretary of the Department of Human Services with a copy of the 'child contact report' form submitted by any registered sex offender where the information in the report identifies a particular child or children.
55. The Chief Commissioner of Police and the Secretary of the Department of Human Services should be authorised to exchange information they hold about a registered sex offender when the Secretary is investigating any contact between that offender and a particular child or children.
56. The *Children, Youth and Families Act 2005* (Vic) should be amended to provide that information obtained by the Secretary of the Department of Human Services about a particular child from a child contact report or from the Chief Commissioner of Police when exercising the powers to share information with the Secretary of the Department of Human Services should be deemed a report to the Secretary under section 28 of the *Children, Youth and Families Act 2005* (Vic) about the wellbeing of a child.
57. The *Children, Youth and Families Act 2005* (Vic) should be amended to give the Secretary of the Department of Human Services and the Chief Commissioner of Police the power to authorise officers of a designated rank or grade to disclose to a parent or carer of a child who is having contact with a registered sex offender:
  - (a) that the person is a registered sex offender
  - (b) details of the offending that led to registration of that person, and
  - (c) the duration and the conditions of registration.

The *Sex Offenders Registration Act 2004* (Vic) should be amended to permit such disclosures made under the *Children, Youth and Families Act 2005* (Vic).

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58. The designated officers should be permitted to make a disclosure only if they believe, on reasonable grounds, that disclosure of the information to a parent or carer is necessary to ensure the safety and wellbeing of the child.
  59. The *Children, Youth and Families Act 2005* (Vic) should provide that it is an offence for:
    - (a) a person to make a disclosure of this kind without having been authorised to do so, or
    - (b) a designated officer to make a disclosure of this kind that is not in accordance with the relevant provisions.
  60. The *Children, Youth and Families Act 2005* (Vic) should provide that a designated officer who intends to make a disclosure to a parent or carer must make all reasonable efforts to notify the registered sex offender prior to making that disclosure unless the designated officer believes on reasonable grounds that to do so would endanger the life or safety of any person.
  61. The *Children, Youth and Families Act 2005* (Vic) should be amended to codify the existing Ministerial Authority that permits Corrections Victoria to provide risk summary reports and assessment reports to the Department of Human Services.
  62. The *Children, Youth and Families Act 2005* (Vic) should authorise the Secretary of the Department of Justice to disclose risk summary reports or assessment reports in relation to a registered sex offender where the Secretary of the Department of Human Services has requested the information because the Secretary of the Department of Human Services holds concerns about the risks posed to a particular child or children by that registered sex offender.
  63. The Secretaries of the Departments of Human Services and Justice should develop protocols identifying the reports that can be disclosed and establishing procedures to ensure the speedy provision of relevant information.

## Chapter 10—Accountability and review

64. The compliance monitoring currently undertaken by the Director, Police Integrity should be extended to include compliance with Part 3 of the *Sex Offenders Registration Act 2004* (Vic).
65. Compliance monitoring reports to the Minister by the Director, Police Integrity (or any agency to which the compliance monitoring function is transferred) should be required to be tabled in Parliament.
66. The Chief Commissioner of Police should be required to report to the Minister for Police data about the operation of the registration scheme, current as at the end of the financial year, within three months of the end of the financial year. The Minister should be required to table the report within 14 days of receiving it.
67. The data in the Chief Commissioner's report to the Minister for Police on the operation of the scheme should include information about:
  - (a) the number of registered offenders in total, and those added during the past financial year, by category of offence and length of reporting period
  - (b) the number of prosecutions during the financial year for offences under the Act, by offence
  - (c) the number of registered offenders who were sentenced for a subsequent Category 1, 2 or 3 offence during the financial year
  - (d) the number of special conditions on registration orders; extensions of registration orders; and child protection prohibition orders made during the year
  - (e) any other statistical information about the operation of the scheme as determined by the Minister.
68. The Minister for Police should cause an independent review of the operation and effectiveness of the *Sex Offenders Registration Act 2004* (Vic) to be conducted as soon as practicable seven years after the proposed revised scheme commences, and every five years thereafter. The report should be tabled in Parliament.

69. The Minister for Police should propose to the Ministerial Council on Policing and Emergency Management—Police that an appropriate body or individual researchers be engaged to conduct longitudinal research into the effect of Australia’s sex offender registration schemes on recidivism.

## Chapter 11—Transitional arrangements

70. The *Sex Offenders Registration Act 2004* (Vic) should establish a Sex Offenders Registration Review Panel. The Panel should comprise a retired judge, a health professional with experience in the treatment and management of child sex offenders, and at least one other person with significant experience in making decisions about the management of offenders.
71. The role of the Sex Offenders Registration Review Panel should be to review all registrations under the *Sex Offenders Registration Act 2004* (Vic) prior to the amendments.
72. The Sex Offenders Registration Review Panel should be permitted to terminate the registration of any person, other than an interstate or corresponding registrable offender, who was registered for an offence that is no longer a registrable offence in Victoria.
73. The Panel should be permitted to suspend the reporting obligations of any person who would be permitted to seek suspension of their reporting obligations under the new registration scheme due to physical or cognitive impairment.
74. The Sex Offenders Registration Review Panel should not be permitted to terminate an existing registration for an offence that is a Category 1 offence under the new registration scheme unless:
  - (a) an exception would apply under the new registration scheme, or
  - (b) the offender was a child at the time of the finding of guilt for the Category 1 offence and the Panel is satisfied that no useful protective purpose is served by the registration continuing.
75. The Sex Offenders Registration Panel should be permitted to terminate an existing registration for:
  - (a) an offence that is a Category 2 or 3 offence under the new registration scheme, where a finding of guilt was made when the offender was an adult, or
  - (b) an offence that is a Category 2 or 3 offence under the new registration scheme, where a finding of guilt was made when the offender was a child,if it is satisfied that no useful protective purpose is served by the registration continuing.
76. The Sex Offenders Registration Review Panel should be permitted to reduce the reporting period of a registered sex offender under the existing scheme so that it corresponds with the reporting period accorded to the same offence under the new provisions.
77. The Sex Offenders Registration Review Panel should be permitted to impose any of the conditions provided for in the new registration scheme if it is satisfied that this would reduce the risk of the registered sex offender committing a Category 1, 2 or 3 offence during the period for which the order would apply.
78. The Sex Offenders Registration Review Panel should be permitted to make decisions favourable to the registered sex offender without a hearing, but in any other circumstances the offender should have a right to be heard by the Panel before any decision that might be adverse to that person’s interests is made. The Chief Commissioner of Police should have a right to be heard by the Panel in such instances in order to represent the public interest.
79. The Chief Commissioner of Police and the registered sex offender should have the right to review any decision of the Panel in the court in which the offender was found guilty of the offences that led to inclusion in the Sex Offenders Register.





# Introduction

- 4** Background
- 4** The Ombudsman's report
- 4** The Sex Offenders Registration Act
- 5** The Commission's process
- 6** Expert consultants
- 6** Related projects
- 8** Overview of the report

## 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*,<sup>1</sup> was tabled in Parliament.<sup>2</sup> 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.<sup>3</sup>
- 1.4 In the report, the Ombudsman referred to concerns held by various senior public officials<sup>4</sup> 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'.<sup>5</sup>
- 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.<sup>6</sup> 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.<sup>7</sup> 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.<sup>8</sup>
- 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 years<sup>9</sup>—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.<sup>10</sup>
- 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).

2 Victoria, *Parliamentary Debates*, Legislative Assembly, 9 February 2011, 117; Victoria, *Parliamentary Debates*, Legislative Council, 9 February 2011, 99.

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.<sup>11</sup>
- 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).<sup>12</sup>
- 1.11 The New South Wales scheme formed the basis of model legislation that was agreed by the Australasian Police Ministers’ Council in 2004.<sup>13</sup> The Sex Offenders Registration Act is broadly consistent with the model and all other Australian jurisdictions have since introduced similar laws.<sup>14</sup>
- 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.<sup>15</sup> 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.<sup>16</sup> 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,

11 Ibid s 1.

12 New South Wales was not the first Australian state to introduce legislation under which sex offenders could be registered. 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).

13 The Australasian Police Ministers’ Council comprised the Ministers responsible for police from the Commonwealth Government, each of the states and territories, and New Zealand. In 2006, the Australasian Police Ministers’ Council was renamed the Ministerial Council for Police and Emergency Management—Police.

14 *Child Protection (Offender Reporting and Registration) Act* (NT), commenced January 2005; *Child Protection (Offender Reporting) Act 2004* (Qld), commenced January 2005; *Community Protection (Offender Reporting) Act 2004* (WA), commenced February 2005; *Crimes (Child Sex Offenders) Act 2005* (ACT), commenced December 2005; *Community Protection (Offender Reporting) Act 2005* (Tas), commenced March 2006; *Child Sex Offenders Registration Act 2006* (SA), commenced October 2007. Amendments to the *Child Protection (Offenders Registration) Act 2000* (NSW), commencing in September 2005, largely brought the NSW scheme into line with the model legislation agreed by the Australasian Police Ministers’ Council. The registration schemes differ in significant ways and are discussed in more detail in Chapter 3. A comparative table of registration schemes in Australia is at Appendix E.

15 *Violent Crime Control and Law Enforcement Act of 1994*, § 170101, Pub L No 103–322, 108 Stat 1796.

16 The Commission received five confidential submissions.

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<sup>17</sup> and living nearby at the supervised residential facility at Corella Place.<sup>18</sup>
- 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').<sup>19</sup>

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.

19 The terms of reference may be viewed at <<http://www.parliament.vic.gov.au/lawreform/article/947>>.

- 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.<sup>20</sup> For the purposes of child pornography, a child is someone who is, or appears to be, under the age of 18.<sup>21</sup>
- 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.<sup>22</sup>
- 1.27 The Commission understands that the Committee will commence its inquiry early in 2012.<sup>23</sup> 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.<sup>24</sup> 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.<sup>25</sup> 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.

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 6(4); *Community Protection (Offender Reporting) Regulations 2004 (WA)* reg 8.

25 Law Reform Commission of Western Australia, *Community Protection (Offender Reporting) Act: Discussion Paper*, Project No 101 (2011). For information about the review, visit the Law Reform Commission of Western Australia's website at <<http://www.lrc.justice.wa.gov.au>>.

- 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,<sup>26</sup> and the other will, if passed, permit publication of information about some registered sex offenders.<sup>27</sup> 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'.<sup>28</sup> 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.<sup>29</sup>
- 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.<sup>30</sup>

#### 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)*.<sup>31</sup>

**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.<sup>32</sup>

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

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 'registered 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 6(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.<sup>33</sup> 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.

- 1.48 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.
- 1.49 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.





# The purpose of the sex offenders registration scheme

- 14** Introduction
- 14** The origins of the scheme
- 22** The Victorian scheme
- 24** The shift in focus to protecting children
- 25** Other protective legislative responses to sex offenders
- 30** Refining the Act

## 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.

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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.



# The operation of the registration scheme

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## Introduction

- 3.1 The *Sex Offenders Registration Act 2004 (Vic)* requires sex offenders to report a range of information to the police for specified periods. The information encompasses various personal details, their travel out of the state and the country, and many of their interactions with children. The Chief Commissioner is required to store this information in a Register and to comply with various restrictions about its use and disclosure.
- 3.2 The Sex Offenders Registration Act is exceedingly complex, both in terms of the scheme it creates and in its drafting. The Act is dense, unclear in places, highly prescriptive about some matters and vague about others, and it is obscure or silent about fundamental elements of the scheme.<sup>1</sup> The Commission encountered numerous examples of the registration scheme being misunderstood by police officers, legal practitioners, judicial officers and government officials who have worked with the legislation for some time.
- 3.3 Four key features of the scheme define its scope and determine its operation:
- Offenders who are sentenced for certain sexual offences, known as registrable offences, can be required to comply with the reporting obligations set out in the Act.
  - Most of the people on the Register have been included as an automatic consequence of being convicted of particular offences; only a small number have been included by a court exercising the power given to it to make a registration order in some instances.
  - All registered sex offenders living in the community are required to comply with reporting obligations for a period of time that is determined by the sexual offences for which they have been sentenced.
  - The information they report and other information about them is held in a Register maintained by Victoria Police.
- 3.4 These four features are described below. In Chapters 5 and 6, they are examined in more detail and recommendations for reform made.

## Registrable offences

- 3.5 Registrable offences are those that result in the offender becoming a registered sex offender. They are divided into four classes and listed in schedules 1 to 4 respectively of the Sex Offenders Registration Act.
- 3.6 The offences are classed as follows:
- Class 1—serious crimes, generally involving penetrative sex with a child and including Commonwealth as well as Victorian offences<sup>2</sup>
  - Class 2—a broad range of sexual offences involving children, including indecent assault of a child and possession of child pornography, and bestiality, and including Commonwealth as well as Victorian offences<sup>3</sup>
  - Class 3—similar to the Class 1 offences but committed by a ‘serious sexual offender’<sup>4</sup> against an adult rather than a child and confined to Victorian offences<sup>5</sup>
  - Class 4—similar to the Class 2 offences but committed by a ‘serious sexual offender’ against an adult rather than a child and confined to Victorian offences.<sup>6</sup>

1 For example, while the Act is highly prescriptive about some personal details that the registered sex offender must report, it does not define the ‘unsupervised contact’ with a child that the offender is required to report: *Sex Offenders Registration Act 2004 (Vic)* s 14. The Act sets out the length of a registered sex offender’s reporting period, but nowhere does it specify that a registered sex offender is to be ‘deregistered’ at the end of their reporting period. The Act merely specifies that certain documents and materials are to be destroyed at the end of the reporting period: *Sex Offenders Registration Act 2004 (Vic)* ss 34, 30. Submissions 7 (CASA Forum) and 11 (CEASE) noted the complexity of the scheme, and Submissions 14 (Victoria Legal Aid) and 24 (Criminal Bar Association of Victoria) discussed this at length.

2 *Sex Offenders Registration Act 2004 (Vic)* sch 1.

3 *Ibid* sch 2.

4 A ‘serious sexual offender’ for the purpose of Class 3 and Class 4 offences is a person who has been sentenced at any time for two or more Class 1, 2, 3 or 4 offences, whether in the one trial or hearing, in different trials or hearings, or in separate trials of different charges in the one indictment: *Sex Offenders Registration Act 2004 (Vic)* s 8(3).

5 *Sex Offenders Registration Act 2004 (Vic)* sch 3.

6 *Ibid* sch 4.

- 3.7 The schedules to the Act are out of date and difficult to follow.<sup>7</sup> Updated and simplified lists are contained in Appendix C of this report.
- 3.8 The class of the offence determines the period for which the offender is required to report under the Act. For adult offenders, it also determines whether they are included in the Register automatically or by order of the court.
- 3.9 The Commission understands that detailed information about which offences led those who are currently on the Register to be registered, and how many offenders are on the Register for each offence, is not available.

## Inclusion in the Register

- 3.10 Anyone sentenced for committing a sexual offence listed in a schedule to the Sex Offenders Registration Act may be included in the Register. Whether registration is mandatory depends on the age of the victim and the age of the offender.
- 3.11 Adults who commit a child sexual offence (a Class 1 or Class 2 offence) are automatically registered as an administrative consequence of being sentenced for the offence. The Commission refers to this as 'statutory inclusion'.
- 3.12 Adults who commit an adult sexual offence (a Class 3 or Class 4 offence), and children who commit any registrable offence, are registered only if a court makes a registration order. The Commission refers to this as 'discretionary inclusion'.
- 3.13 In addition, any person found guilty of *any* offence may be ordered to comply with the reporting obligations set out in the Act if the sentencing court is satisfied beyond reasonable doubt that the offender poses a risk to the sexual safety of any person or the community.<sup>8</sup>
- 3.14 Table 1 summarises the statutory and discretionary inclusion of offenders in the Register.
- 3.15 Information on how many offenders have been registered by category of offence is not available.<sup>9</sup>

**Table 1—Statutory and discretionary inclusion in the Register**

Offence	Adult Offender	Young Offender
Class 1—Offence against a child	Statutory	Discretionary
Class 2—Offence against a child	Statutory	Discretionary
Class 3—Offence against an adult by serious sex offender	Discretionary	Discretionary
Class 4—Offence against an adult by serious sex offender	Discretionary	Discretionary
Other	Discretionary	Discretionary

## Statutory inclusion

- 3.16 All adults sentenced for a Class 1 or Class 2 offence since 1 October 2004, or serving particular sentences for a Class 1 or Class 2 offence immediately before that date,<sup>10</sup> are on the Register. The only exceptions are those who are in a witness protection program of the Commonwealth or of another state or territory.<sup>11</sup>

<sup>7</sup> Schedules 1 and 2 contain a number of Commonwealth offences that no longer exist or have been moved from the *Crimes Act 1914* (Cth) to the *Criminal Code Act 1995* (Cth): see, eg, *Sex Offenders Registration Act 2004* (Vic) sch 1 cl 7, sch 2 cl 27. There are also a number of new Commonwealth offences that have not been included and should be: see, eg, *Criminal Code Act 1995* (Cth) ss 272.11, 474.25A, 474.25B. Additionally, the effect of including bestiality in Class 2 is unclear, because an offence involving a child being forced to engage in an act of bestiality would be the Class 1 offence of compelling a victim to take part in an act of bestiality: *Crimes Act 1958* (Vic) s 38A(2)(b). As such, bestiality should not be included in sch 2. Offences leading to inclusion in the Register are discussed in Chapter 5.

<sup>8</sup> *Sex Offenders Registration Act 2004* (Vic) s 11(1). A 'finding of guilt' for the purposes of the Act applies when the court makes a formal finding of guilt, or of not guilty because of mental impairment, or when it accepts a guilty plea or an admission for the purposes of s 100 of the *Sentencing Act 1991* (Vic): s 4.

<sup>9</sup> Information provided by the Manager, Sex Offenders Registry, 6 October 2011.

<sup>10</sup> The *Sex Offenders Registration Act 2004* (Vic) requires the retrospective registration of offenders who were still subject to a specified sentencing order in respect of a registrable offence 'immediately before 1 October 2004': ss 3 (definition of 'existing controlled registrable offender'), 6(4). The specified sentencing orders include imprisonment, suspended terms of imprisonment, parole, home detention, drug treatment orders and others.

<sup>11</sup> *Sex Offenders Registration Act 2004* (Vic) s 6(5); *Sex Offenders Registration Regulations 2004* (Vic) reg 6.

- 3.17 Statutory inclusion occurs automatically once the adult offender has been sentenced for a Class 1 or Class 2 offence. There is no need for a court to make a registration order and, in fact, a court has no power to do so because of the automatic operation of the statutory scheme. However, the court must not have regard to any consequences under the Sex Offenders Registration Act when sentencing the offender.<sup>12</sup>
- 3.18 There is marked confusion about the statutory inclusion component of the registration scheme. Some judicial officers make registration orders in these circumstances because they believe the Act requires them to do so.<sup>13</sup> In other cases, the parties have assumed that an offender has avoided inclusion in the Register when the judicial officer has not made a formal registration order.<sup>14</sup>
- 3.19 As at 1 December 2011, approximately 97 per cent of those on the Sex Offenders Register had been automatically included following sentencing for Class 1 and Class 2 offences. Relying on statutory inclusion as the primary means of selecting offenders for inclusion in the Register has had a number of consequences that have weakened the effectiveness of registration as a law enforcement tool and as a source of information for child protection workers. These consequences, and recommended reforms to strengthen the scheme, are discussed in Chapter 5.

### Discretionary inclusion

- 3.20 Adult offenders may be included in the Sex Offenders Register at the discretion of the court if found guilty of any offence (including a Class 3 or Class 4 offence) other than a Class 1 or Class 2 offence.<sup>15</sup>
- 3.21 Offenders who commit a Class 1 or Class 2 offence, or any other offence (including a Class 3 or Class 4 offence) as a child may also be included in the Register at the court's discretion.<sup>16</sup> However, the court cannot make a registration order if it—
- without conviction, dismisses the charge and orders the giving of an undertaking, as permitted by sections 360(1)(b) and 360(1)(c) of the *Children, Youth and Families Act 2005* (Vic), or
  - without conviction, places the offender on a good behaviour bond, as permitted by section 360(1)(d) of that Act.<sup>17</sup>
- 3.22 The sentencing court exercises its discretionary power to include an offender in the Register by making a 'sex offender registration order'. The order requires the offender to comply with the reporting obligations of the Act.<sup>18</sup> Registration is, in effect, an administrative consequence of the order because the information the offender provides in compliance with the reporting obligations must be held in the Register.<sup>19</sup>
- 3.23 The court may make a registration order only if the prosecution applies for one within 30 days of sentencing<sup>20</sup> and the court satisfied beyond reasonable doubt that 'the person poses a risk to the sexual safety of one or more persons or of the community'.<sup>21</sup> It may take any matter that it considers appropriate into account in considering the application for the order, and is not required to identify who in particular may be at risk.<sup>22</sup>
- 3.24 Approximately 3 per cent of those currently on the Sex Offenders Register are there by way of a sex offender registration order. As at 1 December 2011, there were 139 offenders on

12 *Sentencing Act 1991* (Vic) s 5(2BC).

13 See, eg, Michelle Draper, 'Soldier on Sex Register a "Travesty"', *The Age* (online), 19 August 2011 <<http://news.theage.com.au/breaking-news-national/soldier-on-sex-register-a-travesty-20110819-1j1la.html>>; Whitney Harris, 'Listing on Sex Register Slammed', *Bendigo Advertiser* (Bendigo), 21 September 2011, 5.

14 See, eg, Submissions 2 (Name withheld); 4 (Sonya Karo).

15 *Sex Offenders Registration Act 2004* (Vic) s 11(1).

16 *Ibid* ss 11(1), (2A).

17 *Ibid* ss 6(3)(b), 11(5).

18 *Ibid* s 11.

19 *Ibid* s 6(2).

20 *Ibid* s 11(6).

21 *Ibid* ss 11(2)–(3).

22 *Sex Offenders Registration Act 2004* (Vic) ss 11(3)–(4). The requirement for the court to be satisfied of the risk 'beyond reasonable doubt' has been criticised for being too onerous. The test that a court should apply when making individual assessments about registration is discussed further in Chapter 5.

the Register as a result of a registration order. Of these, 43 were children at the time they committed the offence (though most are now adults).<sup>23</sup>

## Reporting obligations

3.25 Registered sex offenders are required to report details set out in the Act to Victoria Police at least once a year. Additionally, they must report when intending to travel interstate or overseas, and whenever the reported details change. All must report the same information. The period for which they must report depends on the class of the offence, the number of offences, and the offender's age.<sup>24</sup>

### The details that must be reported

3.26 All registered sex offenders must report the following information to an authorised member of Victoria Police<sup>25</sup> within seven days of being sentenced or, if they receive a custodial sentence, within seven days of being released from custody:<sup>26</sup>

- name(s) by which they are known
- any other name(s) by which they have been known in the past, and the period for which they were known by that name
- date of birth
- address of each place they reside for at least 14 days (whether consecutive or not) in any 12-month period or, if homeless, the localities in which they can generally be found
- telephone number
- email address
- name and business address of internet service provider
- internet, instant messaging, chat room or other user names or identities used through the internet or other electronic communication services
- names and ages of any children with whom they usually live or have unsupervised contact for at least three days (whether consecutive or not) in any 12-month period
- employment details, including work under an employment contract, as a self-employed person or sub-contractor, any practical training as part of an educational or vocational course, or work as a volunteer or for a religious organisation, for at least 14 days (whether consecutive or not) in any 12-month period
- details of affiliations with any clubs or organisations that have child membership or child participation in their activities
- details of any motor vehicle they own or drive on at least 14 days (whether consecutive or not) in any 12-month period
- details of any existing or former tattoos or permanent distinguishing marks
- details of any requirement to register and report under corresponding sex offender legislation
- details of any periods of government custody since they were either sentenced or released from custody for the registrable offence
- if they travel interstate at least once a month on average, or plan to do so, the reason, frequency and destinations of the travel<sup>27</sup>
- passport number and country of issue of each passport held.

23 Information provided by Victoria Police, 6 December 2011.

24 *Sex Offenders Registration Act 2004* (Vic) ss 34–5.

25 *Ibid* s 23(3).

26 *Ibid* ss 14–15.

27 This requirement is set out twice, in similar terms, at both s 14(1)(l) and s 21 of the *Sex Offenders Registration Act 2004* (Vic).

## Frequency of reports

- 3.27 The first time the required details are provided is known as the initial report.<sup>28</sup> The information must then be provided annually for the duration of the registered sex offender's reporting period.<sup>29</sup>
- 3.28 In addition to reporting annually, registered sex offenders must report any changes to the information they provide within the following periods:
- details of any children with whom they generally reside or have 'regular unsupervised contact'<sup>30</sup>—within one day of the change<sup>31</sup>
  - changes to any of the other details—within 14 days of the change<sup>32</sup>
  - periods in government custody for 14 or more consecutive days—within 28 days after ceasing to be in custody or before leaving Victoria, whichever is sooner.<sup>33</sup>
- 3.29 Those who travel interstate for two weeks or more, or leave the country for any period, must inform Victoria Police beforehand about the dates and destinations of the travel, where they will be living, and the approximate date of their return to Victoria, if applicable.<sup>34</sup> Reports of these details must be made at least seven days before leaving Victoria<sup>35</sup> and any subsequent changes must be reported as soon as practicable.<sup>36</sup>

## Method of reporting

- 3.30 All registered sex offenders must make their initial and annual reports in person at a police station.<sup>37</sup> They must also present themselves in person to report changes to where they live and any new, altered or removed tattoos or other permanent distinguishing marks.<sup>38</sup>
- 3.31 Offenders who live in remote locations may, with the prior agreement of the Chief Commissioner, provide the required information by telephone or other means if they cannot make their report in person in time.<sup>39</sup>
- 3.32 Other reports, including those concerning a change of travel plans, may be made by telephone to the Chief Commissioner or the Registrar (being a police officer appointed by the Chief Commissioner for the purpose).<sup>40</sup>
- 3.33 When reporting in person, the registered sex offender is entitled to do so out of the hearing of members of the public and may be accompanied by a support person of their choosing. Registered sex offenders who are children must be accompanied by a parent or guardian or, if neither is available, an independent person.<sup>41</sup> The accompanying adult may also make the report on behalf of the child.<sup>42</sup>
- 3.34 When the report is not required to be made in person, a parent, guardian, or independent person may make it on behalf of a registered sex offender who is a child.<sup>43</sup>
- 3.35 Similarly, if the registered sex offender has a disability that renders it impossible or impracticable to make a report, or to report in person, a parent, guardian, carer or anyone else they nominate

28 *Sex Offenders Registration Act 2004* (Vic) s 23(1)(a).

29 *Ibid* ss 16, 23(1)(b).

30 The meaning of 'regular unsupervised contact' is discussed in Chapter 7.

31 *Sex Offenders Registration Act 2004* (Vic) ss 14(2)(b)–(c), 17(1A). The change is deemed to occur once the person has resided with a child, or had unsupervised contact with a child, for at least 3 days (whether consecutive or not) in any period of 12 months: s 17(2).

32 *Sex Offenders Registration Act 2004* (Vic) s 17(1). A change to the offender's place of work is deemed to occur once the person is employed there for at least 14 days (whether consecutive or not) in any period of 12 months. Similarly, a change to the details of the motor vehicle they generally drive is deemed to occur once the person drives it on at least 14 days (whether consecutive or not) in any period of 12 months: ss 14(2)(d)–(e), 17(2).

33 *Sex Offenders Registration Act 2004* (Vic) s 17(4). Shorter periods in government custody can be reported at the next annual report: s 16(3).

34 *Sex Offenders Registration Act 2004* (Vic) s 18(2).

35 *Ibid* ss 18(1)–(2). If it is impracticable for the registered sex offender to make the report 7 days before leaving, they must report to the Chief Commissioner at least 24 hours before leaving Vic: s 18(3).

36 *Sex Offenders Registration Act 2004* (Vic) s 31; *Sex Offenders Registration Regulations 2004* (Vic) reg 13.

37 *Sex Offenders Registration Act 2004* (Vic) ss 23(1)(a)–(b).

38 *Ibid* ss 23(1)(c)–(d).

39 *Ibid* s 19(2).

40 *Sex Offenders Registration Regulations 2004* (Vic) regs 10, 13. Information about changed periods of absence from Victoria may also be made in writing, sent either by post or electronically: *Sex Offenders Registration Act 2004* (Vic) s 19(3).

41 *Sex Offenders Registration Act 2004* (Vic) s 24(1)(b).

42 *Ibid* s 23(4)(a).

43 *Ibid* s 23(4)(b).

may accompany them when they must report in person and/or make the report on their behalf.<sup>44</sup>

- 3.36 The police officers to whom they report must be authorised by the Chief Commissioner.<sup>45</sup> Currently, about 280 police officers have been designated as ‘compliance managers’ for this purpose. Their responsibilities under the registration scheme are in addition to their general duties.<sup>46</sup>
- 3.37 Detectives,<sup>47</sup> generally at the rank of senior sergeant, have primary responsibility for the management of registered sex offenders.<sup>48</sup> Lower ranking detectives and uniform senior sergeants, sergeants and officers in charge of police stations may also be compliance managers for registered sex offenders in their policing area, particularly in rural areas.<sup>49</sup> All compliance managers are trained in risk assessment and relationship building.<sup>50</sup>
- 3.38 A compliance manager may be responsible for monitoring the reporting obligations of as many as 120 registered sex offenders—or as few as two. Once the reporting period begins, the police conduct a risk assessment for resource allocation purposes. Higher risk offenders are monitored more closely than lower risk offenders.<sup>51</sup>
- 3.39 After receiving a report, the compliance manager must acknowledge it in writing and retain a copy of the acknowledgement. The acknowledgement must include the name of the compliance manager, details about when and where the report was received, and a copy of the reported information.<sup>52</sup>
- 3.40 Compliance managers must submit all information to the Sex Offenders Registry, the administrative unit within Victoria Police that manages the Sex Offenders Register.<sup>53</sup> They are also responsible for verifying information about changes to registered sex offenders’ personal details or travel plans, and must notify the Sex Offenders Registry of a breach of reporting obligations if an offender does not make their annual report and cannot be located.<sup>54</sup> The Victoria Police Manual requires compliance managers to notify the Department of Human Services if a registered sex offender reports that they have had unsupervised contact with children.<sup>55</sup>
- 3.41 The collection and management of information about unsupervised contact between registered sex offenders and children, including arrangements between Victoria Police and the Department of Human Services to share it, is discussed in Chapter 9.

### Proof of identity and the veracity of reported information

- 3.42 When providing a report in person, the registered sex offender must provide proof of identity by presenting a driver licence or other identifying documentation as specified in the regulations, and a passport-style photograph.<sup>56</sup> Payslips must be produced to substantiate employment details, and registration papers or other documentation must be provided to show that the offender owns or generally drives a particular motor vehicle.<sup>57</sup>
- 3.43 The compliance manager may take the offender’s fingerprints or finger scan instead of requiring proof of identity documents,<sup>58</sup> or if not reasonably satisfied of the offender’s identity after examining the documents.<sup>59</sup> The fingerprints or finger scan of a child may be taken only

44 Ibid ss 23(4)(b), (5)(b).

45 Ibid s 23(3).

46 Consultation 1 (Sex Offenders Registry, Victoria Police).

47 The Victoria Police Manual uses the term ‘investigators’: Victoria Police, *Victoria Police Manual: Procedures and Guidelines*, ‘Registered sex offenders’, provided by Victoria Police 11 May 2011, 1.

48 Victoria Police, *Victoria Police Manual: Procedures and Guidelines*, ‘Registered sex offenders’, provided by Victoria Police 11 May 2011, 1.

49 Ibid.

50 Consultation 1 (Sex Offenders Registry, Victoria Police).

51 Ibid.

52 *Sex Offenders Registration Act 2004* (Vic) s 25.

53 Victoria Police, above n 48, 2.

54 Ibid 1–3.

55 Ibid 1–2.

56 *Sex Offenders Registration Act 2004* (Vic) s 26(1); *Sex Offenders Registration Regulations 2004* (Vic) reg 11. This requirement may be waived if the police officer receiving the report takes the offender’s fingerprints or a finger scan, or is otherwise satisfied as to the offender’s identity: *Sex Offenders Registration Act 2004* (Vic) s 26(2).

57 *Sex Offenders Registration Regulations 2004* (Vic) reg 12.

58 *Sex Offenders Registration Act 2004* (Vic) s 26(2).

59 Ibid s 27.

if the child is accompanied by a parent or guardian or, if neither is available, an independent person.<sup>60</sup>

- 3.44 The police may also photograph the offender and, for this purpose, may require the offender to expose any part of the body on which there are tattoos or permanent distinguishing marks.<sup>61</sup> The police cannot require some parts of the body to be exposed<sup>62</sup> and the photography cannot occur where members of the public are present.<sup>63</sup> If practicable, the photographer and any other police officers present must be of the same sex as the offender.<sup>64</sup> The offender is entitled to be accompanied by a support person of their own choosing.<sup>65</sup> A child must be accompanied by a parent or guardian or, if neither is available, an independent person.<sup>66</sup>
- 3.45 If the offender refuses to cooperate voluntarily, reasonable force may be used to obtain a fingerprint or finger scan or take a photograph.<sup>67</sup> If practicable, the person who uses the reasonable force must be a police officer of the same sex as the offender.<sup>68</sup>
- 3.46 Victoria Police may retain copies of identifying documents, fingerprints, finger scans and photographs for the duration of the registered sex offender's reporting period, following which the material must be destroyed.<sup>69</sup> This identifying material is separate from photographs, fingerprints, DNA samples and other personal details that the police may have collected when investigating and prosecuting the offences and which may be retained for operational purposes.

## Notification of obligations

- 3.47 When a court imposes a sentence for a registrable offence it must give the offender written notice of the reporting obligations and the reporting period.<sup>70</sup> Upon release from government custody, the offender must again be given written notice of the reporting obligations and the consequences of failing to comply.<sup>71</sup> Should the reporting period subsequently change, the Chief Commissioner must ensure that the offender is notified of this in writing.<sup>72</sup>
- 3.48 Similarly, registrable offenders entering Victoria who have not previously been given notice of their reporting obligations, and those in Victoria who become corresponding registrable offenders because they are registered under an equivalent law in another jurisdiction, must be notified by the police as soon as practicable.<sup>73</sup>
- 3.49 A failure to provide written notice as required by the Act does not, of itself, affect the offender's reporting obligations.<sup>74</sup> However, in proceedings for failing to comply with an obligation, it is a defence to establish that, at the time, the offender had not received notice and was unaware of the obligation.<sup>75</sup>

## Reporting periods

- 3.50 Adult registered sex offenders are required to report for eight years, 15 years or the rest of their lives, depending on the offences they have committed.<sup>76</sup>

60 Ibid. 'Independent person' is not defined in the Act.

61 *Sex Offenders Registration Act 2004* (Vic) s 27A.

62 Ibid s 27A(2). A registrable offender cannot be required to expose their genitals, the anal area of their buttocks or, in the case of females or transgender people who identify as females, their breasts.

63 *Sex Offenders Registration Act 2004* (Vic) s 29(3)(a).

64 Ibid ss 29(3)(b)–(4).

65 Ibid s 29(5).

66 Ibid.

67 Ibid s 28(2).

68 Ibid s 28(3).

69 Ibid s 30.

70 Ibid ss 50(1)–(3), (5); *Sex Offenders Registration Regulations 2004* (Vic) table A.

71 *Sex Offenders Registration Act 2004* (Vic) ss 50(1)–(2). Depending on the form of government custody, it can be the Secretary to the Department of Justice, the Secretary to the Department of Human Services or the Chief Commissioner of Police who is responsible for giving this notice: *Sex Offenders Registration Act 2004* (Vic) s 50(3); *Sex Offenders Registration Regulations 2004* (Vic) table A.

72 *Sex Offenders Registration Act 2004* (Vic) s 52.

73 Ibid ss 50(1)–(2); *Sex Offenders Registration Regulations 2004* (Vic) table A.

74 *Sex Offenders Registration Act 2004* (Vic) s 55.

75 Ibid s 46(3).

76 Ibid s 34.

- 3.51 The reporting periods for child registered sex offenders are half that which would apply to an adult offender, but with a maximum of seven and a half years where an adult would be required to report for life.<sup>77</sup>
- 3.52 Calculating the reporting period can be quite complex. Table 2 summarises the provisions in the Act.

**Table 2—Statutory reporting periods**

Reporting period	Offences
<b>Adult offenders</b>	
8 years	One Class 2 or Class 4 offence
15 years	One Class 1 or Class 3 offence (other than persistent sexual abuse of a child under the age of 16), or Two Class 2 or Class 4 offences
Life	More than two Class 1 or Class 3 offences, or One offence of persistent sexual abuse of a child under the age of 16, or One Class 1 offence or Class 3 offence plus one or more Class 2 or Class 4 offences, or Three or more Class 2 or Class 4 offences
<b>Young offenders</b>	
4 years	Offences for which the reporting period for an adult is 8 years
7.5 years	All offences for which the reporting period for an adult is 15 years or life

- 3.53 Reporting obligations do not apply while the offender is in government custody. Table 3 shows the reporting periods that applied to registered sex offenders living in the community as at 1 December 2011.<sup>78</sup>

**Table 3—Reporting periods of registered sex offenders living in the community as at 1 December 2011**

Reporting period	Number
7.5 years or less (young offenders)	29
8 years	912
15 years	1178
Life	711

- 3.54 In Chapter 6, the Commission recommends a series of changes to the reporting periods, to strengthen the scheme in protecting children from the risk of harm from people who have previously been sentenced for child sexual offences.

## The Register

- 3.55 The Act makes the Chief Commissioner of Victoria Police responsible for establishing and maintaining the Register,<sup>79</sup> controlling access to it<sup>80</sup> and protecting the personal information in it from unauthorised disclosure.<sup>81</sup>
- 3.56 The Sex Offenders Registry has been established within Victoria Police to manage the Register. The Commission understands that the number of staff positions has recently increased to 20.<sup>82</sup> The information collected from registered sex offenders is held in hard copy paper files and in a Microsoft Access database.

77 Ibid s 35.

78 Information provided by Victoria Police, 6 December 2011.

79 *Sex Offenders Registration Act 2004* (Vic) s 62(1).

80 Ibid s 63(1)(a).

81 Ibid s 63(1)(b).

82 The Commission understands this number includes six detective senior sergeants, a forensic psychologist, two analysts and 11 compliance officers.

- 3.57 Registry staff enter information from the courts, Corrections Victoria, the Registry of Births, Deaths and Marriages, compliance managers and other sources into the Register. They also manually enter information into the Australian National Child Offender Register (ANCOR), held by the CrimTrac agency.<sup>83</sup>
- 3.58 The information in ANCOR is available to other law enforcement agencies and is used primarily to alert them to movements of registered sex offenders across state borders or overseas. Within Victoria Police, access to ANCOR is limited to registry staff and is similarly used to obtain information about registered sex offenders entering Victoria from other jurisdictions.
- 3.59 The Sex Offenders Registration Act does not specify when registration occurs or set out any registration procedure. Nor does it provide for a registered offender to be removed from the Register, as distinct from their reporting period ending. The Commission understands that these and other ambiguities in the legislation have led to confusion and inconsistencies in the administration of the scheme and procedural challenges for the Sex Offenders Registry.<sup>84</sup>
- 3.60 The Commission makes a number of recommendations about the use and disclosure of information contained in the Register in Chapter 9.

## Enforcement

- 3.61 It is an offence for a registered sex offender to fail to comply with any reporting obligation without a reasonable excuse.<sup>85</sup> The penalty was originally 240 penalty units or imprisonment for two years. In 2007, the penalty was increased to five years imprisonment.<sup>86</sup> When introducing the amending legislation into Parliament, the then Minister for Police and Emergency Services said the increase was necessary because ‘failure to report changes in personal details is a serious matter and is often an indicator of further offending’.<sup>87</sup>
- 3.62 A court may consider the following factors when determining whether a registered sex offender had a reasonable excuse for not complying with a reporting obligation:
- the registered sex offender’s age
  - whether the registered sex offender has a disability that affects their ability to understand or comply with the obligation
  - whether the form of notification given to the registered sex offender about the reporting obligation was adequate in the circumstances
  - any other matter the court considers appropriate.<sup>88</sup>
- 3.63 Providing false or misleading information is also an offence.<sup>89</sup> The maximum penalty is 240 penalty units or imprisonment for two years.<sup>90</sup>
- 3.64 During 2011, Victoria Police directed particular attention to enforcing compliance with the reporting obligations and the number of offenders being prosecuted for breaches has increased substantially. The number of breaches has doubled each year since 2008–09. The figures since the scheme began are in Table 4.

83 There are plans to migrate the Sex Offenders Register from the Access database to another system. When this occurs, the process of uploading data to ANCOR will be automated: Consultation 1 (Sex Offenders Registry, Victoria Police).

84 Consultation 8 (Manager, Sex Offenders Registry, Victoria Police).

85 *Sex Offenders Registration Act 2004* (Vic) s 46(1).

86 *Justice and Road Legislation Amendment (Law Enforcement) Act 2007* (Vic) s 16.

87 Victoria, *Parliamentary Debates*, Legislative Assembly, 19 July 2007, 2462–3 (Bob Cameron, Minister for Police and Emergency Services).

88 *Sex Offenders Registration Act 2004* (Vic) s 46(2).

89 *Ibid* s 47.

90 *Ibid*.

**Table 4—Breach offences by year<sup>91</sup>**

Year	Offences
2004–05	14
2005–06	59
2006–07	64
2007–08	111
2008–09	118
2009–10	255
2010–11	518

- 3.65 The police rely on common law powers to investigate possible offences under the Sex Offenders Registration Act and can exercise their powers of arrest, entry and search under the *Crimes Act 1958* (Vic)<sup>92</sup> if the offender breaches the reporting obligations. These powers are discussed in more detail in Chapter 6.<sup>93</sup>

91 Information provided by Victoria Police, 6 December 2011.

92 *Crimes Act 1958* (Vic) ss 458, 459A.

93 Police powers in relation to child protection prohibition orders are discussed in Chapter 8.



# Sex offenders and the risk of harm to children

- 46** Introduction
- 46** The need for a registration scheme
- 50** The effectiveness of registration
- 56** Conclusions from the data

## Introduction

- 4.1 This chapter examines the evidence base for establishing and maintaining the sex offenders registration scheme. As discussed in Chapter 2, the *Sex Offenders Registration Act 2004* (Vic) states that the scheme is intended to reduce the risk of re-offending.
- 4.2 This expectation conveys two beliefs. The first is that the incidence of child sexual abuse in the community has required the introduction of a regime to monitor people who have prior convictions for child sexual offences. The second is that a registration scheme deters and reduces re-offending by those people.
- 4.3 The evidence for these beliefs is discussed below.

## The need for a registration scheme

### The incidence of child sexual abuse

- 4.4 The incidence and prevalence of child sexual abuse are very difficult to quantify. It is under-reported and difficult to investigate. The victims are reluctant to disclose the abuse to their families for a variety of reasons; when they do, the families are reluctant to report it to the police or other authorities.<sup>1</sup>
- 4.5 Estimates of the incidence of child sexual abuse by researchers vary according to how they define the offences and collect data about them.
- 4.6 Australian studies that comprehensively measured the prevalence of sexually abusive behaviour against children in the general community have produced estimates in the following ranges:<sup>2</sup>

**Table 5—Estimates of the prevalence of child sexual abuse**

	Prevalence among males	Prevalence among females
Penetrative child sexual abuse	4–8%	7–12%
Non-penetrative child sexual abuse	12–16%	23–36%

- 4.7 Whether child sexual abuse is becoming more prevalent is difficult to determine. Smallbone, Marshall and Wortley have observed that, although child protection authorities are reporting increases in the number of substantiated cases of child sexual abuse, there is some evidence in Australia and overseas that abuse of this nature is declining.<sup>3</sup>

### Reported offences

- 4.8 Statistics of reported offences can provide only an indication of the incidence of child sexual abuse because these offences are under-reported.
- 4.9 In 2005, the Australian Bureau of Statistics conducted a Personal Safety Survey in which it collected information about men's and women's experiences of physical or sexual assault.<sup>4</sup> It found that there had been an increase in the incidence of reporting by women who had been sexually assaulted. During the 12 months before the 2005 survey, 19 per cent (19,100) of those assaulted had reported the sexual assault to the police. During the 12 months before a similar survey in 1996, 15 per cent (14,700) of those assaulted had reported the sexual assault to the police.<sup>5</sup>

1 Stephen Smallbone, William Marshall and Richard Wortley, *Preventing Child Sexual Abuse: Evidence, Policy and Practice* (Willan Publishing, 2008) 20.

2 Rhys Price-Robertson, Leah Bromfield and Suzanne Vassallo, *The Prevalence of Child Abuse and Neglect* (National Child Protection Clearinghouse, 2010).

3 Smallbone, Marshall and Wortley, *Preventing Child Sexual Abuse*, above n 1, 19. Research shows that victims are less likely to report to the police when the offender is known to them: Karen Gelb, *Recidivism of Sex Offenders* (Sentencing Advisory Council, 2007) 7.

4 Australian Bureau of Statistics, *Personal Safety Survey Australia, 2005*, Cat No 4906.0.

5 *Ibid* 8.

- 4.10 In 2007, drawing upon the results of the Personal Safety Survey, the Sentencing Advisory Council found that less than 20 per cent of victims of sexual assault reported the offence to police.<sup>6</sup> Under-reporting about sexual offences against children is likely to be even greater. Professor Paul Mullen observed in his submission that, although 30–50 per cent of child victims report the offence to someone, probably less than five per cent of the offences are reported to police.<sup>7</sup>

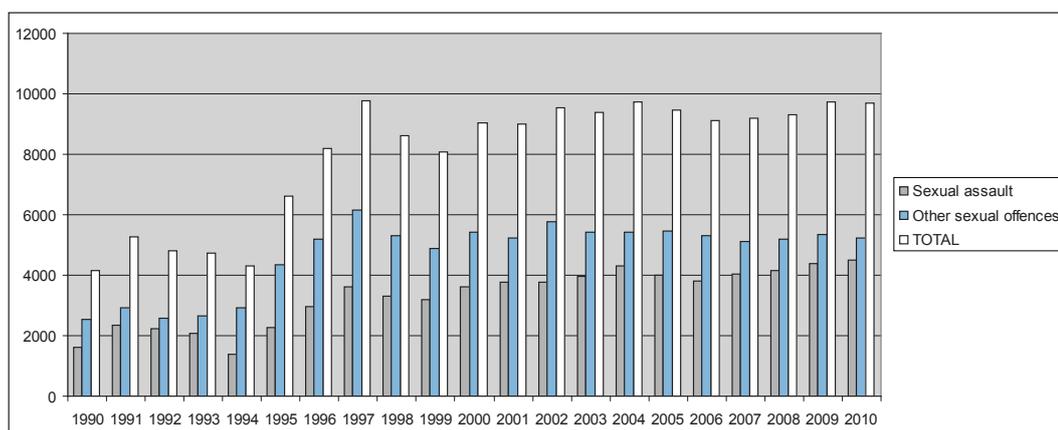
#### Police statistics on number of offences

- 4.11 The number of sexual offences reported to police is increasing. Statistics released by Victoria Police in August 2011 show that 1826 rape offences were reported in Victoria in the 2010–11 financial year, an increase of 9.3 per cent on the previous year.<sup>8</sup> Other sexual offences (non-rape) rose by 5.8 per cent from 5421 to 5735.<sup>9</sup>
- 4.12 Also in 2010–11, the Australian Federal Police charged 128 people across Australia with carriage service child offences,<sup>10</sup> which include producing, possessing, transmitting and soliciting pornography and using services to groom children for sexual purposes.<sup>11</sup>

#### New South Wales Bureau of Crime Statistics

- 4.13 The New South Wales Bureau of Crime Statistics has undertaken longer-term analysis of trends in sexual offences. The Bureau recently published a report by Steve Moffat and Derek Goh on trends in the rates of 10 major categories of property and violent crime over the 20-year period 1990–2010 in New South Wales.<sup>12</sup> While the rates for most offences declined, the rate of sexual assault grew by 128 per cent and that of other sexual offences by 67 per cent. The sharpest rises were in the mid to late 1990s and the rate of increase has eased since then. Nevertheless, sexual assault was the only offence that registered an upward trend over the period and was at its highest in 2010. The trend for other sexual offences is stable.<sup>13</sup>
- 4.14 Figure 1 has been prepared from statistics published in the report.
- 4.15 Trends similar to those identified in New South Wales are likely to have occurred in Victoria, though these figures refer to all sexual offences and the trend for child sexual offences may be different.

**Figure 1—New South Wales sexual offence crime statistics 1990–2010<sup>14</sup>**



6 Karen Gelb, *Recidivism of Sex Offenders* (Sentencing Advisory Council, 2007) 4.

7 Submission 23 (Professor Paul Mullen).

8 Victoria Police, *Official Release Crime Statistics: 2010/2011* (30 August 2011) 6.

9 Rape offences include rape and buggery (repealed) only, all other sexual offences fall into the non-rape category: *ibid* 49.

10 Note that these offences do not include state and federal child pornography/carriage service offences prosecuted by the Victorian Office of Public Prosecutions. The state and federal prosecution agencies have a memorandum of understanding about which agency prosecutes cases including both state and federal offences: Office of Public Prosecutions, *Prosecution Policies and Guidelines: Protocols for Prosecution of Joint State/Commonwealth Matters*, 17 <<http://www.opp.vic.gov.au/home/opp+-+prosecution+policies+and+guidelines+%28pdf%29>>.

11 Australian Federal Police, *Number of charges/offenders for online child sex offences* (2011) <<http://www.afp.gov.au/media-centre/facts-stats/online-child-sex-offences.aspx>>.

12 Steve Moffat and Derek Goh, *Crime and Justice Statistics Bureau Brief: An Update of Long-Term Trends in Property and Violent Crime in New South Wales 1990-2010* (New South Wales Bureau of Crime Statistics, 2011).

13 *Ibid* 2–3.

14 Figure created from data in Moffat and Goh, above n 12, 5.

### Australian Bureau of Statistics data on victims

- 4.16 Every year, the Australian Bureau of Statistics publishes information from police records about the number of victims of sexual offences. These statistics are different from those published by police forces in individual states and territories because different definitions of offences and counting methodologies are used.
- 4.17 National recorded crime victims statistics are compiled on a victim basis— they count the number of victims for each individual offence category as determined by the Australian and New Zealand Standard Offence Classification, rather than the number of breaches of the criminal law. By comparison, the Victoria Police statistics count the number of offences.
- 4.18 According to the Australian Bureau of Statistics,<sup>15</sup> there were 3463 reported victims of sexual offences in Victoria during 2010. Of these, 1000 were victims under the age of 15. A further 962 were between 15 and 19 years of age.
- 4.19 As Table 6 shows, these results are consistent with those compiled in previous years.
- 4.20 There is an apparent discrepancy between the Victoria Police statistics relating to the increase in the number of reported sexual offences and the Australian Bureau of Statistics figures, which show a smaller growth in victim numbers. This disparity may well be due to the commission of multiple offences against a single victim.<sup>16</sup>

**Table 6—Victims of sexual offences 2006–10, by age group and sex, Victoria<sup>17</sup>**

Age range*	2006		2007		2008		2009		2010	
	Female	Male								
0–9	125	56	240	103	104	114	238	102	214	104
10–14	359	48	670	116	700	102	592	86	555	122
15–19	635	62	985	74	886	113	823	73	890	72
20+	1326	167	1649	229	1699	188	1250	130	1337	133
<b>Total</b>	<b>2445</b>	<b>333</b>	<b>3544</b>	<b>522</b>	<b>3389</b>	<b>517</b>	<b>2903</b>	<b>391</b>	<b>2996</b>	<b>431</b>

\* includes unspecified age

### Court cases

- 4.21 Although it is impossible to gauge the precise level of sexual offending in the community, the prosecution of these offences is increasing.
- 4.22 Sexual offences constituted 12.5 per cent of the County Court’s criminal workload in 2001–02.<sup>18</sup> In 2009–10, the proportion was 20 per cent.<sup>19</sup> Over the same period, the number of sexual offence cases initiated in the County Court each year grew by 55 per cent, from 324 to 502. However, as the data in Figure 2 shows, the number of new cases decreased in 2009–10.

<sup>15</sup> Australian Bureau of Statistics, *Recorded Crime—Victims, Australia, 2010*, Cat No 4510.0.

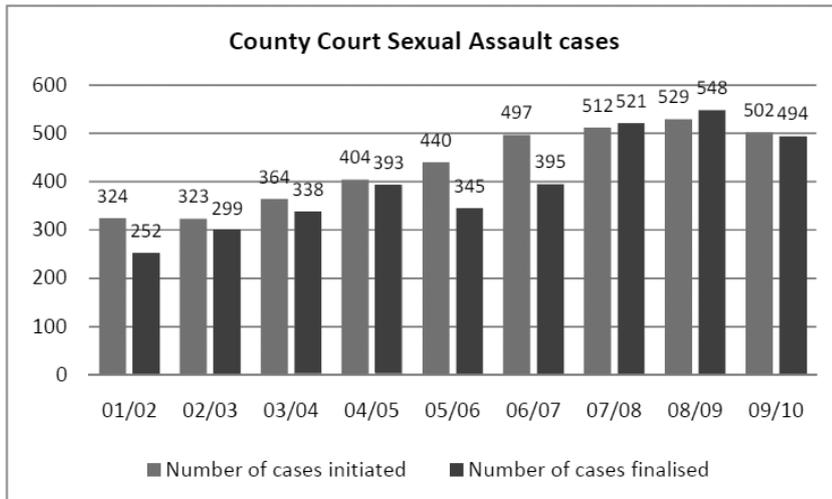
<sup>16</sup> For example, in the period 2006–07 to 2007–08, the average number of sexual offences sentenced for cases with sexual penetration of a child aged 10 to under 16 was 9.8: Sentencing Advisory Council, *Sentencing for Sexual Penetration Offences: A Statistical Report (2009)* 33.

<sup>17</sup> Information compiled from reports by the Australian Bureau of Statistics on recorded crime. Australian Bureau of Statistics, *Recorded Crime—Victims, Australia, 2006*, Cat No 4510.0; Australian Bureau of Statistics, *Recorded Crime—Victims, Australia, 2007*, Cat No 4510.0; Australian Bureau of Statistics, *Recorded Crime—Victims, Australia, 2008*, Cat No 4510.0; Australian Bureau of Statistics, *Recorded Crime—Victims, Australia, 2009*, Cat No 4510.0; Australian Bureau of Statistics, *Recorded Crime—Victims, Australia, 2010*, Cat No 4510.0; <<http://www.abs.gov.au/ausstats/abs@.nsf/mfi/4510.0>>.

<sup>18</sup> Success Works, *Sexual Assault Reform Strategy: Final Evaluation Report*, prepared for the Department of Justice (2011) 129.

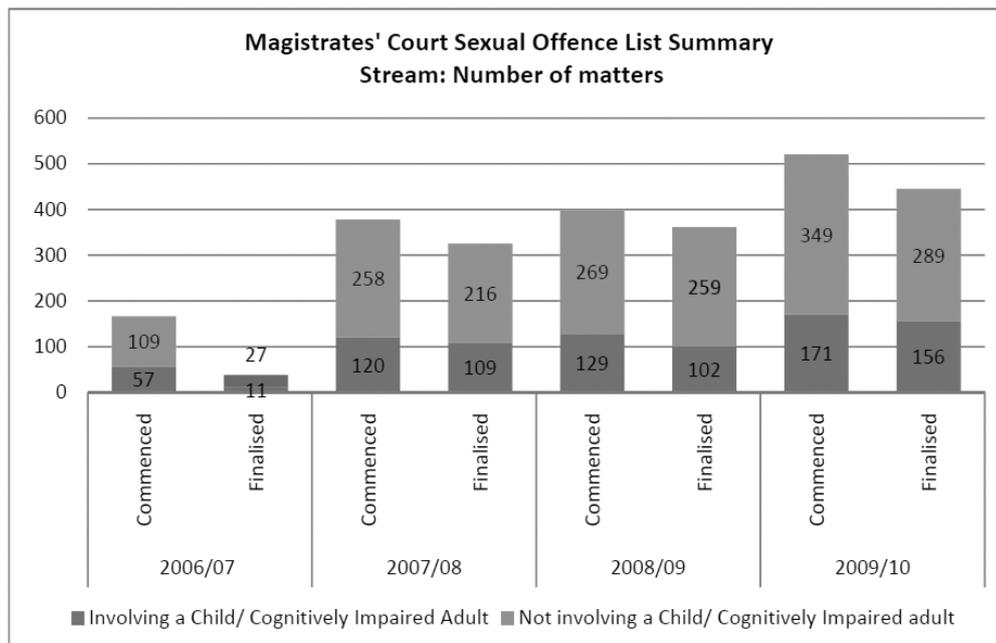
<sup>19</sup> Ibid.

**Figure 2—County Court Sexual Assault Cases 2001–02 to 2009–10<sup>20</sup>**



- 4.23 In 2010–11, sexual offences again made up less than a quarter of all criminal matters initiated in the County Court. However, they accounted for 46 per cent of all criminal trials.<sup>21</sup> One reason for this is that, compared to other criminal cases, sexual offence cases more frequently go to trial. While 74 per cent of non-sexual offence cases in 2010–11 were finalised by the offender pleading guilty, only 50 per cent of sexual offences were resolved this way.<sup>22</sup>
- 4.24 Sexual offence cases involving a child or a cognitively impaired witness accounted for 38 per cent of sexual offence trials in the County Court in 2010–11.<sup>23</sup>
- 4.25 A sharper increase in workload has occurred in the Magistrates’ Court and the trend remains upward, as shown in Figure 3.<sup>24</sup> The number of cases initiated in the sexual offences summary stream more than tripled in the three years between 2006–07 and 2009–10. While 109 cases were initiated in 2006–07, there were 349 in 2009–10.<sup>25</sup>

**Figure 3—Magistrates’ Court Sexual Offence List Summary Stream: Number of Matters 2006–07 to 2009–10<sup>26</sup>**



20 Ibid 130.  
 21 County Court of Victoria, *Annual Report 2010-2011* (2011) 3, 15.  
 22 Ibid 15.  
 23 Ibid.  
 24 Note that this specialist list commenced operation in 2006.  
 25 Success Works, above n 18, 99.  
 26 Ibid.

- 4.26 When the Magistrates' Court and County Court figures are combined, it is clear that there has been a significant increase in the prosecution of sexual offences.

### Child protection complaints

- 4.27 The Australian Institute of Health and Welfare publishes annual reports on state and territory child protection services. The most recent report was for 2009–10. During that year, the number of children who were subject to a notification decreased by 10 per cent nationally (from 207,462 to 187,314), though the number of children on protection orders increased by seven per cent (from 35,409 to 37,730).<sup>27</sup>
- 4.28 According to figures published by the Australian Institute for Health and Welfare, the number of substantiated cases of maltreatment of children in Victoria in 2009–10 was 6603. The most prevalent form of substantiated maltreatment was emotional abuse (3137 cases), followed by physical abuse (2468 cases), sexual abuse (526 cases) and neglect (472 cases).<sup>28</sup> While it is possible that sexual abuse was under-represented because it is harder to prove than emotional or physical abuse, it is clearly not the most prevalent form of harm to children that is reported in Victoria.
- 4.29 More recent figures from the Department of Human Services indicate that the number of substantiated cases of child sexual abuse grew in 2010–11, though reports of sexual abuse are still a small proportion of all child protection reports. During 2010–11, the Department received 55,137 child protection reports from members of the community and mandatory reporters.<sup>29</sup> Of these, 8232 were substantiated. Sexual abuse was the primary substantiated type of harm in 795 (9.6 per cent) cases.<sup>30</sup>
- 4.30 While the data indicates that reports of and prosecutions for sexual offences are increasing, it is unclear whether the incidence of child sexual abuse has increased. In view of the low rate of reporting of child sexual offences, it is difficult to determine whether an increase in reported offences is simply an increase in the rate of reporting rather than an indication that more sexual offences are being committed. Other reasons, such as changes to the ways in which these cases are handled by the police and the courts, might explain the increase in reports of child sexual abuse and the increasing number of prosecutions.

### The effectiveness of registration

- 4.31 The Sex Offenders Registration Act is based on the assumption that sex offenders are less likely to re-offend if they are required to comply with reporting obligations under a registration scheme. However, the existing limited research data is equivocal as to whether registration is an effective means of reducing re-offending.

### The risk from sex offenders in context

- 4.32 In considering the need for a registration scheme and the contribution it can make to the incidence of child sexual offending, it is important to be mindful that most child sexual offences are committed by persons known to the victim.
- 4.33 Sexual assaults by strangers are uncommon. Of the 1000 victims of sexual assault in Victoria in 2010 who were under the age of 15, 399 (40 per cent) were assaulted by family members and

27 Australian Institute of Health and Welfare, *Child Protection Australia 2009-10*, Child Welfare Series No 51, Cat No CWS 39 (2011) vii. What constitutes a notification may vary across jurisdictions. For example, in some jurisdictions all contacts to the authorised department regarding concerns for children (and child protection reports) are considered to be a notification. In other jurisdictions, the initial report is subject to an assessment and considered a notification only when the information received suggests that a child needs care or protection. Care and protection orders are legal orders or arrangements that give child protection departments some responsibility for a child's welfare: at 3.

28 Australian Institute of Health and Welfare, *Child Protection Australia 2009-10*, Child Welfare Series No 51, Cat No CWS 39 (2011) 68. If a child was the subject of more than one type of abuse or neglect as part of the same notification, the type of abuse or neglect reported is the one considered by the child protection workers to cause the most harm to the child. Where a child is the subject of more than one substantiation during the year, the type of abuse or neglect reported is the one associated with the first substantiation decision during the year.

29 Department of Human Services, *Annual Report 2010-2011*, 48.

30 Information provided by the Department of Human Services, 24 August 2011.

- 499 (50 per cent) by someone else they knew. Assaults by strangers accounted for 67 (7 per cent) of the cases. In 41 cases, the relationship of the offender to the victim was not known.<sup>31</sup>
- 4.34 These statistics are consistent with research findings in Australia and overseas concerning sexual assaults against children. In a 2007 Australian study of 182 men sentenced for sexual offences against children, 56.5 per cent self-reported that they lived with the victim at the time of the offence, and 36.9 per cent reported that they knew the child at the time of the offence. Only 6.5 per cent were strangers.<sup>32</sup>
- 4.35 The Australian Bureau of Statistics Personal Safety Survey in 2005 reported that the relationship of victims to the perpetrator varies by the sex of the victim.<sup>33</sup> Girls under the age of 15, who are far more likely than boys of the same age to be the victims of sexual offending, are most likely to be abused by a relative. The perpetrator identified most often by the survey was a male relative other than the girl's father or stepfather (35.1 per cent). The next most prevalent perpetrator was the girl's father or stepfather (16.5 per cent) or a family friend (16.5 per cent), followed by an acquaintance or neighbour (15.4 per cent), another known person (11 per cent) or a stranger (8.6 per cent).
- 4.36 Boys under the age of 15 are most at risk from someone to whom they are not related. The survey showed that the perpetrator was often known to the boy but was not a relative, family friend, acquaintance or neighbour (27.3 per cent). Strangers accounted for 18.3 per cent of the surveyed cases of sexual abuse of boys. The next most prevalent perpetrators were a male relative other than a father or stepfather (16.4 per cent), an acquaintance or neighbour (16.2 per cent) and a family friend (15.6 per cent).<sup>34</sup>
- 4.37 These figures indicate that preventative and protective measures should be directed toward intra-familial risks of offending as well as to the far less prevalent risk of 'stranger danger'.
- 4.38 The available data also suggests a need for measures to be directed to protecting children from the risk of harm from individuals with no prior sexual offending history. It is very important to bear in mind that most child sexual offences are committed by people who have not previously been convicted of an offence of that type. For example, over the period 2006–07 to 2007–08, 93.1 per cent of the charges in Victoria for sexual penetration of a child aged 10 to 16 were against defendants with no prior convictions for sexual offences. The highest proportion of defendants with a prior sexual offence conviction occurred in cases with charges of sexual penetration with a child aged under 10 (22.5 per cent).<sup>35</sup>
- 4.39 Smallbone, Marshall and Wortley, who have conducted extensive research into sexual offending, advocate an evidence-based prevention-centred approach to addressing the problem. They propose a public health model focusing on how to target offenders, victims, situations and communities at different levels.<sup>36</sup> As offenders, victims and the circumstances in which offending occurs interact differently and the consequences vary, broader prevention strategies than can be provided by a registration scheme are needed.

## Recidivism rates of child sex offenders

- 4.40 The design of the sex offenders registration scheme, and particularly the statutory inclusion of all offenders who are sentenced for certain offences, reflects an assumption that all sex offenders are likely to re-offend. In a recent paper published by the Australian Institute of Criminology, Kelly Richards observed that 'in public and media discourse, child sex offenders are often constructed as compulsive recidivists who are virtually certain to re-offend'.<sup>37</sup> Richards has contrasted this with the view, often expressed by criminologists, that sex offenders have low rates of recidivism compared with other types of offenders.<sup>38</sup>

31 Australian Bureau of Statistics, *Recorded Crime—Victims*, above n 15.

32 Richard Wortley and Stephen Smallbone, 'Ten Myths about Child Sex Offenders' (Paper presented at the Australian and New Zealand Society of Criminology Conference: Criminology and Human Rights, Hobart, 7–9 February 2006), cited by Gelb, above n 6, 7.

33 Australian Bureau of Statistics, *Personal Safety Survey*, above n 4.

34 Ibid 42. See also Kelly Richards, *Misperceptions about Child Sex Offenders* (Australian Institute of Criminology, 2011) 3.

35 Sentencing Advisory Council, *Sentencing for Sexual Penetration Offences: A Statistical Report* (2009) 27.

36 Smallbone, Marshall and Wortley, *Preventing Child Sexual Abuse*, above n 1, 197.

37 Kelly Richards, *Misperceptions about Child Sex Offenders* (Australian Institute of Criminology, 2011) 4.

38 Ibid.

- 4.41 Many studies have examined the recidivism rates of sex offenders overseas, but few have been completed in Australia. According to Karen Gelb, in a paper published by the Sentencing Advisory Council, the Australian results are consistent with a large body of international research, which has found that 'most serious violent and sexual criminals do not have previous convictions for violent or sexual offences and are not reconvicted for violent and sexual offending'.<sup>39</sup>
- 4.42 Recidivism is not easy to measure. Researchers use different definitions and methodologies and the rates they calculate are not necessarily comparable.<sup>40</sup> In any event, the rates they identify are likely to be conservative because sexual offences are under-reported.
- 4.43 Several large-scale studies overseas have found sex offenders to have lower recidivism rates and less criminal history than those committing non-sexual serious crimes.<sup>41</sup> Significantly, they have found that different types of sex offenders re-offend at different rates.
- 4.44 In 1998, a Canadian analysis of 61 studies of rates of recidivism of sexual offenders<sup>42</sup> found that an average of 13.4 per cent committed further sexual offences.<sup>43</sup> However, the average re-offence rate for rapists was 18.9 per cent, while that for child sex offenders was 12.7 per cent.<sup>44</sup> Another study in 2005 yielded similar results, revealing a 13.7 per cent recidivism rate for sexual offences.<sup>45</sup>
- 4.45 When examining the nature and incidence of sexual offending, it is useful to make a distinction between sex offenders and other offenders, and further distinguish between different types of sex offenders. In practice they are not so easily categorised. Sex offenders tend to have versatile criminal careers, with their sexual offending embedded in more general offending behaviour.<sup>46</sup> For example, evidence shows that child sex offenders are more than twice as likely to be convicted of non-sexual offences as sexual offences, both before and after the sexual offending.<sup>47</sup>
- 4.46 Based on Australian research, Wortley and Smallbone<sup>48</sup> have argued against the widely held view that most sex offenders are 'dedicated serious offenders drawn by irresistible sexual urges'. Their research into registered sex offenders found the following characteristics:<sup>49</sup>
- Fewer than a quarter had previous convictions for sexual offences but a majority had previous convictions for non-sexual offences.
  - 94 per cent abused their own child or a child they already knew.
  - Many began their offending behaviour when well into adulthood, and more than a third began when between 31 and 40 years of age.
  - There was not a great deal of networking among offenders and only about 8 per cent had talked to other offenders.
  - There was a low incidence of child pornography use, with only about 10 per cent having used it.
  - There was a low incidence of other deviant sexual behaviour.
- 4.47 The risk of re-offending is greatest for those offenders who started offending at an early age, have stable deviant sexual preferences, have multiple convictions for sexual offending, have

39 Gelb, above n 6, 21–22.

40 For example, recidivism can be variously measured as rates of re-conviction, or re-arrest, or self-reported re-offending: Richards, above n 37, 4.

41 Terance D Miethe, Jodi Olson and Ojmarrh Mitchell, 'Specialization and Persistence in the Arrest Histories of Sex Offenders: A Comparative Analysis of Alternative Measures and Offense Types' (2006) 43(8) *Journal of Research in Crime and Delinquency* 204, 207.

42 R K Hanson and M T Bussiere, 'Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism Studies' (1998) 66(2) *Journal of Consulting and Clinical Psychology* 348.

43 That is the rate of committing further sexual offences. The authors note that we should treat these statistics with caution as the studies had different follow up periods and not all sexual offences are reported.

44 Hanson and Bussiere, above n 42, 351.

45 Ibid.

46 Gelb, above n 6, vii.

47 Smallbone, Marshall and Wortley, *Preventing Child Sexual Abuse*, above n 1, 9.

48 Richard Wortley and Stephen Smallbone, 'Applying Situational Principles to Sexual Offences Against Children', in Richard Wortley and Stephen Smallbone (eds), *Situational Prevention of Child Sexual Abuse*, Child Prevention Studies 19 (Criminal Justice Press, 2006) 7–35.

49 Ibid.

committed diverse sexual offences and target male child victims.<sup>50</sup> The size of the group may be small but these offenders present a danger of serious harm to the community.<sup>51</sup>

4.48 Although calculating recidivism rates is an ongoing challenge, the research suggests protective legislative responses to the risk that a sex offender will re-offend should be responsive to different levels of risk and not be based on the common assumption that recidivism is inevitable in all cases.

4.49 The evidence indicates that not all child sex offenders are alike. They do not all behave in the same way. Not all child sex offenders are paedophiles. Paedophiles are sexually attracted to young children. Other offenders may be sexually interested in adults as well as children and act out of opportunity rather than preference. Moreover, not all paedophiles are sex offenders. Although attracted to children they may not act on the attraction. As Gelb concluded after surveying the research in Australia and overseas:

Across all these studies, one consistent result has emerged: substantially different recidivism rates and patterns and precursors of offending are found for different types of sex offender. This variation has implications for risk assessment and treatment, and also highlights the theoretical and policy dangers of seeing sex offenders as a homogenous and coherent group, when in fact the evidence suggests this is not the case.<sup>52</sup>

### Risk assessment tools

4.50 As Gelb has observed, 'the prediction of risk of re-offending is notoriously difficult and often inaccurate'.<sup>53</sup> There are a number of methods used by psychologists and psychiatrists for this purpose, and the balancing of factors that increase or decrease the risk has become more finely tuned over time. However, leading clinicians have observed that:

With recent advances in the field of risk assessment, the available methods to predict risk for future sex offending are significantly better than chance but still relatively moderately accurate.<sup>54</sup>

4.51 Clinicians employ static and dynamic predictors of risk. Static predictors are unchanging historical factors that have been found to be related to recidivism. Dynamic predictors are factors that contribute to risk but change over time. They may be stable, which means they change slowly, or acute, which means they may be present for a short period.

4.52 There are two broad approaches to risk assessments—actuarial instruments and structured professional judgment.<sup>55</sup> The Static 99 is a widely used actuarial instrument that has been designed to estimate the risk of sexual recidivism among adult males who have been convicted of at least one child sexual offence. It measures 10 factors that have been shown to have a connection with sexual re-offending. These factors are weighted and a score is given against each.

4.53 As an actuarial tool, the Static 99 can provide a foundation for further analysis but does not assist in understanding the ongoing changeable nature of the risk that a particular individual will re-offend. The individual is associated with data about a group of people with similar characteristics. The risk of re-offending applies to the group in which the individual is placed because of their score.<sup>56</sup> There is particular concern about static assessments being used in court, where their limitations may not be understood.<sup>57</sup>

4.54 Recognition of the limitations of relying on static factors led to the development of instruments which assess dynamic factors. The Sex Offender Needs Assessment Rating, for example, measures stable and acute dynamic factors. The stable dynamic factors include intimacy

50 Gelb, above n 6, vii. See also Hanson and Bussiere, above n 42, vii.

51 Gelb, above n 6, 1.

52 Ibid 29.

53 Ibid 30.

54 James Ogloff and Dominic Doyle, 'A Clarion Call: Caution and Humility must be the Theme when Assessing Risk for Sexual Violence under Post-Sentence Laws' (2009) 2(1) *Sexual Abuse in Australia and New Zealand* 59, 59.

55 Dominic J Doyle, James R P Ogloff and Stuart D M Thomas, 'An Analysis of Dangerous Sexual Offender Assessment Reports' (2011) 18(4) *Psychiatry, Psychology and Law* 537, 539.

56 Ogloff and Doyle, 'A Clarion Call', above n 54.

57 Bernadette McSherry and Patrick Keyzer, *Sex Offenders and Preventive Detention: Politics, Policy and Practice* (Federation Press, 2009); Doyle, Ogloff and Thomas, 'An Analysis of Dangerous Sexual Offender Assessment Reports', above n 55.

deficits, negative social influences, attitudes tolerant of sexual offending, sexual self-regulation and general regulation, all assessed over the preceding 12 months. The acute dynamic factors are substance abuse, negative mood, anger and victim access, assessed over the preceding 6–12 months.<sup>58</sup>

4.55 The second broad approach to risk assessment, structured professional judgment, takes into account both historical and dynamic risk factors. In view of the criticisms of actuarial assessment, and the shortcomings of the earlier type of tests, some mental health professionals prefer to use their professional judgment within a structured framework to consider relevant static and dynamic factors and their likely impact on future offending. Examples of this type of assessment include the Sexual Violence Risk-20 and the Risk for Sexual Violence Protocol.

4.56 Professor James Ogloff, Director, Centre for Forensic Behavioural Science, Monash University and Director of Psychological Services, Forensicare, and Dominic Doyle, clinical and forensic psychologist, Forensicare, contend that:

Due to their recent development, the [structured professional judgment] approach has only been evaluated in a handful of studies; although this research has generally been quite promising and has found that the SVR-20 is predicting sexual offending with moderate to high degrees of accuracy.<sup>59</sup>

4.57 Experienced psychiatrists and psychologists commonly use the structured professional judgement approach when preparing risk assessment reports for courts.

4.58 In *Secretary to the Department of Justice v AB*, counsel for the respondent challenged the reliability of the risk assessment instruments that were used to determine the likelihood that AB would commit a relevant sexual offence if released into the community without supervision.<sup>60</sup> Judge Iain Ross<sup>61</sup> described the relevant instruments and provided an analysis of their accuracy and usefulness.<sup>62</sup> While cautioning against using them in a mechanistic way, he concluded that they provide a legitimate component of a structured clinical judgment about an individual offender. Judge Ross agreed with and adopted the conclusion of the New Zealand Court of Appeal in *R v Peta*:

Risk assessments and the related judicial decision making for risk management are best informed through an individualised formulation of risk. This should draw upon a variety of different sources of information in an attempt to identify risk factors within a aetiological (causative) framework. This recognises that risk is contingent upon factors that are both environmental and inherent in the individual. Such an approach also helps avoid the shortcomings of a mechanical and potentially formulaic assessment of risk, one that is overly reliant on static historical factors and potentially insensitive to features of the individual that change with time and context.<sup>63</sup>

4.59 This conclusion suggests that the risk assessments by clinicians with expertise in using the available assessment methods and instruments to inform their opinions can be of assistance to the court, though it is important to acknowledge the limitations of the tools used. The Commission notes the sombre warning of Doyle, Ogloff and Thomas that dependence on risk assessment for the operation of post-sentence schemes for managing serious sex offenders 'places a considerable burden on the clinician and raises expectations that are perhaps impossible to attain'.<sup>64</sup>

## The existing research into the effectiveness of registration schemes

4.60 Much of the research into the effectiveness of sex offender registration is from the United States, and is therefore not directly applicable to the Australian context. The United States schemes include community notification, whereby sex offender registers are made public, and residence restrictions, which prohibit registered sex offenders from living within a certain

58 *Secretary to the Department of Justice v AB* [2009] VCC 1132 (16 September 2009) [300]–[304].

59 Dominic J Doyle and James R P Ogloff, 'Calling the Tune Without the Music: A Psycho-Legal Analysis of Australia's Post-Sentence Legislation' (2009) 42(2) *Australian and New Zealand Journal of Criminology* 179, 195.

60 *Secretary to the Department of Justice v AB* [2009] VCC 1132 (16 September 2009) [288].

61 Now Justice Ross of the Supreme Court of Victoria.

62 *Secretary to the Department of Justice v AB* [2009] VCC 1132 (16 September 2009).

63 *R v Peta* [2007] 2 NZLR 627, [52].

64 Doyle, Ogloff and Thomas, 'An Analysis of Dangerous Sexual Offender Assessment Reports', above n 55, 538.

distance of places like schools, kindergartens and playgrounds.<sup>65</sup> With these limitations in mind, research from the United States is equivocal about the effectiveness of registration in reducing sexual re-offending.

### Effectiveness of registration alone

- 4.61 The Commission is aware of only one United States study that evaluates registration separately from community notification.<sup>66</sup> This study focused on the law enforcement purposes of registration, as distinct from the aim of notification laws ‘to reduce crime through greater public awareness of nearby offenders’.<sup>67</sup>
- 4.62 The study found no evidence that fear of registration deters non-registered people from committing sexual offences.<sup>68</sup> However, it found that registration does reduce sexual offending by registered sex offenders against people who are close to them, but not against strangers.<sup>69</sup> The authors suggest that this effect of registration is achieved by law enforcement agencies monitoring offenders.<sup>70</sup>

### Effectiveness of registration coupled with community notification

- 4.63 A 2008 study followed 550 sex offenders released from custody between 1990 and 2000.<sup>71</sup> This study assessed the effectiveness of Megan’s Law, a federal law introduced in 2006 that required all states to make their sex offender registers publicly accessible via the internet.<sup>72</sup> It found that this law ‘showed no demonstrable effect in reducing sexual reoffenses’ and ‘no effect on reducing the number of victims involved in sexual offenses’.<sup>73</sup> The Commission reiterates that United States studies must be viewed with some caution because of the community notification elements of the sex offender registration schemes.
- 4.64 A 2009 review of the existing research into registration and community notification found that:
- Regarding specific deterrence, the weight of the evidence indicates the laws have no statistically significant effect on recidivism ... we tentatively conclude that existing research does not offer much policy guidance on the specific deterrent effect of registration/ notification laws.<sup>74</sup>
- 4.65 A 2010 summary of existing research into the effectiveness of sex offender registration and notification laws in the United States found that eight out of nine recent studies failed to find any clear effect of these laws on sexual offence recidivism.<sup>75</sup> These authors also conducted their own study of South Carolina’s sex offender registration and notification laws, which closely replicate the federal laws, and found:
- Results indicated that offender registration status at the time of recidivism was not associated with reduced risk of sex crime recidivism or reduced time to detection of sex crime recidivism ... There was no evidence that South Carolina’s broad [sex offender registration and notification] policy decreased recidivism rates.<sup>76</sup>

65 See Appendix F for a discussion of registration, community notification, residence restrictions and civil commitment in the United States.

66 J J Prescott and Jonah E Rockoff, ‘Do Sex Offender Registration and Notification Laws Affect Criminal Behaviour?’ (2011) 54(1) *Journal of Law and Economics* 161,163. The study followed the evolution of sex offender registration and notification laws in a number of US states from 1990, using the National Incident-Based Reporting System as its primary data source: at 165. The study was discussed in Submission 29 (Dr Astrid Birgden).

67 J J Prescott and Jonah E Rockoff, ‘Do Sex Offender Registration and Notification Laws Affect Criminal Behaviour?’ (2011) 54(1) *Journal of Law and Economics* 161, 163.

68 Ibid 180. The study found, however, that notification laws may deter non-registered individuals from sexual offending: at 164–5, 181.

69 Ibid 180–4.

70 Ibid 180.

71 Kristen Zgoba et al, *Megan’s Law: Assessing the Practical and Monetary Efficacy* (December 2008). Submission 29 (Dr Astrid Birgden) discusses this study.

72 Kristen Zgoba et al, *Megan’s Law: Assessing the Practical and Monetary Efficacy* (December 2008).

73 Ibid 2.

74 Washington State Institute for Public Policy, *Does Sex Offender Registration and Community Notification Reduce Crime? A Systematic Review of the Research Literature* (June 2009). Specific deterrence relates to deterrence of the individual offenders subject to registration and community notification laws, rather than deterrence of the general public from committing sexual offences.

75 Elizabeth Letourneau and Jill Levenson, ‘Effects of South Carolina’s Sex Offender Registration and Notification Policy on Adult Recidivism’ (2010) 21(4) *Criminal Justice Policy Review* 435, 438, 440–1.

76 Ibid 452.

## Additional commentary

- 4.66 United Kingdom academic Terry Thomas warns that high levels of compliance with reporting obligations are not indicative of a reduction in sexual offending rates.<sup>77</sup> He also makes the point that:

In the face of limited evidence on the effectiveness of registers it could be that they are expensive policies built on no evidence base, and the result of public concerns and political expediency to be seen to be doing something. Politicians may speak of their usefulness ... but such statements stand alone from research results.<sup>78</sup>

## Symbolic effects of registration

- 4.67 United States researchers Sample, Evans and Anderson state that even if sex offender registration policy cannot be demonstrated to have an instrumental effect on offenders' behaviour, the laws can be characterised as symbolic, providing the public with reassurance that sex offenders' whereabouts are known and their behaviour monitored.<sup>79</sup> However, they ask:

Is there a tipping point at which time the resources expended to adhere to symbolic laws and a point where the financial and human costs of the law become too high to continue to support legislation that is largely symbolic in nature?<sup>80</sup>

- 4.68 In response to the 2008 study that found Megan's Law to have no appreciable effects on recidivism or public safety,<sup>81</sup> Megan Kanka's mother was quoted as saying:

the purpose of the law was to provide an awareness to parents ... Five million people have gone to the state website. It's doing what it was supposed to do ... we never said it would stop them from reoffending or wandering to another town.<sup>82</sup>

It is possible, in light of the United States research, that any symbolic value of registration is diminished by the fact that it may give parents a false sense of security about the safety of their children.<sup>83</sup>

## Conclusions from the data

- 4.69 There is no compelling evidence as to whether there has been a significant increase in child sexual abuse in Victoria in recent years, as distinct from an increase in prosecutions for child sexual offences. There is also no compelling evidence that registration schemes are an effective means of reducing child sexual abuse because they deter re-offending.
- 4.70 Existing research indicates that child sex offenders do not comprise a homogenous group. For example, commonly held assumptions that child sex offenders have high rates of recidivism and predominantly prey on children who are unknown to them are not supported by evidence.
- 4.71 On the other hand, criminological studies demonstrate the existence of a subset of child sex offenders who do re-offend frequently and target extra-familial male children. There is empirical evidence that they abuse a high number of victims.
- 4.72 The vulnerability of child victims and the devastating effect of sexual abuse on them have led to the creation of legislative schemes designed to protect children from people who return to the community after completing sentences for sexual offences. The Commission has discussed the current regimes in Chapters 2 and 3 of this report.
- 4.73 There is no data about the effectiveness of the Victorian sex offender registration scheme in reducing re-offending. This lack of information is an Australia-wide phenomenon.

77 Terry Thomas, *The Registration and Monitoring of Sex Offenders: A Comparative Study* (Routledge, 2011) 148.

78 Ibid.

79 Lisa Sample, Mary Evans and Amy Anderson, 'Sex Offender Community Notification Laws: Are Their Effects Symbolic or Instrumental in Nature?' (2010) 22(1) *Criminal Justice Policy Review* 27, 28.

80 Ibid 46.

81 Discussed above at [4.63].

82 See Submission 29 (Dr Astrid Birgden).

83 See, eg, Brittany Kane, 'The Legal See-Saw: The Rights of the Sex Offender v the Perception of a Safe Community' (2009) *Salves Dissertations and Theses*, 16; Carol Ronken and Robyn Lincoln, 'Deborah's Law: The Effects of Naming and Shaming on Sex Offenders in Australia' (2001) 34(3) *Australian and New Zealand Journal of Criminology* 235; Naomi Freeman and Jeffrey Sandler, 'The Adam Walsh Act: A False Sense of Security or an Effective Public Policy Initiative?' (2010) 21(131) *Criminal Justice Policy Review* 31, 43.

- 4.74 Research is clearly required, but any study will necessarily extend over a number of years. While the efficacy of the registration scheme remains unknown, the available data does reveal that some types of child sex offenders are more prone to re-offend than others.
- 4.75 As not all of the high-risk offenders fall within the ambit of the *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic), other preventative measures may need to be used.
- 4.76 It is therefore prudent—indeed essential—that the current sex offenders registration scheme should be refined and strengthened in order to concentrate on those people who pose the greatest risk to children.



# Strengthening the scheme by sharpening its focus—Selecting who is on the Register

- 60** Introduction
- 61** Statutory inclusion
- 68** Registrable offences
- 72** Proposed system of structured individual assessment

## Introduction

- 5.1 As the Commission pointed out in Chapter 2, the purpose of the sex offender registration scheme is evolving, with one of its primary functions now being to operate as a source of information for child protection authorities about children who might be at risk of harm.<sup>1</sup> It appears that there are many reasons for this change of emphasis from a scheme that was designed as a static information gathering tool to a mechanism which allows child protection authorities to take action to protect children from exposure to people who might sexually abuse them.
- 5.2 The *Sex Offenders Registration Act 2004 (Vic)* establishes the first of three statutory post-sentencing schemes that seek to protect children from exposure to people who are living in the community after completing a sentence for sexual offending. It was followed in 2005 by serious sex offender legislation<sup>2</sup> and the *Working with Children Act 2005 (Vic)*.
- 5.3 It is highly likely that the introduction of the later legislation has contributed to the evolving purpose of the sex offender registration scheme because it is no longer the sole means of taking preventative action when responsible authorities fear that a particular convicted sex offender might pose a risk to the safety of children.
- 5.4 The *Serious Sex Offenders (Detention and Supervision) Act 2009 (Vic)*, in particular, permits a targeted response when there is evidence to suggest that an offender should be detained in custody, or subjected to close supervision while living in the community, because of the likelihood of re-offending.
- 5.5 Another reason for the evolving purpose of the sex offender registration scheme probably stems from the fact that the original aim was not clear to people involved in the daily administration of the legislation. The Sex Offenders Registration Act is based on the unsustainable 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.
- 5.6 As discussed in Chapter 4, not all sex offenders present the same risk of committing further sexual offences. The automatic registration of every adult who commits a Class 1 or Class 2 offence has extended the reach of the scheme to offenders who are highly unlikely, based on any reasonable assessment, to offend again. In practice, it has not been apparent to people who witness the scheme in operation, such as judges, magistrates, legal practitioners and police officers, why reporting obligations are imposed on an offender who is highly unlikely to re-offend.
- 5.7 The current undifferentiated method of selecting who should be registered solely by reference to the number and type of offences for which they have been convicted has led to a Register that appears to have outstripped initial estimates of size. The Register, which is becoming increasingly expensive to maintain, contains a vast amount of information of variable use. It is time to assess whether the benefits of the scheme in its current form justify its escalating cost, especially as there are approximately 50 new registrants each month.<sup>3</sup>
- 5.8 As at 1 December 2011, 4165 people had been included on the Sex Offenders Register since the scheme commenced on 1 October 2004. At the current rate of increase, there will be approximately 10,000 registrations by 2020. As details are collected from all registered offenders for many years—and from some for life—the value of the information that is collected is highly likely to decline as the Register continues to expand. Details about people who might be potentially dangerous re-offenders sit alongside those of offenders who pose no risk of harm, with police and child protection authorities having no reasonable means of allocating risk ratings, and investigative resources, to particular offenders.
- 5.9 The long reporting periods, with limited review, impose a significant burden on the police to compile and manage information that may be of little operational value in many instances. Demands on the time of child protection workers at the Department of Human Services are also

1 The Commission recommends in Chapter 2 that the legislation be amended to reflect this change.

2 The original legislation was the *Serious Sex Offenders Monitoring Act 2005 (Vic)*. This Act was replaced by the *Serious Sex Offenders (Detention and Supervision) Act 2009 (Vic)*.

3 Consultation 1 (Sex Offenders Registry, Victoria Police).

building as the number of reports of contact between registered sex offenders and children continues to rise. Understandably, all of these reports are investigated regardless of the risk of re-offending posed by a particular offender, unless there is compelling evidence of the child's safety.<sup>4</sup>

- 5.10 In Chapter 2, the Commission recommended amending the statutory purpose of the Sex Offenders Registration Act in accordance with current expectations that the scheme can play a role in protecting children from sexual abuse.<sup>5</sup> In this chapter, the Commission makes a series of recommendations designed to support the evolving child protection orientation of the scheme and to strengthen the scheme by sharpening its focus.

## Statutory inclusion

### Decision to adopt this approach

- 5.11 The current system of statutory inclusion operates as a form of mandatory registration for adults who have been sentenced for child sexual offences. There are no exceptions.
- 5.12 When introducing the Sex Offenders Registration Bill to Parliament, the Minister for Police and Emergency Services did not indicate why automatic statutory inclusion had been chosen as the method of selection for inclusion in the Register and the matter was not raised in subsequent debate on the Bill.
- 5.13 The Commission believes that statutory inclusion was probably adopted in Victoria because it was a feature of the model legislation on which the registration schemes in all states and territories are based. Statutory inclusion has been adopted in all jurisdictions except Tasmania.<sup>6</sup> The Tasmanian registration scheme relies on individual assessment by a court, although there is a statutory presumption that the court will make a registration order for offenders who are found guilty of the most serious offences.<sup>7</sup>
- 5.14 As discussed in Chapter 2, the model legislation was agreed by the Australasian Police Ministers Council after receiving a report by an inter-jurisdictional working party.<sup>8</sup> The report reflected the view that people convicted of certain sexual offences and other serious offences demonstrate a clear risk to child safety and therefore demand automatic registration.<sup>9</sup>
- 5.15 The working party's arguments for statutory inclusion appear to have relied largely on the perceived disadvantages of inclusion by court order. It was suggested that discretionary inclusion would have a significant impact on the justice process. Doubt was cast on whether the courts were able to determine risk to the community, and it was suggested that a court-based system could create unnecessary delays and cause additional stress to victims. The working party also argued that discretionary inclusion would place an unacceptable burden on the police, or prosecutors, because they would be criticised if they failed to apply for a registration order for an offender who subsequently harmed a child.<sup>10</sup>

### The consequences

- 5.16 As noted in Chapter 3, statutory inclusion accounts for nearly all of the people on the Victorian Sex Offenders Register. Approximately 97 per cent of registered offenders have been included in the scheme as an automatic consequence of being sentenced for a registrable offence.<sup>11</sup>
- 5.17 Following seven years experience of the operation of the scheme in Victoria, the Commission has found few supporters of statutory inclusion. Of the submissions that addressed the issue,

4 Consultation 2 (Child Protection, Department of Human Services).

5 Recommendation 1.

6 *Child Protection (Offenders Registration) Act 2000* (NSW) s 6; *Child Protection (Offender Reporting and Registration) Act 2004* (NT) ss 3, 3A; *Child Protection (Offender Reporting) Act 2004* (Qld) s 5; *Community Protection (Offender Reporting) Act 2004* (WA) s 6; *Crimes (Child Sex Offenders) Act 2005* (ACT) s 10; *Child Sex Offenders Registration Act 2006* (SA) s 6.

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

8 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, *Community Protection (Offender Reporting) Act: Discussion Paper*, Project No 101 (2011) 72.

9 Law Reform Commission of Western Australia, *Community Protection (Offender Reporting) Act: Discussion Paper*, Project No 101 (2011) 73.

10 *Ibid* 73–4.

11 The number of people on the Register, and the means by which they were included in the Register, are discussed in this chapter at [5.37].

all but one called for individual assessment of people for inclusion in the Register.<sup>12</sup> Similar sentiments were expressed during consultations.

5.18 The general concern reflected by many people and organisations was expressed by Liberty Victoria:

Notwithstanding the importance of the objective of preventing sexual offences, there are real doubts as to whether the Act in its present form is best suited to achieve such aspirations, and whether it strikes the right balance between protecting the community and protecting the rights of registered persons.<sup>13</sup>

5.19 The issues raised about statutory inclusion concerned the following overlapping themes:

- recognising and responding to the risk of recidivism
- cost implications
- effectiveness of the scheme
- fairness issues.

### Recognising and responding to the risk of recidivism

5.20 The automatic registration of adult offenders as an administrative consequence of committing certain offences reflects—and reinforces—the widely held, but inaccurate, view that all child sex offenders are people with similar behavioural patterns who are all highly likely to re-offend.

5.21 These views were evident during debate on the Sex Offenders Registration Bill, when the Minister for Police and Emergency Services explained:

The philosophy behind [the sex offenders register] was effectively that sex offenders—particularly paedophiles or child sex offenders—are people who are notoriously recidivist in their behaviour, and that while somebody who has served their sentence is entitled to the view that they have done their time and you do not want to carry on an ongoing punitive regime against them, the very significant recidivist nature that goes with some sexual offences requires that we keep some sort of ongoing tab on those people without excessively impinging upon their rights.<sup>14</sup>

5.22 The working party that reported to the Australasian Police Ministers Council on a national approach to registration appears to have recognised, however, that not all sex offenders present the same risk of re-offending. It proposed that registration should not be automatic where the sentencing court does not impose a custodial or supervised sentence because the court's decision suggests that the offender does not pose a significant risk to the community. Nevertheless, it went on to argue for statutory inclusion because courts are not necessarily in the 'best position to determine future risk'.<sup>15</sup>

5.23 The position advanced by the working party was not supported by the submissions made to the Commission. Victoria Legal Aid, for example, observed that:

The legislation operates in such an automated way that a number of people who are convicted of 'relevant offences' face registration even though they do not pose an ongoing risk to the community.<sup>16</sup>

5.24 Professor Paul Mullen, a leading forensic psychiatrist and researcher in this area, shares this view and says that the Victorian Register has been flooded with people who are unlikely to re-offend.<sup>17</sup>

5.25 These concerns are reinforced by recent examples of unnecessary registration. Earlier this year, County Court Judge Lisa Hannon presided over a plea of guilty by a 19-year-old soldier who had sexual intercourse with two teenage girls in circumstances where the sexual activity would

12 Submission 8 (Royal Australian and New Zealand College of Psychiatrists, Victorian Branch) supported mandatory registration, though for fewer offences, with review by a court after three years. It recommended removing offences concerning the possession and importation of child pornography.

13 Submission 18 (Liberty Victoria).

14 Victoria, *Parliamentary Debates*, Legislative Assembly, 25 August 2004, 150 (Andre Haermeyer, Minister for Police and Emergency Services).

15 Inter-jurisdictional Working Party, above n 8, 60, cited in Law Reform Commission of Western Australia, above n 9, 73.

16 Submission 14 (Victoria Legal Aid).

17 Submission 23 (Professor Paul Mullen).

have been legal were it not for the girls' ages.<sup>18</sup> The man was sentenced to a community based order and, as an automatic consequence, is now a registered sex offender for the rest of his life.<sup>19</sup> Judge Hannon is reported to have said during the hearing:

You are in my mind no risk to the sexual safety of the community. To mark you for life in this way is not justified and of no utility to the community.<sup>20</sup>

- 5.26 The Office of the Privacy Commissioner said that it is vital that judicial discretion be the ultimate determinant of who is included in the Register:
- Courts are uniquely placed as the best arbiter to determine the question of risk, based on the evidence and history at hand, rather than with reference solely to the offence.<sup>21</sup>
- 5.27 Even though there was overwhelming support for a court-based inclusion system, most commentators expected the court's discretion to be guided in all cases, and limited where the offence was particularly serious.
- 5.28 The Australian Community Support Organisation said that the court's discretionary power should be restricted to the consideration of first time sex offenders and based on the results of a risk assessment and the seriousness of the offence.<sup>22</sup> The Law Council of Australia advocated discretionary inclusion in all cases but argued that it is particularly important where an offender who is found guilty is discharged without a custodial or supervisory sentence being imposed.<sup>23</sup>
- 5.29 Other submissions suggested that the extension of the court's discretion could be accompanied by a rebuttable presumption that registration will occur where certain offences have been committed.<sup>24</sup>
- 5.30 Although they support different outcomes, the approach recommended by the working party to the Australasian Police Ministers' Council and many of the proposals put to the Commission share a common feature. They distinguish between the most serious offences, which should result in registration unless exceptional circumstances apply, and those where there should be individual assessment of the risk of re-offending.

## Cost implications

### At the time of selection

- 5.31 The preference for automatic statutory inclusion in the Register appears to have been strongly influenced by financial considerations. In support of its recommendation for statutory inclusion, the working party reporting to the Australasian Police Ministers' Council on a national registration scheme pointed out that a court-based system would add to the workload of the prosecution and the courts.<sup>25</sup>
- 5.32 Automatically imposing reporting obligations on an offender as a consequence of being sentenced for a child sexual offence is clearly cheaper than requiring the prosecution to make an application for a registration order to a court. Individual assessment of each offender will probably extend the duration of sentencing proceedings. However, the Commission does not consider this a sufficient reason to continue a system that is not effectively focused on the offenders who pose a risk of harm to children.
- 5.33 The Commission also notes that, in practice, statutory inclusion may have increased the workload of the courts and the cost of proceedings in another way. The Commission was told during consultations that the prospect of statutory inclusion in the Sex Offenders Register is

18 The girls were aged 14 and 15 years at the time of the offence.

19 The life expectancy of a person who is 19 years of age in 2011 is approximately 76: Australian Bureau of Statistics, *4102.0 Australian Social Trends—Life Expectancy Trends* (23 March 2011) <<http://abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4102.0Main+Features10Mar+2011>>. Therefore, this person could expect to be on the Register for approximately 56 years.

20 See, eg, Michelle Draper, 'Soldier on Sex Register a "Travesty"', *The Age* (online), 19 August 2011 <<http://news.theage.com.au/breaking-news-national/soldier-on-sex-register-a-travesty-20110819-1j11a.html>>; Whitney Harris, 'Listing on Sex Register Slammed', *Bendigo Advertiser* (Bendigo), 21 September 2011, 5.

21 Submission 10 (Office of the Victorian Privacy Commissioner).

22 Submission 9 (Australian Community Support Organisation).

23 Submission 1 (Law Council of Australia).

24 Submissions 10 (Office of the Victorian Privacy Commissioner); 16 (Mental Health Legal Centre Inc); 17 (Victorian Equal Opportunity and Human Rights Commission). This view was also expressed in Consultations 10 (Adult Parole Board); 24 (Magistrates' Court of Victoria and Children's Court of Victoria); 28 (Criminal Bar Association of Victoria).

25 Inter-jurisdictional Working Party, above n 8, 60, cited in Law Reform Commission of Western Australia, above n 9, 73.

a disincentive to pleading guilty.<sup>26</sup> Earlier this year, an evaluation of the Department of Justice sexual assault reform strategy found that, despite the early settlement of matters being one of the objectives of the reforms, the number of defendants pleading guilty at initiation had declined:

in 2009/10, for every 100 defendants who plead not guilty at initiation, only 37 plead guilty. This is a considerably lower ratio than for all other years considered, and represents a large decline from 2007/08 (68 guilty pleas for every 100 guilty pleas).<sup>27</sup>

5.34 One of the possible reasons suggested for the decline was that the mandatory requirement for inclusion in the Register creates a disincentive for a guilty plea.<sup>28</sup>

5.35 The possibility that statutory inclusion is increasing the workload of the courts was recently suggested by the County Court. In its 2010-11 Annual Report, the Court observed that sexual offences made up less than a quarter of the criminal matters initiated but accounted for almost half the trials. Noting that this has been a consistent trend for the past four years, the Court explained that:

This is in part due to the fact that there is a low plea rate in sex cases. In the last financial year, 74% of non-sexual offence cases were finalised by the offender pleading guilty. In sexual offence cases, only 50% of cases resolved in this way.

It is unclear why there is such a low guilty plea rate for these cases, although this has been consistent for a number of years. It may be that offenders are likely to receive immediate custodial sentences for these offences and be subject to reporting requirements for a significant period of time under the *Sex Offenders Registration Act 2004*.<sup>29</sup>

#### Operational costs

5.36 Although individual assessment of child sex offenders will have resource implications for the courts, any consideration of the financial impact of sex offender registration needs to extend beyond the selection process to the operational costs of the scheme to Victoria Police and the Department of Human Services.

5.37 The registration of sex offenders is a highly expensive undertaking and costs will continue to mount as the number of registered offenders increases substantially. As noted above, the Chief Commissioner of Police advises that, as at 1 December 2011, a total of 4165 people had been included in the Victorian Sex Offenders Register.<sup>30</sup> By the end of 2012, nearly 5000 people will have been included in the Register, and by the end of 2014 that figure should reach approximately 6200 if the legislation remains in its present form.<sup>31</sup> The Director, Police Integrity, who monitors the management of information in the Register, estimated earlier in 2011 that there would be 20,000 individuals registered by 2034.<sup>32</sup> This is probably a conservative estimate.<sup>33</sup>

5.38 Several features of the registration scheme are driving the increase in numbers:

- the statutory inclusion of all adult offenders who commit Class 1 and Class 2 offences
- lengthy reporting periods, including mandatory life-long reporting conditions for many offences
- limited opportunities for anyone to be removed from the Register.<sup>34</sup>

5.39 An observation repeatedly made to the Commission in submissions and during consultations is that the current system of statutory inclusion is placing an unsustainable burden on police in

26 Consultations 5 (Office of Public Prosecutions); 6 (Victoria Legal Aid).

27 Success Works, *Sexual Assault Reform Strategy: Final Evaluation Report*, prepared for the Department of Justice (2011) 214.

28 Ibid.

29 County Court, *2010-2011 Annual Report* (2011) 15.

30 Information provided by Victoria Police, 6 December 2011.

31 Ibid.

32 Letter from the Director, Police Integrity, 23 February 2011.

33 The growth of the registers in the United Kingdom and United States is discussed in Appendix F and indicates a similar escalating trend. Comparable data about the current size of registries in other Australian jurisdictions is not publicly available.

34 The Commission has been told by Victoria Police that the Chief Commissioner's power in s 39A to apply to the Supreme Court for an order suspending the reporting obligations of a registered sex offender has not been exercised. Also, it is too soon for anyone to have used the procedure under s 39 whereby a registered offender who is required to comply with the reporting obligations for life may apply to the Supreme Court for a suspension of those obligations after 15 years. Given that registration began in October 2004, it will not be possible to gauge the impact of that provision until at least October 2019.

collecting and processing information from registered sex offenders, and on child protection workers in responding to reports of contact between registered sex offenders and children.

### **Victoria Police**

- 5.40 As at 1 December 2011, 2830<sup>35</sup> registered sex offenders were living in the community. Police compliance managers must meet each of them at least once a year, and they will be in contact with them more frequently if their personal details change, if they travel, or if they report unsupervised contact with children. Reports of contact with children are forwarded to the Department of Human Services for a protective investigation.<sup>36</sup>
- 5.41 The Commission understands that Victoria Police has not received any additional resources to administer the scheme. As noted in Chapter 3, there are approximately 280 police compliance managers statewide, in addition to 20 staff at the Sex Offenders Registry. Some compliance managers monitor up to 120 offenders, though their duties under the Sex Offenders Registration Act are in addition to other policing duties.<sup>37</sup>
- 5.42 The Privacy Commissioner pointed out that automatic registration can result in costly and time-consuming registration of low risk offenders.<sup>38</sup> Professor Terry Thomas, a leading expert in this field, has called for more discretionary inclusion because it would
- avoid the register becoming ‘clogged up’ with people who are not a continuing risk yet are still registered and still have to be dealt with on a routine basis by the police—arguably a waste of police time and registrants’ time.<sup>39</sup>

### **The Department of Human Services**

- 5.43 The growth in the size of the Register is also affecting the workload of child protection workers at the Department of Human Services. Every month, the Department receives between 90 and 100 reports from Victoria Police of contact between registered sex offenders and children.<sup>40</sup> These reports are in addition to the notifications made to the Department by other sources.<sup>41</sup>
- 5.44 As the information received from Victoria Police is unfiltered, the Department of Human Services is obliged to undertake a risk assessment in each instance in case there is a risk of harm to a child. This can be a time consuming exercise as it involves consideration of the registered offender’s history, home visits, and discussions with a child’s parents or carers before assessing whether any child is at risk of harm.
- 5.45 The Ombudsman observed in his report on the management of sex offenders that, between October 2004 and March 2010, 899 registered offenders reported to Victoria Police that they had had contact with a child.<sup>42</sup> The police did not notify the Department of Human Services about the contact reported by 376 of those offenders.<sup>43</sup> Discovery of this omission saw the Department of Human Services undertake a risk assessment of all of those cases.
- 5.46 The Department ascertained that the 376 offenders had been in contact with 641 children.<sup>44</sup> Following further investigation, 11 protection applications were issued, of which only five or six were made on the primary basis of risk of harm from sexual abuse.<sup>45</sup>

### **Effectiveness of the scheme**

- 5.47 Statutory inclusion, and the consequential registration of some offenders who do not pose a risk of harm to children, has also been criticised for weakening the effectiveness of the scheme.

35 Information provided by Victoria Police, 6 December 2011.

36 The Victoria Police Manual states that ‘[m]embers must always notify Child Protection (DHS) of a registered sex offender’s contact with children. DHS may be in possession of significant information about the child that would alter the overall view of risk. Notification is to be seen as a matter of priority’: Victoria Police, *Victoria Police Manual: Policy Rules*, ‘Registered Sex Offender Management’, provided by Victoria Police 11 May 2011, 6.

37 Consultation 1 (Sex Offenders Registry, Victoria Police).

38 Submission 10 (Office of the Victorian Privacy Commissioner).

39 Submission 3 (Professor Terry Thomas).

40 Consultation 26 (Child Protection, Department of Human Services, Eastern Region). The collection of this data commenced only recently.

41 The Commission understands that the Department of Human Services received 55,000 mandatory reports in the past year.

42 Ombudsman Victoria, *Whistleblowers Protection Act 2001: Investigation into the Failure of Agencies to Manage Registered Sex Offenders* (2011) 7.

43 *Ibid* 7.

44 Consultation 26 (Child Protection, Department of Human Services, Eastern Region). The figure of 641 refers to ‘substantiated reports’, that is, where a child has been placed at risk of harm.

45 Consultation 26 (Child Protection, Department of Human Services, Eastern Region).

The Commission has been told that the task of monitoring these offenders diverts police attention from those who pose a higher risk to the community.

- 5.48 It has also been suggested that as the size of the Register increases, the value of the information diminishes. The Crime Victims Support Agency described this as ‘diluting the pool’ of information.<sup>46</sup>
- 5.49 This over-inclusion is occurring even though there is no evidence of the effectiveness of Australian sex offender registration schemes in discouraging people who have been convicted of sexual offending against children from re-offending.

## Fairness issues

- 5.50 As a matter of principle, a regime that relies on statutory inclusion is inherently unfair to offenders who pose little or no risk of re-offending. It seems unlikely that those who devised the scheme foresaw outcomes such as the lifetime of reporting for the 19-year-old soldier who was described by a County Court judge as presenting ‘no risk to the sexual safety of the community’.<sup>47</sup> This young man faces the prospect of being obliged to comply with sex offender reporting obligations for the next 60 years.
- 5.51 A number of submissions referred to the unfair consequences of statutory inclusion for young people.<sup>48</sup> Typically, although not exclusively, they arise from young people being found guilty of committing child sexual offences in the following circumstances:
- Young sexual partners, for example an 18-year-old male and 15-year-old female, in an ongoing, otherwise consensual sexual relationship. The adult male is committing the offence of sexual penetration of a child under the age of 16.<sup>49</sup>
  - Young people exploring their sexuality by taking intimate pictures of themselves and forwarding them electronically—a practice known as ‘sexting’.<sup>50</sup> This activity can fall under state child pornography offences as well as Commonwealth offences involving the use of carriage services in connection with child pornography.
- 5.52 Victoria Legal Aid has both a specialist youth crime and a sexual offences practice. It described the dilemma for young people in consensual sexual relationships:
- The relationship may arise in a context of an extended friendship group where the young people see each other as contemporaries. However if one of them is under 16 and the age disparity is more than two years an offence is committed. A conviction for this offence can result in life time registration. This might be the case even if the victim has subsequently turned 16 and the relationship is ongoing, consensual and supportive.<sup>51</sup>
- 5.53 Victoria Legal Aid also noted in its submission that most young people have access to computers and mobile telephones with a camera and many are engaged in ‘sexting’.<sup>52</sup> A similar finding arose from a study of the prevalence of sexting among university students conducted by the Monash Law Society’s Just Leadership Program.<sup>53</sup> The Commission met a young man who was registered for life after being convicted of taking and sending photographs of his 17-year-old girlfriend.<sup>54</sup> Registration has significantly interfered with his employment prospects.

46 Consultation 30 (Crime Victims Support Agency).

47 See, eg, Michelle Draper, ‘Soldier on Sex Register a “Travesty”’, *The Age* (online), 19 August 2011 <<http://news.theage.com.au/breaking-news-national/soldier-on-sex-register-a-travesty-20110819-1j11a.html>>; Whitney Harris, ‘Listing on Sex Register Slammed’, *Bendigo Advertiser* (Bendigo), 21 September 2011, 5.

48 Submissions 14 (Victoria Legal Aid); 15 (Law Institute of Victoria); 28 (Monash Law Students’ Society’s Just Leadership Program).

49 If the young person was aged 18 or older and only found guilty of one count of sexual penetration of a child under the age of 16, they would be registered for 15 years: *Sex Offenders Registration Act 2004* (Vic) s 34. If they were found guilty of multiple counts, they would be registered for life: *Sex Offenders Registration Act 2004* (Vic) s 34.

50 If the young person was aged 18 or older and found guilty of one child pornography offence, they would be registered for eight years: *Sex Offenders Registration Act 2004* (Vic) s 34. If they were found guilty of two child pornography offences, they would be registered for 15 years: s 34. If they were found guilty of three or more child pornography offences, they would be registered for life: s 34. The Legislative Assembly has referred an inquiry into ‘sexting’ to the Parliamentary Law Reform Committee. This inquiry is discussed in Chapter 1. The terms of reference may be viewed at <<http://www.parliament.vic.gov.au/lawreform/article/947>>.

51 Submission 14 (Victoria Legal Aid) (citations omitted).

52 Ibid.

53 Submission 28 (Monash Law Students’ Society’s Just Leadership Program).

54 Submission 2 (Name withheld). *The Sex Offenders Registration Act 2004* (Vic) provides that a registered sex offender will be registered for life if they have ever been found guilty of three or more Class 2 offences: s 34. The production and transmission of child pornography involves Class 2 offences: sch 2.

- 5.54 The Law Institute of Victoria submitted that the mandatory nature of the registration scheme has led to unjust outcomes where the legislation has not kept pace with technological and societal changes:
- It is arguable that these (often youthful) offenders pose little risk to society, yet the long-term consequences of inclusion on the Register are profound. Significantly, registered offenders are prevented from applying for or engaging in child-related employment. The definition of child-related employment is very broad and includes most conceivable jobs that would put the registered offender in contact with children.<sup>55</sup>
- 5.55 Victoria Legal Aid said that conviction for offences involving young people in consensual sexual relationships or engaging in the practice of 'sexting' is a 'poor predictor of risk to children', and went on to observe:
- Yet young people in these categories face onerous obligations under the Registration Act. This can have a substantial impact upon the young person's life, including employment and future relationships. For example, a young person is placed on the Register following conviction for a "sexting" offence. They will face employment restrictions. If they later form a relationship with a person who has a child from another relationship they must report this. If they become parents their involvement in the normal activities of their own child's life will be severely impacted.<sup>56</sup>
- 5.56 Most submissions called for statutory inclusion to be replaced with individual assessment of offenders. Others, including the Centre Against Sexual Assault and CEASE, submitted that young people should not be on the Register at all.<sup>57</sup>
- 5.57 The legal implications for young people of sexting have recently generated media attention and public debate in Victoria. On 1 September 2011, the Parliamentary Law Reform Committee was asked to inquire into the matter.<sup>58</sup>

### Commission's conclusions and recommendations

- 5.58 The Commission believes that the sex offenders registration scheme can be strengthened by sharpening its focus. Individual assessment of the need to register particular offenders would make the scheme more effective and much fairer. This individual assessment is best performed by judges and magistrates who can make decisions based on the facts of each case, including the circumstances and history of the particular offender.
- 5.59 While there is some merit in the proposal that decisions about registration should be deferred until the offender has completed any custodial sentence, the Commission has concluded that it is preferable for the sentencing court to make decisions about sex offender registration at the time of sentencing.
- 5.60 Judges and magistrates will be familiar with the evidence against the offender and will have heard their plea in mitigation. They will have considered the offender's prior criminal history, if any, and a forensic psychiatric or psychological report addressing, among other things, the risk of re-offending. However, if there is insufficient evidence upon which to assess the need for inclusion in the Register, judges and magistrates have wide powers to gather relevant information.
- 5.61 Individual assessment is highly likely to enhance the effectiveness of a scheme that places a great strain on the resources of Victoria Police and the Department of Human Services without, as yet, any clear evidence of its success in reducing child sexual abuse. If registration were more closely aligned with the risk of harm to children, the rate of growth in numbers of registered offenders might be manageable. The police and child protection resources allocated to administering the scheme and taking protective action could be directed to those people who are more likely to re-offend.

55 Submission 15 (Law Institute of Victoria).

56 Submission 14 (Victoria Legal Aid) (citations omitted).

57 Submissions 7 (CASA Forum); 9 (Gatehouse Royal Children's Hospital); 11 (CEASE).

58 The terms of reference may be viewed at <<http://www.parliament.vic.gov.au/lawreform/article/947>>.

## Recommendation

4. A person should be included in the Sex Offenders Register only by order of a court. The current system of automatic inclusion of adult offenders following a finding of guilt for an offence listed in schedule 1 or 2 of the Act should be discontinued.

## Registrable offences

### Registrable offences under the current scheme

- 5.62 The size and rate of growth of the Sex Offenders Register is determined not only by the method by which offenders are selected for inclusion but also by the number of offences that can lead to registration.
- 5.63 As discussed in Chapter 3, the registrable offences under the current scheme are divided into four classes that are listed in four schedules to the Sex Offenders Registration Act. Class 1 and 2 offences are child sexual offences. Class 3 and 4 offences are adult sexual offences.
- 5.64 Offenders who are sentenced for Class 1 and 2 offences are registered as an automatic consequence of conviction. Those who are sentenced for Class 3 and 4 offences may be registered at the discretion of the sentencing court.
- 5.65 The Commission received submissions arguing that the breadth of the offences currently resulting in registration is unwarranted,<sup>59</sup> and calling for some to be removed.<sup>60</sup> The Centre Against Sexual Assault said that there should be more specific, considered categories of offences than the existing ones.<sup>61</sup>
- 5.66 The Commission believes that revising the character and categorisation of the registrable offences is an important means of strengthening the contribution that the scheme can make to child protection. The Commission has devised a refined list of offences that will assist in focusing the scheme on offenders who pose a risk of harming children.

### Approach to revising the offences

- 5.67 Individual assessments by courts of the need for registration should be guided by the expectation that the more serious the offence, the more likely it is that a registration order will be made.
- 5.68 The Commission proposes that legislative guidance be given to courts in two ways. First, by the categorisation of the offences—the current division of child sexual offences into two categories is too blunt to prioritise risk.
- 5.69 The Working with Children Act contains a more useful categorisation of offences for protective purposes. The Secretary of the Department of Justice is empowered under that Act to consider applications for an assessment notice that will permit the applicant to engage in child-related work.<sup>62</sup> The Act establishes three categories of applications, determined by the nature of the offence and the applicant's offending history. Each category limits and guides the Secretary's discretion to give the applicant an assessment notice.
- 5.70 Category 1 applications under the Working with Children Act are those made by the most serious sex offenders. The Secretary must refuse them unless directed to do otherwise by

59 Submission 13 (Confidential).

60 Submission 8 (Royal Australian and New Zealand College of Psychiatrists, Victorian Branch).

61 Submission 7 (CASA Forum).

62 *Working with Children Act 2005* (Vic) pt 2.

the Victorian Civil and Administrative Tribunal.<sup>63</sup> Category 2 applications relate to less serious offences. There is a presumption that the Secretary will refuse Category 2 applications unless satisfied that granting the application would not pose an unjustifiable risk to the safety of children.<sup>64</sup> Category 3 applications are the least serious. The presumption in this case is that the Secretary will grant the application unless satisfied in the particular circumstances that it is appropriate not to do so.<sup>65</sup>

- 5.71 The Commission has drawn on the model employed by the Working with Children Act when devising recommendations for changes to the registrable offences in the Sex Offenders Registration Act.
- 5.72 The second way in which the Commission recommends that the courts should be guided when making individual assessments of the need for registration is by the tests that should be applied for each category of offence. These are discussed later in the chapter.

## Registrable offences under the refined scheme

### Registrable offences against children

#### Rationalisation of the categories of offences

- 5.73 In place of the existing two classes of child sexual offences set out at schedules 1 and 2 of the Sex Offenders Registration Act, the Commission recommends re-ordering them into three categories according to the type of offending. The categories seek to reflect, in very broad terms, the nature of the harm that could result from re-offending.
- 5.74 The Commission's proposals involve some changes to the current distribution of offences. Schedule 1 of the Sex Offenders Registration Act sets out all of the offences involving sexual penetration of children. This list includes offences that can be committed against both children and adults.
- 5.75 Some offences appear to have been unnecessarily included in Schedule 1. In practice, some offences are not used when the complainant is a child because there is a more suitable alternative charge that is easier to prove, or carries a higher penalty, or both.
- 5.76 An example is the offence of sexual penetration of a person with a cognitive impairment by providers of special programs.<sup>66</sup> This offence could be charged if the complainant were under 16 years of age. However, the accused could also be charged with sexual penetration of a child under the age of 16.<sup>67</sup> The latter offence carries a maximum penalty of 15 years imprisonment and does not require the prosecution to prove the additional elements of cognitive impairment and provider of special programs. The former offence carries only 10 years maximum imprisonment and is more difficult to prove. The offence of sexual penetration of a person with a cognitive impairment by a provider of medical or therapeutic services<sup>68</sup> should be excluded for similar reasons.

#### Revised categorisation

- 5.77 The Commission proposes that the registrable offences should be organised as follows for the purposes of determining which test the court should apply when assessing whether an offender should be included on the Sex Offenders Register:

##### *Category 1 offences*

- All penetrative offences involving or possibly involving a child victim (rape, sexual penetration, incest, sexual intercourse with a child outside Australia).
- Persistent sexual abuse of a child (which may or may not involve penetration, but usually does). Includes both state and Commonwealth offences.

63 Ibid s 12.

64 Ibid s 13.

65 Ibid s 14.

66 *Crimes Act 1958 (Vic)* s 51(2).

67 Ibid s 45.

68 Ibid s 51(1).

- Engaging in sexual activity with a child using a carriage service (which may or may not involve penetration).
- Procuring a child to take part in an act of sexual penetration or indecent act.

#### *Category 2 offences*

- All of the sexual offences involving a child victim, other than those offences that fall within Category 1, where the offender actually participates in the sexual act, either in person or by using a carriage service.
- Production of child pornography, as this may involve contact offences against a child.

#### *Category 3 offences*

- All sexual offences involving a child victim that do not fall within categories 1 or 2.
- The very serious offences of facilitating sexual offences against children committed by third parties, but only where they do not involve the participation of the offender in the sexual act either physically or by the use of a carriage service.
- Possession of child pornography.

- 5.78 The proposed categories, and the offences within each, are listed in a table at Appendix D.
- 5.79 Judges and magistrates should be directed to apply different tests when deciding whether a person found guilty of an offence in any of the three categories should be included in the Sex Offenders Register.<sup>69</sup> The proposed tests, discussed later in this chapter, differ according to the category of the offence and the consequences of re-offending.
- 5.80 The practical outcome of this revised categorisation of child sexual offences will be that most adults who commit penetrative sexual offences against children will be registered, and all other child sexual offenders will be registered if the court finds that this step will serve a useful protective purpose.

## Recommendations

5. The Class 1 and Class 2 offences currently listed in schedules 1 and 2 of the *Sex Offenders Registration Act 2004 (Vic)* should be replaced with the offences that are set out in Appendix D of this report and which have been sorted into three categories: 1, 2 and 3.
6. A person would be eligible for inclusion in the Sex Offenders Register by court order following a finding of guilt for an offence in Category 1, 2 or 3 as set out in Appendix D of this report.

### Registrable offences against adults

- 5.81 The Commission believes that it is no longer useful for people who are found guilty of the adult sexual offences currently listed as Class 3 and Class 4 offences to be eligible for inclusion in the Sex Offenders Register.
- 5.82 Class 3 and Class 4 registrable offences are those committed against adults by a ‘serious sexual offender’. A serious sexual offender is a person who has been sentenced at any time for two or more registrable offences (of any class), whether in the one trial or hearing, in different trials or hearings, or in separate trials of different charges in the one indictment.<sup>70</sup>

<sup>69</sup> There are two exceptions to inclusion in the Register that are discussed later in this chapter.  
<sup>70</sup> *Sex Offenders Registration Act 2004 (Vic)* s 8(3).

- 5.83 Very few people, approximately 3 per cent of all registered sex offenders in Victoria, have been placed on the Register for committing sexual offences against adults.<sup>71</sup> On average, 20 adult sex offenders have been registered each year since the inception of the scheme seven years ago. It is likely that they include the most serious sex offenders against adults, many of whom might still be serving custodial or supervised sentences, in which case their reporting obligations will not have commenced.
- 5.84 Serious sex offenders who pose a risk of offending against adults or children can now be dealt with under the Serious Sex Offenders (Detention and Supervision) Act. The Act permits the Secretary of the Department of Justice to apply for a post-release supervision order for a period of up to 15 years<sup>72</sup> and the Director of Public Prosecutions to apply for a detention order for a period of up to three years.<sup>73</sup>
- 5.85 Towards the end of their prison sentence, every sex offender is assessed by the Department of Justice to consider the risk of re-offending. The offender is given a preliminary screening test and, if it indicates a moderate risk or higher, the Department will commission a full clinical assessment. The Serious Sex Offender Review Board considers these assessments, together with other information about the offender.<sup>74</sup> After considering these assessments, the Secretary decides whether to apply for a supervision order or to refer the matter to the Director of Public Prosecutions to apply for a detention order.<sup>75</sup>
- 5.86 The Commission understands that the Secretary of the Department of Justice makes approximately 40 applications for serious sex offender supervision orders per year.
- 5.87 The Commission believes that the serious sex offenders regime is more suited to managing adult offenders who sexually offend against adults and notes that most people on supervision orders are also registered sex offenders. There were 75 people on supervision orders as at 5 December 2011, most of whom were also registered sex offenders.<sup>76</sup>
- 5.88 While serious sex offenders under the age of 18 who offend against adults may be registered under the Sex Offenders Registration Act, supervision and detention orders can only be made in respect of offenders who are aged 18 or older.<sup>77</sup> Nevertheless, the Commission believes that the Children's Court has a sufficient array of options in its Family and Criminal Divisions, together with the specialist Therapeutic Treatment Board, to manage young people who offend against adults more effectively than by including them in the Sex Offenders Register.
- 5.89 There are no national cooperation implications in excluding adult sex offenders from eligibility for inclusion in the Register. Apart from Victoria, adult sex offenders are currently registrable offenders only in Western Australia,<sup>78</sup> Tasmania and the Australian Capital Territory.<sup>79</sup> Under existing provisions of the Sex Offenders Registration Act, any registered sex offender from another jurisdiction who moves to Victoria must continue to report to police for the period imposed by that jurisdiction.<sup>80</sup> The Commission proposes that these provisions should continue to apply to interstate adult sex offenders. Their continuation should discourage people from moving to Victoria to avoid reporting obligations imposed in another Australian jurisdiction.
- 5.90 As discussed in Chapter 2, the purpose of the sex offenders registration scheme has evolved so that it is now primarily concerned with the protection of children. The capacity of the scheme to fulfil this purpose is diminished where resources are diverted to monitoring adult sex offenders. Furthermore, the scheme has not been designed to monitor the activities of

71 As at 1 December 2011, 139 offenders were on the Register following conviction for sexual offences against adults. Forty-three of these offenders were under the age of 18 when they committed the offence for which they were sentenced. Of the 139 registered for committing sexual offences against adults, 27 were also registered for committing sexual offences against children. The Commission has been unable to ascertain how many of those 27 were offences committed by a person who was under the age of 18, and how many were committed by a person who was over the age of 18, at the time of the offence: information provided by Victoria Police, 6 December 2011.

72 *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) ss 7(1), 12(1).

73 *Ibid* ss 33, 35.

74 The Serious Sex Offender Review Board is comprised of representatives from Corrections Victoria, the Department of Human Services, the Office of Public Prosecutions, the Victorian Government Solicitor's Office and the Victim Support Agency.

75 *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) ss 104–5.

76 Three of these were interim supervision orders: information provided by Corrections Victoria, 9 December 2011.

77 *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) s 4(1)(a).

78 Provisions in the *Community Protection (Offender Reporting) Act 2004* (WA) for the mandatory registration of adult sex offenders have not commenced, but some adult sex offenders have been registered under other provisions: Law Reform Commission of Western Australia, above n 9, 7 (n 23).

79 *Community Protection (Offender Reporting) Act 2005* (Tas) ss 6–7; *Crimes (Child Sex Offenders) Act 2005* (ACT) s 16.

80 *Sex Offenders Registration Act 2004* (Vic) ss 9, 37.

adult sex offenders, particularly because of its strong emphasis on gathering information about unsupervised contact with children.

- 5.91 The Commission believes that continuing to register adult sex offenders is no longer necessary because the Serious Sex Offenders (Detention and Supervision) Act<sup>81</sup> provides a more suitable protective legislative response to the risk of harm these offenders pose to the community.

## Recommendation

7. It should no longer be possible for a court to order that a person found guilty of a sexual offence against an adult be included in the Sex Offenders Register. Schedules 3 and 4 of the Act should be repealed.

### Bestiality

- 5.92 The Sex Offenders Registration Act currently provides for statutory inclusion of people who commit a sexual offence against an animal.<sup>82</sup> The Commission does not consider that this offence should be a registrable offence under a scheme that seeks to protect children from harm.
- 5.93 However, an offence involving a child being forced to engage in an act of bestiality also leads to automatic inclusion in the Register<sup>83</sup> and the Commission proposes retaining it as a registrable offence under the refined scheme.

### Proposed system of structured individual assessment

- 5.94 The Commission has recommended replacing the existing statutory inclusion mechanism with court-ordered registration as a means of strengthening the sex offenders registration scheme by sharpening its focus. The Commission proposes that the courts should be given clear legislative guidance when making individual assessments of the need for registration.
- 5.95 The three new categories are grouped according to the seriousness of the offence. Courts should be required to apply a different test for each category. The policy underpinning these tests is clear: the more serious the offence, the higher the expectation that the court will make a registration order.
- 5.96 The proposed changes seek to ensure that the court assesses whether the individual offender poses a risk of harm to children. By directing courts to consider whether registration will serve a useful protective purpose, the new system should avoid the over-inclusiveness of the current statutory inclusion scheme, which has led to unnecessary diversion of police and child protection resources from dealing with people who pose some risk of re-offending and has produced unfair outcomes for some people.

### Category 1 offences

- 5.97 The offences contained in Category 1 are those which involve, or may involve, the sexual penetration of a child by the offender. These are the offences for which the offender should be registered for a reasonable time, in all but exceptional circumstances.

81 Note that the *Serious Sex Offender (Detention and Supervision) Act 2009* (Vic) replaced the *Serious Sex Offender Monitoring Act 2005* (Vic), which commenced after the *Sex Offenders Registration Act 2004* (Vic).

82 *Crimes Act 1958* (Vic) s 59. This offence is currently a Class 2 offence.

83 *Crimes Act 1958* (Vic) s 38A(2)(b). This offence, which forms part of the offence of sexual penetration of a minor, is currently a Class 1 offence.

- 5.98 The fact that the offender has committed an offence of this nature is a sufficient basis in most cases to take the protective measure of imposing reporting obligations, because the consequences of any re-offending are profound.
- 5.99 For this reason, the Commission considers that people who commit these offences should continue to be subject to mandatory registration, other than in very limited circumstances.
- 5.100 In view of widespread concerns about the unfair impact that statutory inclusion under the current scheme can have on a young person who is involved in an ongoing, 'consensual' sexual relationship with a person who has not yet reached the age of consent, it should be possible for courts to make individual assessments about the need for inclusion in these cases.<sup>84</sup>
- 5.101 The Commission considered the desirability of stipulating an upper limit to the age of a person convicted of a Category 1 offence who could seek the benefit of this exception. Because there are so many different circumstances that fall within offending behaviour of this nature, the Commission concluded that it was preferable to allow the judge or magistrate in a particular case to determine whether the age difference between the people involved was 'significant'. However, it is important that this exception not be available in those cases where the complainant is under the age of 14 years.
- 5.102 As discussed later in this chapter, the Commission recommends that offenders who are unable to meet the requirements of a registration order because of a cognitive or physical impairment, or who committed an isolated offence many years ago, may also seek exemption from registration. However, it is highly likely that exemptions on these grounds would be extremely rare for offenders who have committed a Category 1 offence.

## Recommendation

8. A court should be required to make a registration order in respect of a person found guilty of a Category 1 offence unless that person satisfies the court on the balance of probabilities that:
- (a) the age difference between the person and the complainant is not significant and the complainant was at least 14 years old at the time of the offence, and
  - (b) the conduct would not have been a sexual offence but for the ages of the persons involved, and
  - (c) no useful protective purpose is served by making a registration order.

## Category 2 offences

- 5.103 Although Category 2 offences do not involve sexual penetration of children, many offenders who commit these crimes should be monitored for a reasonable time because they might pose an ongoing risk to children.
- 5.104 The Commission believes that there should be a presumption in favour of a person found guilty of a Category 2 offence being included in the Register. It should be possible for people found guilty of Category 2 offences to avoid inclusion if they can satisfy the court on the balance of probabilities that making an order would serve no useful protective purpose.
- 5.105 To ensure that courts consider appropriate expert evidence before making decisions about Category 2 offenders, they should consider a risk assessment report from a suitably qualified psychiatrist or psychologist unless there are exceptional circumstances that justify making an order without a report.

## Recommendation

9. A court should be required to make a registration order in respect of a person found guilty of a Category 2 offence unless that person satisfies the court on the balance of probabilities that making an order would serve no useful protective purpose.

In considering whether to make an order, the court should be required to consider a risk assessment report from a psychiatrist or psychologist with expertise in assessing an offender's risk of committing further sexual offences against children unless there are exceptional circumstances that cause a report to be unavailable or unnecessary.

### Category 3 offences

- 5.106 Category 3 offences are non-contact offences where the principal offender does not actually participate in the sexual activity. They include pornography and sex work offences that are often committed for commercial purposes.
- 5.107 While these offences are serious and merit appropriate penalties, the offenders do not actually engage in sexual contact with the victim and might not pose a risk of committing contact offences.<sup>85</sup> In view of the need to ensure that the registration scheme uses police and child protection resources effectively, the Commission believes that a registration order should only be made in these cases where the court considers that it is necessary to protect children from the risk of sexual abuse.
- 5.108 Some of the offences in Category 3, such as possessing child pornography, can occur in very different circumstances. This offence applies to young people who take photographs of naked, underage, partners with their permission, and to older people who collect graphic photographs of very young children being sexually penetrated. Registering the former offenders might be of little benefit, while registering the latter might assist in protecting children from the risk of sexual abuse.
- 5.109 The Commission believes that the prosecution should bear the burden of satisfying a court on the balance of probabilities that it is necessary to make a registration order for a person found guilty of a Category 3 offence. As with Category 2 offences, courts should consider a risk assessment report from a suitably qualified psychiatrist or psychologist unless there are exceptional circumstances that justify making an order without a report.

## Recommendation

10. A court should be required to make a registration order for a person found guilty of a Category 3 offence if it is satisfied on the balance of probabilities that it is necessary to do so to protect children from the risk of harm from sexual abuse.

The prosecution should bear the burden of proving that a registration order should be made for a person found guilty of a Category 3 offence.

In considering whether to make an order, the court should be required to consider a risk assessment report from a psychiatrist or psychologist with expertise in assessing an offender's risk of committing further sexual offences against children unless there are exceptional circumstances that cause a report to be unavailable or unnecessary.

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It is acknowledged, however, that these offences cause harm to the ultimate victim in an indirect way, and that the secondary offender or consumer creates a market from which the primary offender profits. The courts recognise that these type of offences are therefore not victimless: *R v Fulop* [2009] VSCA 296 (9 December 2009); *Director of Public Prosecutions (Cth) v Ison* [2010] VSCA 286 (28 October 2010).

## Multiple offences

### Multiple offences arising from the same facts and circumstances

- 5.110 Sometimes a person will be found guilty of a number of child sexual offences that fall within more than one category. In these cases, the Commission believes that the test applying to the highest category offence should apply to the person.<sup>86</sup>
- 5.111 The test for the highest category offence is most likely to lead to a registration order being made. If this test is not met, the court should not usually be required to consider the tests for the other categories of offences. For example, if a court decides not to register an offender pursuant to a Category 1 test because he was an 18-year-old male in an otherwise consensual sexual relationship with a 15-year-old female, it would be pointless for the court to apply the test for any Category 2 offences arising out of the same facts and circumstances.

### Recommendation

11. The *Sex Offenders Registration Act 2004 (Vic)* should provide that, if an adult offender is found guilty of offences in more than one category, including any offences committed as a child, the test when determining whether to make a registration order should be that of the highest category.

### Multiple offences arising from different facts and circumstances

- 5.112 There may be other occasions, however, where an offender has been found guilty of numerous offences and, while the test for the highest category offence is not met, it would be appropriate for a court to have the power to order registration after considering the test that applies to the other offences. This could occur where different types of offending involving different complainants have been dealt with at the same time.
- 5.113 For example, a court may decline to make a Category 1 registration order for an 18-year-old who has been found guilty of sexual penetration of a 15-year-old in circumstances of a supportive, ongoing and otherwise 'consensual' relationship. However, that same person may also have been found guilty of the Category 3 offence of possessing pornography involving child sexual abuse. In these circumstances, the court should be permitted to make a registration order under the Category 3 test if it is satisfied that it is appropriate to do so.

### Recommendation

12. If an offender who has been found guilty of offences in more than one category does not meet the test of the most serious applicable category, the court should be permitted to consider the test for the next category if different facts and circumstances arise in relation to that offending.

Different facts and circumstances may include:

- (a) a different complainant
- (b) offending that is not incidental to the first category of offending.

## Offences committed by children and young people

- 5.114 The Children’s Court has a discretionary power to order that any child or young person found guilty of any offence be included in the Sex Offenders Register.<sup>87</sup> As at 1 December 2011, there were 43 people on the Register who had been included by a court order made when they were under the age of 18.<sup>88</sup>
- 5.115 The intrusive nature of registration orders is far more pronounced for young people than it is for adults because they ordinarily have contact with other young people as part of their daily lives, such as when going to school, playing sport, living with their siblings, and having young visitors in the family home. A registered sex offender who is a young person must report all of these contacts. In addition, young people tend to be active users of social media, mobile phones and other means of electronic communication that must also be reported when it involves regular unsupervised contact with a child.<sup>89</sup>
- 5.116 As noted earlier in this chapter, the Centre Against Centre Assault and The Gatehouse, Royal Children’s Hospital, have argued that children should never be registered.<sup>90</sup>
- 5.117 The Commission believes that children and young people should be included in the Register only in exceptional circumstances, because there are other mechanisms that can be used to protect children from the risk of sexual abuse and because of the impact of registration on a young person.

## Proceedings in the Children’s Court

- 5.118 Both the Criminal and Family Divisions of the Children’s Court have access to a variety of mechanisms for managing young sex offenders.
- 5.119 The *Children, Youth and Families Act 2005* (Vic) establishes a sentencing scheme specifically for use by the Criminal Division of the Children’s Court when dealing with offenders aged 10 to 18 (or 19 provided that their matter was before the court prior to their 19th birthday).<sup>91</sup>
- 5.120 Upon finding a child or young person guilty of an offence, the Criminal Division may:
- dismiss the charge with or without an accountable undertaking, place the child on a good behaviour bond or impose a fine<sup>92</sup>
  - impose supervisory orders, including probation, a youth supervision order, or a youth attendance order<sup>93</sup>
  - sentence the child or young person to a period of detention in a youth residential centre or youth justice centre.<sup>94</sup>
- 5.121 The Family Division may make a therapeutic treatment order, which is specifically targeted towards children and young people exhibiting sexually abusive behaviour. The order may be made in respect of a child who is over the age of 10 years and under the age of 15 years, if the Court is satisfied that:
- the child has exhibited sexually abusive behaviours, and
  - the order is necessary to ensure the child’s access to, or attendance at, an appropriate therapeutic treatment program.<sup>95</sup>
- 5.122 The order remains in force for a period of up to 12 months and must require the child to participate in an appropriate therapeutic treatment program.<sup>96</sup> It has the practical effect of removing a charge against the person from the Criminal Division and treating the behaviour therapeutically rather than punitively.

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87 *Sex Offenders Registration Act 2004* (Vic) s 11.  
88 Information provided by Victoria Police, 6 December 2011.  
89 *Sex Offenders Registration Act 2004* (Vic) s 14(1)(e).  
90 Submissions 7 (CASA Forum), 19 (Gatehouse Royal Children’s Hospital).  
91 *Children, Youth and Families Act 2005* (Vic) s 516(5).  
92 *Ibid* ss 360(1)(a)–(e).  
93 *Ibid* ss 360(1)(f)–(h).  
94 *Ibid* ss 360(1)(i)–(j).  
95 *Ibid* s 248.  
96 *Ibid* ss 249–50.

- 5.123 The Family Division also has a wide range of protective dispositions for use in managing young people involved in intra-familial sexual offending.
- 5.124 The Commission considers that, because of the many protective options open to the Children's Court, young people found guilty of child sexual offences should only be included in the Sex Offenders Register where the Court is satisfied that it would serve a useful protective purpose and all other reasonable protective responses have been exhausted.

## Recommendation

13. The Children's Court should not make a registration order in respect of a person who is sentenced for a Category 1, 2 or 3 offence that they committed and were found guilty of as a child, unless it is satisfied that making an order would serve a useful protective purpose.

In considering whether to make a registration order, the Children's Court should be required to:

- (1) consider a risk assessment report from a forensic psychiatrist or psychologist, and
- (2) take into account:
  - (a) the nature and circumstances of the offence(s)
  - (b) any prior findings of guilt in the Criminal Division of the Children's Court or orders made by the Family Division of the Children's Court in relation to the person
  - (c) the capacity of the person to understand and meet the requirements of a registration order
  - (d) whether the person is currently subject to any other orders that provide supervision or guidance to the person, and any orders of the Family Division of the Children's Court
  - (e) the availability of supports to the person in the community
  - (f) whether the person can be placed on another order or program which could minimise the risk of committing a Category 1, 2 or 3 offence
  - (g) the desirability of subjecting the young person to the least invasive regime of court orders necessary, and
  - (h) section 362(1) of the *Children, Youth and Families Act 2005* (Vic), so far as it is relevant.

## Proceedings in other courts

- 5.125 If a person who was under the age of 18 committed a registrable offence, but the matter did not come before the court until after their 19th birthday, the Children's Court does not have jurisdiction to hear the matter. The alternative sentencing options of the Children's Court are not available in these circumstances. Therefore, the Commission considers the court should apply the tests for adult offenders when deciding whether to make a registration order.

## Recommendation

14. The *Sex Offenders Registration Act 2004 (Vic)* should provide that, if a person is found guilty as an adult of a Category 1, 2 or 3 offence committed as a child, the court should deal with that person as an adult when determining whether to make a registration order.

### Exemption from inclusion in the Register

- 5.126 There may be some limited situations where a sex offender registration order would not be appropriate because of the inability of the offender to comply with the reporting obligations or because of the very unusual nature of the offending.

#### Physical or cognitive impairment

- 5.127 From time to time, an offender will not be capable of meeting the conditions of registration due to a permanent physical or cognitive disability. The offender may have an intellectual disability, acquired brain injury, mental illness or physical injury. The Commission understands that a small number of current registered sex offenders are unable to comply with their reporting requirements because they have Alzheimer's disease.
- 5.128 A court should have the power to decline to make a registration order in any case if it is satisfied that the offender will not be able to meet the reporting requirements for the duration of any possible order, because the offender would be physically unable to report or does not have the cognitive ability to understand the reporting obligations.

#### Old isolated offences

- 5.129 Sometimes child sex offenders are prosecuted many years after the offence occurred. It is not uncommon for people to be prosecuted for offending that occurred 20 or 30 years earlier. While the Commission believes that it would be contrary to community expectations, and to the purpose of the registration scheme, for anyone to be exempted from registration solely because of the age of the offence, there are circumstances in which no useful protective purpose would be served by making a registration order for a person found guilty of an offence committed many years ago.
- 5.130 A discretionary power not to include an offender should be available to the court where an offence occurred a long time ago, it was out of character, and the person's life history discloses that they do not pose a risk of committing further sexual offences against children.

## Recommendation

15. A court should be permitted to decline to make a registration order in respect of any person found guilty of any offence at any time if that person satisfies the court on the balance of probabilities that:
- (1) the person would be unable to comply with the reporting obligations due to physical or cognitive impairment, or
  - (2) the offence occurred a long time ago, and
    - (a) it appears to have been an isolated event, and
    - (b) no useful protective purpose is served by making a registration order.

## Appeals

- 5.131 As a general principle, it is possible to appeal against any court orders in criminal proceedings that result in adverse consequences for a person.
- 5.132 At present, it is not possible to appeal against statutory inclusion in the Sex Offenders Register because no court order is involved. However, registration orders currently made by the sentencing court under section 11 of the Sex Offenders Registration Act<sup>97</sup> are subject to appeal. Appeals against section 11 orders follow the same path as an appeal against sentence. This outcome is achieved by deeming registration orders to be sentencing orders for the purposes of appeals.<sup>98</sup>
- 5.133 The Commission believes that registration orders made by courts under the refined and strengthened scheme described in this chapter should be subject to appeal in the same way as orders currently made under section 11.
- 5.134 The Commission sees no reason to depart from the established legal principle of a right of appeal in criminal proceedings. Even though a registration order is not a punishment that can be taken into account at the time of sentencing,<sup>99</sup> it is an order that adversely affects an offender who must comply with numerous obligations after having completed a sentence for a crime.

## Recommendation

16. The *Sex Offenders Registration Act 2004 (Vic)* should state that all registration orders are to be treated as sentencing orders for the purposes of appeal rights only and may be appealed pursuant to the usual sentencing appeal procedures.

<sup>97</sup> *Sex Offenders Registration Act 2004 (Vic)* s 11.

<sup>98</sup> *Criminal Procedure Act 2009 (Vic)* s 3.

<sup>99</sup> *Sentencing Act 1991 (Vic)* s 5(2BC).



# Refining the reporting obligations

**82** Introduction

**82** Reporting conditions

## Introduction

- 6.1 In Chapter 5, the Commission recommended strengthening the sex offenders registration scheme by permitting structured individual assessment of offenders for inclusion on the Register. This chapter contains the Commission's proposals for strengthening the scheme by refining the reporting obligations so that some offenders have reporting obligations specifically designed to meet their particular circumstances and all offenders are required to report for periods which are proportionate to their risk of re-offending.
- 6.2 All registered sex offenders currently have the same reporting obligations regardless of their risk of re-offending and of their need for assistance to avoid offending behaviour. It should be possible to tailor reporting conditions to support an individual registrant to function successfully in the community and to better manage the risk of harm to children when there are heightened concerns about the likely behaviour of a particular offender.
- 6.3 All adult registered sex offenders are currently obliged to report for periods ranging from eight years to life.<sup>1</sup> There is a need to reconsider the policy that underpins the blanket imposition of these reporting periods so that assessments of ongoing risk can be made at reasonable intervals and the resources devoted to the Sex Offenders Register can be directed to those people who pose some risk of re-offending. When there are reasonable concerns about re-offending, extension of sex offender registration should be available as a preventative response.<sup>2</sup>

## Reporting conditions

### Reportable information under the current scheme

- 6.4 There is a detailed discussion of reportable information under the current scheme in Chapter 3. Information that registered sex offenders are required to report includes: name(s) by which they are known, date of birth, addresses, email and internet use details, names of children with whom the offender has had contact, employment and club membership information, tattoos, and details of any motor vehicles owned.<sup>3</sup>
- 6.5 They are required to make an initial report, an annual report and a report whenever any of their details change.<sup>4</sup>

### Issues with reporting conditions

- 6.6 The current reporting conditions are mandatory and generic. All registered offenders are required to report the same information, within the same periods. There is no capacity for individual assessment of the needs of the community or the offender. There is no opportunity to include any components that may assist an offender to comply with their order, or to reduce the likelihood of re-offending. There is no power to include additional preventative measures that may assist child protection authorities to safeguard particular children from harm or permit the police to monitor a particular offender more closely than others.
- 6.7 The Commission agrees with the suggestion by the Australian Community Support Organisation that:

In addition to the minimum set of reporting obligations, ACSO proposes that the court be provided with discretionary power to impose a further set of reporting obligations that are offence or offender specific.<sup>5</sup>

1 Reporting periods for adult offenders are eight years, 15 years and life: *Sex Offenders Registration Act 2004* (Vic) s 34(1). For offenders who were under the age of 18 when they committed the offences for which they were registered, reporting periods are four years and seven and a half years: s 35.

2 The *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) is discussed in Chapter 2.

3 *Sex Offenders Registration Act 2004* (Vic) ss 14–15.

4 *Ibid* ss 12, 16–17.

5 Submission 9 (Australian Community Support Organisation).

## Individually tailored conditions

- 6.8 The Commission believes that registered sex offenders should continue to be subject to the current standard reporting requirements, though changes to the obligations and procedures for reporting contact with children are recommended in Chapter 7. However, the court should also have some capacity to tailor the conditions of the registration order towards the management of the individual offender.

## More frequent reporting

- 6.9 Registered sex offenders must report to the police annually, when there are changes to their personal details and when they have unsupervised contact with children. There is no capacity to require an offender to report more frequently, such as when first released from prison, or when on bail after having been charged with a new offence.
- 6.10 Courts should be permitted to order that those offenders who are of particular concern should be more closely monitored than annually and whenever personal details or contact with children change. Individual judges and magistrates are best placed to make these decisions when directing that a particular offender be included in the Sex Offenders Register or when deciding to renew a registration order.

## Better collaboration between the police and the Department of Human Services

- 6.11 In his report on the management of registered sex offenders, the Ombudsman recommended that the Department of Human Services 'ensure that it has the capacity to identify, analyse and promptly respond to reports received from the registry'.<sup>6</sup>
- 6.12 In Chapters 7 and 9, the Commission makes recommendations to enhance the timely flow of useful information from the Register to the Department of Human Services to assist it in investigating protective concerns about a registered sex offender having contact with a particular child or children. These recommendations include clearly defining the type of 'contact' with a child that registered sex offenders are required to report to police,<sup>7</sup> and amending the process by which information about registered sex offenders' contact with children is collected by Victoria Police and shared with the Department of Human Services.<sup>8</sup>
- 6.13 In addition, the Commission believes that in some cases it may be of assistance to the Department of Human Services to be present when a registered sex offender is reporting information about their contact with a child or children to the police. Being present when a child contact report is being made would enable the Department to make its own preliminary assessment of the risk an offender poses to particular children and to determine the most effective means of responding in order to safeguard those children.
- 6.14 When making a sex offender registration order, a court should have the power to authorise the presence of a delegate of the Secretary of the Department of Human Services when a registered offender is making a report to the police about contact with children. It is highly likely that the court would only authorise the presence of a Department of Human Services child protection worker in particularly complex or high-risk cases. Examples could be offenders who have repeatedly befriended single mothers with children, or those who have engaged in grooming behaviour before abusing children.
- 6.15 The Commission does not believe that a court should have the power to direct the attendance of a child protection worker because of the difficulty in assessing resource constraints. Once a court has authorised the presence of a delegate of the Secretary of the Department of Human Services, the Secretary should have a discretionary power to decide whether an officer of the Department attends when a registered sex offender makes a child contact report to the police.

6 Ombudsman Victoria, *Whistleblowers Protection Act 2001: Investigation into the Failure of Agencies to Manage Registered Sex Offenders* (2011) recommendation 7.

7 See Chapter 7.

8 See Chapter 9.

## Supporting registered offenders with a disability

- 6.16 The Commission has been told that many registrants, especially those with a disability, struggle to understand or remember their reporting obligations. Victoria Legal Aid submitted:
- A number of people who are subject to the obligations of the Registration Act have an intellectual disability or experience periods of mental illness. These circumstances may have contributed to their offending. Ironically, those conditions also make it harder to understand and comply with the conditions of the Registration Act.<sup>9</sup>
- 6.17 For most offenders at present, sex offender registration is an automatic administrative consequence of being sentenced for particular sexual offences involving children. Many of these people serve lengthy terms of imprisonment before their reporting obligations commence on release from custody. Some offenders emerge from prison with a very poor understanding of their reporting obligations.
- 6.18 The Commission believes that support should be provided to registered sex offenders who have a cognitive disability or a mental illness when they make their reports. The existing independent third person scheme administered by the Public Advocate could be extended to cover these cases.
- 6.19 The Victoria Police Manual provides for the presence of an 'independent third person' when interviewing a person with 'an impaired mental state or capacity who is fit to be interviewed'.<sup>10</sup> The manual provides that this person 'will either be a relative or close friend, or a trained volunteer from the Office of the Public Advocate'.<sup>11</sup>
- 6.20 The Public Advocate is the coordinator of the independent third person program. The Office of the Public Advocate trains and registers volunteers who are the only people who may act as an independent third person.<sup>12</sup> Police are able to request an independent third person by using the Office of the Public Advocate 24-hour emergency service number.<sup>13</sup>

## Supporting the rehabilitation of registered sex offenders

- 6.21 The Commission has heard from experts that many sex offenders would benefit from regular guidance and assistance with integrating into the community without re-offending. The Australian Community Support Organisation submitted that:
- In light of the evidence, ACSO proposes that until such time as the Registration Act requires sex offenders to engage in targeted interventions and programs, it is unlikely that the Act will fulfil its purpose of reducing the likelihood of re-offending.<sup>14</sup>
- 6.22 Dr Astrid Birgden, consultant forensic psychologist, submitted:
- To improve community protection, sex offenders need to be engaged in behaviour change through respectful and proactive case management that manages their risk and meets their needs.<sup>15</sup>
- 6.23 Dr Bill Glaser, consultant psychiatrist and clinical consultant to the Commission, strongly supports regular therapeutic maintenance of post-sentence sex offenders.
- 6.24 The Victorian Parliament is clearly entitled to enact laws that seek to prevent child sexual abuse. Two of the most important measures of the success of those laws are their effectiveness and their fairness.
- 6.25 The Commission believes that the *Sex Offenders Registration Act 2004 (Vic)* is more likely to be effective in achieving its purpose of protecting children against sexual abuse from people who have been found guilty of committing crimes of this nature if some offenders who are particularly vulnerable to relapse are provided with access to rehabilitation programs that provide behavioural guidance and assist with integration into the community.

9 Submission 14 (Victoria Legal Aid).

10 Victoria Police, *Victoria Police Manual: Guidelines*, 'Interviewing Specific Categories of Person', as at 21 April 2011, 3.

11 Ibid.

12 Office of the Public Advocate, *Independent Third Person Program: Brochure* (2009).

13 Office of the Public Advocate, *Contact Us* (14 June 2011) <<http://www.publicadvocate.vic.gov.au/about-us/189>>.

14 Submission 9 (Australian Community Support Organisation).

15 Submission 29 (Dr Astrid Birgden).

- 6.26 It is also strongly arguable, as a matter of fairness, that there should be an element of mutual obligation when a community imposes a highly intrusive preventative mechanism, such as a sex offender registration scheme, on people who have completed the sentence imposed on them for their offending behaviour. While it is open to argument that the intrusive nature of the scheme is justified by the need to protect children from sexual abuse, that scheme ought to contain constructive elements that assist registered sex offenders to avoid re-offending and to function effectively in the community.
- 6.27 There are a number of counselling programs available to sex offenders both within and outside of prison:
- Corrections Victoria provides intensive treatment programs for people serving sentences in custody, in the community through Community Corrections, at Corella Place<sup>16</sup> and following release from prison (either on parole or on a supervision order<sup>17</sup>), including maintenance programs.<sup>18</sup>
  - The 'maintaining change' program is offered to offenders both pre- and post-release from prison, to help them maintain the gains from the treatment received in prison and implement relapse prevention plans.<sup>19</sup> Group programs are delivered at Sex Offender Programs, Department of Justice, Carlton and at the Marngoneet Correctional Centre.
  - Support and awareness groups are established while the offender is in prison, with continued assistance following release. They provide a support network that the offender meets with to discuss how to deal with the risk of re-offending.<sup>20</sup>
- 6.28 Maintenance programs already exist under other legislative schemes. The *Family Violence Protection Act 2008* (Vic) authorises a court to direct the respondent to a family violence order to attend counselling in certain circumstances.<sup>21</sup> Under that Act, non-attendance is an offence.<sup>22</sup>
- 6.29 Offenders subject to orders pursuant to the *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) are also frequently required to attend treatment or rehabilitation programs.<sup>23</sup> Under that scheme, non-compliance is not criminalised.<sup>24</sup>
- 6.30 It could be argued that a court order to attend a counselling program for sex offenders interferes with the Victorian Charter right not to be subjected to medical treatment without consent.<sup>25</sup> It is highly unlikely, however, that a counselling program for sex offenders would be characterised as 'medical treatment' for the purposes of the Charter.<sup>26</sup> In addition, the rights protected by the Charter are not absolute, and section 7(2) sets out the manner in which limitations of those rights may be justified.<sup>27</sup> Mandatory attendance at a counselling program for sex offenders appears to be a reasonable and proportionate response to the risk of harm to children.
- 6.31 The Commission believes that courts should have the power to direct offenders to attend rehabilitation and counselling programs as a condition of a sex offender's registration order, though it should not be an offence to fail to attend or participate in a program. The success of programs of this nature depends, in part, on the offender's willingness to participate. However, failure to attend or participate in a program should be a matter that a court can consider when deciding whether to extend a sex offender registration order.

16 Pursuant to an order under the *Serious Sex Offender (Detention and Supervision) Act 2009* (Vic).

17 Ibid.

18 Consultation 18 (Sex Offender Management, Department of Justice).

19 Ibid.

20 Ibid.

21 *Family Violence Protection Act 2008* (Vic) s 30.

22 Ibid s 131(4).

23 *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) s17(1)(e).

24 Ibid s 160(2).

25 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 10(c).

26 While there is no common law definition of 'medical treatment', statutory definitions of the term provide some guidance. Participation in a counselling program does not fall within the definition of 'medical treatment' in section 3 of the *Medical Treatment Act 1988* (Vic) or within the definition of 'medical or dental treatment' in the *Guardianship and Administration Act 1986* (Vic).

27 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7(2). Limitation of this right was discussed in the compatibility statement for the Family Violence Protection Bill treatment provisions: see Victoria, *Parliamentary Debates*, Legislative Assembly, 26 June 2008, 2637 (Rob Hulls, Attorney-General).

- 6.32 The Commission suggests that the sex offenders registration scheme is likely to be more effective and fairer if courts are permitted to direct an offender to attend and participate in rehabilitation programs that provide behavioural guidance and assist with integration into the community.
- 6.33 The reporting obligations that currently exist under the Sex Offenders Registration Act should be retained, subject to the following recommended amendments.

## Recommendations

17. The *Sex Offenders Registration Act 2004* (Vic) should be amended to allow a court to impose any of the following conditions, in addition to the standard reporting obligations, when making a sex offender registration order for a person found guilty of a Category 1, 2 or 3 offence committed as an adult:
- (a) A requirement to report in person more frequently than as prescribed in the Act.
  - (b) Where the court is satisfied that the person has a cognitive disability or mental illness, a requirement that the person must be accompanied by an independent third person, assigned by the Office of the Public Advocate, when making a report in person.
  - (c) A requirement to attend and participate in rehabilitation programs that provide behavioural guidance and assist with integration into the community.
  - (d) Authorising the presence of a delegate of the Secretary of the Department of Human Services in her capacity as a protective intervener when a person makes a child contact report to a delegate of the Chief Commissioner of Police.
18. The Office of the Public Advocate should be funded to expand the independent third person program so that it can better assist registered offenders who have a cognitive disability or mental illness in complying with their reporting obligations.

## Reporting for children and young people

- 6.34 There are special reporting issues to consider when children and young people are placed on the register.
- 6.35 Children and young people necessarily spend much of their time with other children and young people. It would be onerous to expect them to report all of this contact, and unfair to impose conditions that would unduly interfere with their educational, sporting or training activities.<sup>28</sup>
- 6.36 It is desirable that registration orders do not unnecessarily interfere with a child's or young person's education, training, or housing. The Children's Court should have discretion to tailor the reporting conditions of a child or young person in appropriate circumstances.

## Recommendation

19. The *Sex Offenders Registration Act 2004* (Vic) should be amended to enable the court to modify the reporting conditions and obligations imposed on offenders who are under the age of 18, as appropriate in the offender's circumstances.

## Length of reporting period

- 6.37 The duration of a registered sex offender's reporting obligations depends on the nature of the offences for which the offender was sentenced, and whether the offender was an adult or a child at the time of the offence.<sup>29</sup>
- 6.38 The Commission does not know why the current reporting periods of eight years, 15 years, and life were included in the Sex Offenders Registration Act.<sup>30</sup> In New South Wales, registration periods were initially eight years, ten years, 12 years, 15 years, and life,<sup>31</sup> but are now the same as Victoria.<sup>32</sup> It appears that the initial New South Wales reporting periods were based on those used in the United States.<sup>33</sup>
- 6.39 The current reporting periods should be reconsidered because they are producing spiralling workloads for Victoria Police and the Department of Human Services, without any evidence of the benefits that such lengthy registration produces.
- 6.40 As at 1 December 2011, 711 of the 2830 active registrants<sup>34</sup> faced lifetime reporting obligations. Another 1178 are required to report for 15 years, while 912 registrants are required to report for eight years.
- 6.41 The two very limited means of removing a person from the Register before the expiry of their reporting period have not been used. A person who faces lifetime registration can apply to the Supreme Court for removal after 15 years.<sup>35</sup> It will not be possible for anyone to make an application of this nature until 1 October 2019. The Chief Commissioner's power to apply to the Supreme Court at any time for the suspension of a registered offender's reporting obligations<sup>36</sup> has not been used.
- 6.42 It has been suggested to the Commission that five years is an appropriate time for the initial registration period. For example, Professor Paul Mullen said:
- In my opinion, if someone is of an high enough risk for sexual reoffending to be placed on the register, they should be placed on an initial 5 year order with the continuance of the order decided on the basis of an assessment at the end of that period.<sup>37</sup>
- 6.43 The Royal Australian and New Zealand College of Psychiatrists suggested that:
- The initial monitoring period for all registered sex offenders should be set at three years as this is recognised as the period where recidivism is most likely.<sup>38</sup>
- 6.44 Shorter reporting periods would create opportunities for regular review. Reviews would serve a useful purpose of ascertaining not only whether the order should continue, but also whether the conditions continue to be useful. It might be clear to the court at the time of review that a condition should be added or deleted. Liberty Victoria submitted:
- Judicial officers should be empowered to set shorter registration periods than the three fixed periods under the Act of 8 years, 15 years, and life. This is because the limitation to the rights of those registered will only be proportionate if the period of registration is the minimum necessary in the circumstances. There may well be examples of offenders acting in ways completely out of character, where the uncontradicted expert evidence is that the person does not pose a risk to the community, or only requires a very limited period of supervision.<sup>39</sup>

29 *Sex Offenders Registration Act 2004* (Vic) ss 34–5.

30 Ibid s 34. Note that the periods are shorter for children and young people: s 35. The Commission has not been given access to the 2003 national working paper on which the schemes are based, which may have provided insight into the rationale for the current reporting periods: Inter-jurisdictional Working Party, *Child Protection Offender Registration with Police: A National Approach*, Report to Australasian Police Ministers' Council (2003), cited in Law Reform Commission of Western Australia, *Community Protection (Offender Reporting) Act: Discussion Paper*, Project No 101 (2011) 72.

31 *Child Protection (Offenders Registration) Act 2000* (NSW) ss 14(2)–(3), (5) (repealed).

32 *Child Protection (Offenders Registration) Act 2000* (NSW) s 14A.

33 The second reading speech for the bill indicates that these periods reflect first-time and repeat offending and were based on registration periods in the United States: New South Wales, *Parliamentary Debates*, Legislative Assembly, 1 June 2000, 6475 (Paul Whelan).

34 Police use the term 'active registrants' to refer to those who are living in the community and whose reporting obligations are not suspended: information provided by Victoria Police, 6 December 2011.

35 *Sex Offenders Registration Act 2004* (Vic) s 39.

36 Ibid s 39A.

37 Submission 23 (Professor Paul Mullen).

38 Submission 8 (Royal Australian and New Zealand College of Psychiatrists, Victorian Branch).

39 Submission 18 (Liberty Victoria).

- 6.45 The Commission recommends shorter reporting periods for the proposed three new categories of offenders. Category 1 and Category 2 offenders should be registered for five years, while Category 3 offenders should be registered for three years.
- 6.46 The expert opinion available to the Commission suggests that five years after release from prison is a reasonable period within which to monitor the activities of the most serious offenders and to decide whether an application should be made to extend that offender's registration when the current order expires.
- 6.47 Under the Serious Sex Offenders (Detention and Supervision) Act, detention orders may be made for up to three years, and supervision orders may be made for up to 15 years.<sup>40</sup> The Supreme Court must review detention orders every year; supervision orders must be reviewed by the court that made the order every three years.<sup>41</sup> The Commission understands that the average duration of a supervision order is seven years.<sup>42</sup> The shortest current order is one year in length, while the longest order extends for 15 years.
- 6.48 The Commission considers that, as with supervision and detention orders, review of registration orders should be conducted by the sentencing court—that is, the court that made the registration order.
- 6.49 It should be possible to extend the registration orders (and the associated reporting periods) for all three categories of offenders and there should be no limit to the number of times a particular offender's registration order can be extended. As a matter of fairness, an application for extension should be made before the order expires. It should be possible to apply for an extension during a period of suspension of the order.
- 6.50 The reviewing court should consider whether further monitoring would be useful, or whether additional assistance such as ongoing participation in rehabilitation programs is desirable. A person's registration should cease unless the court is satisfied, on the balance of probabilities, that extending the order is necessary to protect children from harm.
- 6.51 As the performance of the person on the order is a relevant factor in considering an extension, regular review will provide an incentive to the person to adhere with conditions such as rehabilitation programs, and to seek reintegration into the community.
- 6.52 Regular review of the need for continuing registration should enhance the allocation of police and Department of Human Services resources by enabling them to focus on those offenders who pose a real risk of harm.

## Recommendations

- 20. A registration order in respect of a person found guilty of a Category 1 or Category 2 offence should be of five years duration. A registration order in respect of a person found guilty of a Category 3 offence should be of three years duration.**

40 *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) ss 12, 40.  
41 *Ibid* ss 64–5.  
42 No detention orders have ever been made in Victoria.

21. It should be possible for the Chief Commissioner of Police to apply to a court for an extension of a registration order. There should be no limit to the number of times that a registration order can be extended. The following procedures should apply when seeking an extension:
- (a) The Chief Commissioner should be permitted to apply to a court to extend the registration order for a further period of five or three years (as the case may be) at any time before the order expires.
  - (b) The burden of proof in an extension application should rest with the Chief Commissioner.
  - (c) The court should extend the order if it finds on the balance of probabilities that it is necessary to do so to protect children from the risk of harm.
  - (d) In determining an extension application, the court should be required to consider a risk assessment report from a psychologist or psychiatrist with expertise in assessing an offender's risk of committing further sexual offences against children.
  - (e) If a court decides to extend the period of a registration order it should be able to include any of the conditions that could have been included in the original order.

## Removal from the Register

- 6.53 It is currently unclear whether a person is removed from the Register when their reporting period ends. The Act says nothing about this matter and refers only to destruction of certain materials.<sup>43</sup>
- 6.54 The Commission believes that a person's name and accompanying information should be removed from the Register once the reporting period has expired. This will both reduce the volume of data in the Register and provide consistency with other provisions in the Act concerning the offender's privacy.<sup>44</sup>

## Recommendation

22. The *Sex Offenders Registration Act 2004 (Vic)* should state that when a registration order expires, or is revoked or terminated by a court, the person who was subject to the order is no longer a registered sex offender.

## Length of reporting period for corresponding offenders

- 6.55 When a registered sex offender who is required to comply with the reporting obligations under one Australian registration scheme moves to or visits another state or territory, they will be generally deemed to be a 'corresponding registrable offender'.<sup>45</sup> This designation means that they remain a registered offender when they move interstate and they must comply with that new state or territory's reporting requirements.

43 For instance, photographs and fingerprints: *Sex Offenders Registration Act 2004 (Vic)* s 30.

44 See, eg, *Sex Offenders Registration Act 2004 (Vic)* ss 24, 30.

45 *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. The term 'corresponding registrable offender' is used here as it is the terminology in the Victorian legislation: s 9. However, other states and territories use the terms 'corresponding offender', 'corresponding registered offender', 'corresponding reportable offender' and 'corresponding registrable person'.

- 6.56 The Commission believes that there should be some amendments to the ‘corresponding registrable offender’ provisions in the Sex Offenders Registration Act to ensure that interstate offenders do not flock to Victoria with the aim of securing a shorter registration period. Interstate registered sex offenders who come to Victoria after the commencement of the revised scheme should retain reporting obligations for the period that was set in the original state or territory.

## Recommendation

23. Interstate registrants who move to Victoria should continue to be required to report for the period for which they would have been required to report in the jurisdiction in which they were placed on a sex offenders register, regardless of whether the offence for which they were registered is a registrable offence in Victoria and the duration of reporting requirements under Victorian law.

## Suspension of reporting obligations

- 6.57 There are only a few circumstances in which reporting obligations under the Sex Offenders Registration Act may be suspended.<sup>46</sup> Reporting obligations are suspended when a registered sex offender is:
- in government custody, or
  - outside Victoria, or
  - subject to a witness protection order.<sup>47</sup>
- 6.58 The Sex Offenders Registration Act provides that any period for which a registered sex offender’s reporting obligations are suspended is added to the offender’s reporting period.<sup>48</sup> That is, for the purposes of an offender’s reporting period, time stops when a registered offender’s reporting obligations are suspended and recommences once the suspension is lifted.
- 6.59 The Commission understands that the reporting obligations of some registered sex offenders are currently suspended for medical reasons, even though the Sex Offenders Registration Act does not specifically deal with these situations.

## Grounds for suspension of reporting obligations

### Government custody

- 6.60 No useful protective purpose is served by requiring a registered sex offender who is in custody to comply with any reporting obligations. The scheme is designed to monitor the activities of people living in the community and people in custody pose no threat to the safety of children. It is an unnecessary expense to require people in any form of custody to report to the police.
- 6.61 The current definition of ‘government custody’ in the Sex Offenders Registration Act<sup>49</sup> does not cover all of those situations where a registered sex offender would be unable to report to the police and should have their reporting obligations suspended.
- 6.62 The definition of ‘government custody’ currently includes:
- being in the legal custody of the Secretary of the Department of Justice when subject to an order of imprisonment<sup>50</sup>

46 *Sex Offenders Registration Act 2004* (Vic) s 32.

47 *Ibid.*

48 *Ibid* s 32(2).

49 *Ibid* s 3 (definition of ‘government custody’).

50 *Ibid* s 3 (definition of ‘government custody’ and ‘inmate’); *Corrections Act 1986* (Vic) s 6A(1).

- being in the legal custody of the Secretary of the Department of Justice when subject to a detention order under the Serious Sex Offenders (Detention and Supervision) Act<sup>51</sup>
- being in the legal custody of the Chief Commissioner of Police when subject to an order of imprisonment or other order requiring the person to be held in police custody<sup>52</sup>
- being a young person who is in the legal custody of the Chief Commissioner of Police, having been remanded in custody by a court or bail justice under the *Children, Youth and Families Act 2005* (Vic)<sup>53</sup>
- being a young person who is detained in a youth justice centre or youth residential centre under the *Children, Youth and Families Act*<sup>54</sup>
- being a forensic patient, forensic resident, security patient or involuntary patient in particular circumstances.<sup>55</sup>

6.63 It appears that the current definition of ‘government custody’ does not include:

- remanded prisoners who are adults<sup>56</sup>
- some people who are detained in approved mental health services or residential treatment facilities<sup>57</sup>
- children or young people who are ordered by the Children’s Court to be held in secure welfare facilities.<sup>58</sup>

6.64 These types of custody should be included in the definition of ‘government custody’, as people living under these arrangements are not able to report to the police.

### Supervision orders

6.65 People who are both registered sex offenders and subject to supervision orders under the Serious Sex Offenders (Supervision and Detention) Act<sup>59</sup> must continue to report to their police compliance manager under the Sex Offenders Registration Act.<sup>60</sup> The Commission understands that police visit Corella Place, where a number of those subject to supervision orders are required to live, to enable residents to make their reports.

6.66 The Commission believes that registered sex offenders who are subject to a supervision order under the Serious Sex Offender (Detention and Supervision) Act should have their reporting obligations suspended during the operation of that order. Supervision orders, which are discussed in Chapter 2, allow a court to require a serious sex offender to comply with an intensive supervisory regime that often involves electronic monitoring and a direction to reside at a specified place, as well as restraints on movement in the community and access to places where children congregate.

6.67 No useful protective purpose is served by requiring people whose compliance with their supervision order is comprehensively monitored by a specialist division of the Adult Parole Board to abide by a second set of reporting obligations.

51 *Sex Offenders Registration Act 2004* (Vic) s 3 (definition of ‘government custody’ and ‘inmate’); *Corrections Act 1986* (Vic) s 6A(4).

52 *Sex Offenders Registration Act 2004* (Vic) s 3 (definition of ‘government custody’ and ‘inmate’); *Corrections Act 1986* (Vic) s 6D(1).

53 *Sex Offenders Registration Act 2004* (Vic) s 3 (definition of ‘government custody’ and ‘inmate’); *Corrections Act 1986* (Vic) s 6D(2).

54 The Commission notes that the language used in the Sex Offenders Registration Act definition of ‘detainee’ is outdated, referring to the *Children and Young Persons Act 1989* (Vic), which has been superseded by the *Children, Youth and Families Act 2005* (Vic): *Sex Offenders Registration Act 2004* (Vic) s 3 (definition of ‘detainee’). The definition also refers to ‘a youth training centre’. This terminology is no longer used and has been replaced by ‘youth justice centre’: *Children, Youth and Families Act 2005* (Vic) ss 410–13.

55 *Sex Offenders Registration Act 2004* (Vic) s 3 (definition of ‘government custody’).

56 The provisions of the *Corrections Act 1986* (Vic) are unclear about whether an adult remanded into custody by a bail justice or court is in ‘government custody’ for the purposes of the *Sex Offenders Registration Act 2004* (Vic) s 3 (definitions of ‘government custody’ and ‘inmate’). Specific reference is not made to the remand of a prisoner by a bail justice or court pursuant to s 12 of the *Bail Act 1997* (Vic). See also *Corrections Act 1986* (Vic) ss 6A(1), 6(b)–(c).

57 The provisions that are listed in the definition of ‘government custody’ in the Sex Offenders Registration Act are not exhaustive of the various forms of involuntary detention that may warrant suspension of reporting obligations: *Sex Offenders Registration Act 2004* (Vic) s 3 (definition of ‘government custody’). For example, a registered sex offender detained in a residential treatment facility under the Disability Act would not have their reporting obligations suspended under the Sex Offenders Registration Act: *Disability Act 2006* (Vic) pt 8; *Sentencing Act 1991* (Vic) s 80(2)(b). Detention in an ‘approved mental health service’ is not covered either: *Mental Health Act 1986* (Vic) s 12AA.

58 *Children, Youth and Families Act 2005* (Vic) s 173(2)(b). As secure welfare can be for an initial period of up to 21 days, registration obligations should be suspended while in secure welfare, as the child or young person would be required to report a change of address after 14 days: *Children, Youth and Families Act 2005* (Vic) s 172(2)(b); *Sex Offenders Registration Act 2004* (Vic) s 14(2)(a).

59 Or extended supervision orders, under the former *Serious Sex Offenders Monitoring Act 2005* (Vic) (repealed).

60 This is because being subject to a supervision order or extended supervision order is not considered being in ‘government custody’ for the purposes of suspension of reporting obligations: *Sex Offenders Registration Act 2004* (Vic) ss 32(1), 3 (definition of ‘government custody’).

### Physical or cognitive impairment

- 6.68 Some registered sex offenders are unable to comply with their reporting obligations because of physical disability or impaired cognitive functioning. The Act does not contain any appropriate means of responding to registered offenders with profound illnesses, such as Alzheimer's disease, which prevent them from complying with their reporting obligations. While the Chief Commissioner of Police can apply to the Supreme Court at any time for an order suspending an offender's reporting obligations,<sup>61</sup> this is an expensive way of dealing with this issue.
- 6.69 The Act provides a defence of reasonable excuse to the offence of failing to comply with reporting obligations, and the court may take into account:
- the person's age
  - whether the person has a disability that affects their ability to understand or comply with their reporting obligations
  - whether the person was able to understand the notification they received about reporting obligations, and
  - any other factor the court considers relevant.<sup>62</sup>
- 6.70 However, it is not a fair or effective response to issues of physical and cognitive impairment to require an offender to raise a statutory defence to a charge of failing to comply with an obligation they were unable to fulfil because of a disability.

### Procedure for suspension of reporting obligations

- 6.71 This deficiency can be overcome by permitting the Chief Commissioner of Police to suspend reporting for up to 12 months if satisfied that a registered sex offender is unable to comply with the reporting obligations due to physical or cognitive impairment. This power would complement the Chief Commissioner's existing power to apply to the Supreme Court for suspension of reporting obligations.<sup>63</sup>
- 6.72 It should be possible for the Chief Commissioner to establish a process for dealing with suspension applications fairly and expeditiously. The applicant should be required to submit medical reports that provide appropriate details of the physical or cognitive impairment that leads to an inability to comply with the reporting obligations. A senior officer could be given the task of determining on behalf of the Chief Commissioner whether the reporting obligations should be suspended.
- 6.73 Given the severe penalties for failure to comply with reporting obligations, a registered sex offender who unsuccessfully applies to the Chief Commissioner of Police for the suspension of reporting obligations due to physical or cognitive impairment should be permitted to seek a review of the Chief Commissioner's decision in the court that made the initial registration order.

## Recommendations

24. Reporting obligations should be suspended if the registered sex offender is subject to a supervision order (including an interim order) under the *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic).
25. Reporting obligations should continue to be suspended if the registered sex offender is in government custody. The definition of 'government custody' in the *Sex Offenders Registration Act 2004* (Vic) should be updated and expanded to include all forms of government custody.

61 *Sex Offender Registration Act 2004* (Vic) s 39A.

62 *Ibid* s 47(2).

63 *Ibid* s 39A.

26. The Chief Commissioner of Police should be permitted to suspend the reporting obligations of a registered sex offender for a period of up to 12 months if the Chief Commissioner is satisfied that the offender is no longer able to comply with those obligations due to physical or cognitive impairment.
27. A registered sex offender who unsuccessfully applies to the Chief Commissioner of Police for the suspension of reporting obligations due to physical or cognitive impairment should be permitted to seek a review of the Chief Commissioner's decision in the court that made the registration order.

### The effect of suspension on the duration of an order

- 6.74 An allied issue that arises when considering the suspension of reporting obligations is whether the suspension period counts as 'time served' for the purpose of calculating the total duration of the order, or whether time stops on suspension of the order and recommences when the reporting obligations are revived.
- 6.75 The current policy is that time stops on suspension of the order and the reporting period expands to include suspension time.<sup>64</sup>
- 6.76 The Commission believes that this policy should be reconsidered in light of the purpose of the sex offenders registration scheme, the proposed reporting periods for the revised three categories of offences and the cost of administering the scheme.
- 6.77 In Chapter 2 the Commission recommends that the Sex Offenders Registration Act be amended so that the purpose of the legislation is clear—to protect children against sexual abuse from people who have been found guilty of sexually abusing children.
- 6.78 The legislation is preventative, not punitive. This point is clearly made in the Sentencing Act, which directs courts not to consider any consequences that may arise from the operation of the Sex Offenders Registration Act when imposing a sentence on an offender.<sup>65</sup> The preventative purpose must be borne in mind when considering the effect of suspension on the duration of an order.
- 6.79 Registered sex offenders who are in any form of government custody do not pose a risk of sexually abusing children. When they are released from custody, they must comply with their reporting obligations for the duration of their order. Moreover, under the revised scheme proposed by the Commission, the Chief Commissioner may apply to a court to extend any registration order.
- 6.80 Registered sex offenders who have satisfied the Chief Commissioner of Police that they are unable to comply with their reporting obligations because of physical or cognitive impairment are highly unlikely to pose a risk of sexually abusing children. Registered sex offenders who are subject to a supervision order are far more closely monitored under that order than under the Sex Offenders Registration Act. In both instances, the Chief Commissioner may apply to a court to extend any registration order before it expires.
- 6.81 The administrative cost of collecting, recording and calculating the effect on duration of all suspensions of reporting obligations is not justified when the purpose of the sex offenders registration scheme and the Chief Commissioner's proposed power to apply to extend any order are considered.
- 6.82 The Commission believes that it is simpler to allow time to run during the suspension of any order. This change would not undermine the protective purpose of the sex offender registration scheme and it would result in greater efficiency. If the offender is in custody throughout this period, is subject to a supervision order or is incapacitated, the Chief Commissioner could apply

64 Ibid s 32(2).

65 Sentencing Act 1991 (Vic) s 5(2BC).

to a court for an extension of the registration order when the offender is about to be released from custody, their supervision order is about to expire or their health improves.

- 6.83 The Commission's proposals are consistent with the manner in which the Serious Sex Offender (Detention and Supervision) Act deals with the effect of a custodial sentence on the duration of a supervision order made under that Act. The time spent in custody counts as time under the supervision order even though the conditions of that order do not apply when the offender is in prison.<sup>66</sup> Recent amendments to the Serious Sex Offender (Detention and Supervision) Act extend the operation of this provision to interim supervision orders.<sup>67</sup>

## Recommendation

28. Whenever a person's reporting obligations are suspended because the person is:
- (a) in government custody, or
  - (b) subject to a supervision order under the *Serious Sex Offenders (Supervision and Detention) Act 2009* (Vic), or
  - (c) no longer able to comply with their reporting obligations due to physical or cognitive impairment,
- time on the registration order should continue to run during the period of suspension.

## Police powers and breaches of reporting obligations

- 6.84 In his report on the management of registered sex offenders, the Ombudsman observed that the Sex Offenders Registration Act contains
- no provision that permits Victoria Police to establish the veracity of information provided by registered sex offenders such as entering a home to establish whether a registered sex offender is living with children.<sup>68</sup>
- 6.85 The Commission's terms of reference require consideration of 'the powers of the Chief Commissioner to assess the veracity of information provided by registrants for the purposes of enforcing the ... Act' and of managing any risks that registrants pose 'to children and the broader community'.<sup>69</sup>
- 6.86 Although the police have no special powers under the Sex Offenders Registration Act, general police powers of entry and search are available when the police are investigating possible breaches of the Sex Offenders Registration Act.
- 6.87 The Act creates two reporting offences—one deals with failing to comply with the reporting obligations<sup>70</sup> without reasonable excuse and the other with knowingly providing a false or misleading report.<sup>71</sup> The maximum penalty for the first of these offences is imprisonment for five years,<sup>72</sup> while the second offence has a maximum penalty of two years imprisonment or 240 penalty units.<sup>73</sup>

66 *Serious Sex Offender (Supervision and Detention) Act 2009* (Vic) s 12(2).

67 *Ibid* s 58A.

68 Ombudsman Victoria, above n 6, 11.

69 The terms of reference are set out on page vi of this report.

70 *Sex Offenders Registration Act 2004* (Vic) s 46.

71 *Ibid* s 47.

72 *Ibid* s 46.

73 *Ibid* s 47.

- 6.88 These significant differences in the maximum penalty do not reflect the gravity of the offending. Failing to report, which could be inadvertent, carries a much greater maximum penalty than knowingly providing false or misleading information, which is far more likely to involve behaviour that is of real concern. The reason for the difference probably lies in the police powers that are available when an offence carries a maximum penalty of five years imprisonment.<sup>74</sup>
- 6.89 As failing to comply with the reporting obligations under the Sex Offenders Registration Act is a 'serious indictable offence' for the purposes of section 459A of the *Crimes Act 1958* (Vic), the police have the power to enter and search any premises without a warrant when they have reasonable grounds for believing that a registered sex offender has committed this offence.
- 6.90 While the Commission is not proposing that this search and entry power should be modified or withdrawn, it is a very significant power for the police to use when dealing with registered sex offenders, especially because it could be triggered by a relatively minor failure to comply with a reporting obligation, such as not reporting the removal of a tattoo. It is not clear whether the Ombudsman considered this power when suggesting that the Commission be asked to consider police powers when dealing with registered sex offenders.
- 6.91 The same powers are not available to the police in relation to the offence of furnishing false and misleading information. The Commission believes that this inconsistency should be remedied by giving the police specific entry and search powers when dealing with all suspected breaches of the Sex Offenders Registration Act. This recommendation is an appropriate, measured response to the Ombudsman's concerns about the powers of the police to deal with inaccurate reports from registered sex offenders.
- 6.92 The Commission proposes that the two offence provisions should be merged. The maximum penalty for breaching the reporting obligations should be proportionate to the degree of wrongdoing rather than set at an artificially high level in order to attract the operation of police powers that are otherwise not available when responding to possible offences that do not attract a penalty of five years imprisonment or more.
- 6.93 For the reasons given earlier in this chapter, the Commission does not believe that breach proceedings should be available when an offender fails to attend or participate in a counselling or rehabilitation program.

## Recommendations

29. The offences of furnishing false or misleading information and failing to comply with reporting obligations should be combined into a single summary offence. Penalty: level 7 imprisonment (two years maximum) or a level 7 fine (240 penalty units maximum) or both.
30. If a member of the police force believes, on reasonable grounds, that a registered sex offender has:
- (a) failed to comply with their reporting obligations without a reasonable excuse, or
  - (b) knowingly furnished false or misleading information in purported compliance with their reporting obligations,
- the member of the police force should be permitted to enter and search any premises where they believe the registered sex offender to be.



# Reportable contact with children

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## Introduction

- 7.1 The *Sex Offenders Registration Act 2004* (Vic) requires registered sex offenders to report a number of details to police, including the names and ages of some children with whom they interact.<sup>1</sup>
- 7.2 In his February 2011 report on the management of registered sex offenders, the Ombudsman expressed concern that the term ‘unsupervised contact’ is not defined in the Sex Offenders Registration Act. He recommended that the Attorney-General ask the Commission to consider this matter.<sup>2</sup> The Commission’s terms of reference implement this recommendation by seeking consideration of ‘the definition of unsupervised contact, including whether this should be broadened to include non-physical contact’.<sup>3</sup>

## Current reporting obligations

- 7.3 Registered sex offenders must report to the police<sup>4</sup> the names and ages of any children ‘who generally reside in the same household’ as them or with whom they have ‘regular unsupervised contact’.<sup>5</sup> While the legislation defines the meaning of some of these broad concepts,<sup>6</sup> others are not defined.
- 7.4 As neither ‘contact’ nor ‘unsupervised’<sup>7</sup> is defined in the Sex Offenders Registration Act, it is difficult for registered sex offenders to understand the precise content of their reporting obligations and for police to know whether they are receiving complete and accurate reports. Police compliance managers are required to rely on an offender’s own interpretation of ‘unsupervised contact’ with a child or to provide offenders with their own definitions of this reporting obligation.<sup>8</sup>
- 7.5 This state of affairs is highly unsatisfactory. It does not assist in protecting children from potential harm and it is unfair to the offender who may face serious penalties for either failing to comply with reporting obligations or providing false or misleading information to the police.<sup>9</sup>
- 7.6 ‘Regular’ is currently defined in the Act as three days, whether consecutive or not, in any period of 12 months.<sup>10</sup> It remains unclear whether this means three separate incidents or three full 24-hour days of unsupervised contact. It seems likely that any unsupervised contact with a particular child or children on three separate days within any 12-month period is sufficient to trigger the reporting obligation.
- 7.7 It is also not clear how the 12-month period should be calculated. The Sex Offenders Registration Act does not stipulate whether a registered offender must report unsupervised contact with a child for three days in any calendar year or whether it is three days in any 12-month period calculated from the first day on which the registered sex offender had unsupervised contact with a particular child.<sup>11</sup> Similar problems exist when determining the meaning of the reporting obligation about residing in the same household as a child ‘for at least three days (whether consecutive or not) in any period of 12 months’.<sup>12</sup>
- 7.8 While an ordinary reading of these provisions favours the conclusion that the 12-month period should be calculated from the first day on which the registered sex offender has unsupervised contact with a particular child, an obligation of this nature seems unworkable in practice because it would require registered sex offenders to keep records of the dates on which they first had unsupervised contact with a particular child in order to ensure that they are in a

1 *Sex Offenders Registration Act 2004* (Vic) ss 14(1)(e), (2)(b)–(c). Other reporting obligations are discussed in Chapters 3 and 6.

2 Ombudsman Victoria, *Whistleblowers Protection Act 2001: Investigation into the Failure of Agencies to Manage Registered Sex Offenders* (2011) 10–11, 13, 31, 35 (recommendation 10).

3 The terms of reference are set out on page vi of this report.

4 *Sex Offenders Registration Act 2004* (Vic) s 14(1)(e). The Chief Commissioner approves compliance managers within Victoria Police to receive reports from registered sex offenders: Victoria Police, *Victoria Police Manual: Procedures and Guidelines*, ‘Registered Sex Offenders’, provided by Victoria Police 11 May 2011, 1. There is a discussion of compliance managers in Chapter 3.

5 *Sex Offenders Registration Act 2004* (Vic) s 14(1)(e).

6 *Ibid* s 14(2).

7 Note that ‘contact’ is separately defined for Part 5 of the Sex Offenders Registration Act, which excludes registered sex offenders from child-related employment, but this definition does not apply to reports of regular unsupervised contact: *Sex Offenders Registration Act 2004* (Vic) s 67 (definition of ‘contact’).

8 Consultation 1 (Sex Offenders Registry, Victoria Police).

9 *Sex Offenders Registration Act 2004* (Vic) ss 46–7.

10 *Ibid* s 14(2)(c).

11 *Ibid*.

12 *Ibid* s 14(2)(b).

position to comply with their reporting obligations. It is unlikely that this was the intention of Parliament when it enacted these provisions.

- 7.9 The Australian Community Support Organisation told the Commission about one of its clients, a registered sex offender, who saw an unaccompanied child fall off a bike outside the client's house.<sup>13</sup> As the client was unsure whether assisting the child would constitute 'unsupervised contact' to be reported to Victoria Police, he remained inside the house.<sup>14</sup> The Office of the Victorian Privacy Commissioner noted

The lack of definition is alarming, as a failure to comply with a reporting obligation, or furnishing false or misleading information, are both offences attracting significant penalties.<sup>15</sup>

- 7.10 There was widespread agreement in submissions and consultations that 'unsupervised contact' should be defined.<sup>16</sup>

## Submissions and consultations in relation to 'regular unsupervised contact'

### Defining 'contact'

- 7.11 Some stakeholders suggested that 'contact' should be defined as it is in the *Children, Youth and Families Act 2005* (Vic).<sup>17</sup> Others raised the need to extend any definition of 'contact' to non-physical contact,<sup>18</sup> such as phone calls, text messaging and online contact. The Commission heard that some registered sex offenders have Facebook accounts, where they may be 'friends' with children.<sup>19</sup>
- 7.12 The Law Institute of Victoria suggested that the definition of 'contact' from Part 5 of the Sex Offenders Registration Act be used when dealing with reporting obligations.<sup>20</sup> This definition states:

*contact* means any form of contact between a person and a child and includes—

- (a) any form of physical contact;
- (b) any form of oral communication, whether face to face or by telephone;
- (c) any form of written communication, including electronic communication.<sup>21</sup>

### Defining 'unsupervised' or 'supervision'

- 7.13 One suggestion was to remove the word 'unsupervised' and require registered sex offenders to report all contact with children, or to define 'supervision' as a responsible adult being present.<sup>22</sup> However, the Commission has been told of an instance where a child was offended against in the same room as other adults, the child and offender being covered by a blanket.<sup>23</sup> This suggests that something more than other adults being present is required to constitute appropriate supervision.

13 Submission 9 (Australian Community Support Organisation).

14 Ibid.

15 Submission 10 (Office of the Victorian Privacy Commissioner).

16 Submissions 3 (Professor Terry Thomas); 7 (CASA Forum); 8 (Royal Australian and New Zealand College of Psychiatrists, Victorian Branch); 9 (Australian Community Support Organisation); 10 (Office of the Victorian Privacy Commissioner); 11 (CEASE); 13 (Confidential); 14 (Victoria Legal Aid); 15 (Law Institute of Victoria); 19 (Gatehouse Royal Children's Hospital); 26 (Children's Court of Victoria). Consultations 1 (Sex Offenders Registry, Victoria Police); 2 (Child Protection, Department of Human Services); 9 (Principal Practitioner, Department of Human Services); 16 (Sex Offenders Registry Liaison, Department of Human Services); 26 (Child Protection, Department of Human Services, Eastern Region).

17 Submissions 7 (CASA Forum); 11 (CEASE); 19 (Gatehouse Royal Children's Hospital). It seems that these submissions were referring to 'access', defined as contact the child has with a person by way of a visit or communication with the person by letter, telephone or other means: *Children, Youth and Families Act 2005* (Vic) s 3 (definition of 'access').

18 Consultations 1 (Sex Offenders Registry, Victoria Police); 8 (Manager, Sex Offenders Registry, Victoria Police); 9 (Principal Practitioner, Department of Human Services); 16 (Sex Offenders Registry Liaison, Department of Human Services); 26 (Child Protection, Department of Human Services, Eastern Region).

19 Consultation 1 (Sex Offenders Registry, Victoria Police).

20 Submission 15 (Law Institute of Victoria). Part 5 of the *Sex Offenders Registration Act 2004* (Vic) excludes registered sex offenders from child-related employment.

21 *Sex Offenders Registration Act 2004* (Vic) s 67 (definition of 'contact').

22 Consultation 8 (Manager, Sex Offenders Registry, Victoria Police).

23 Consultation 26 (Child Protection, Department of Human Services, Eastern Region).

- 7.14 Another suggestion was that the definition of ‘supervision’ should include:
- the child’s parent being with the child, in the same room, at all times<sup>24</sup>
  - both visual supervision (if the child is online) and in-person supervision (if the child is having face-to-face contact with a registered sex offender).<sup>25</sup>

### Defining ‘regular’

- 7.15 Some stakeholders were of the view that the definition of ‘regular’ should be decreased from three days in any 12-month period to one day in any 12-month period.<sup>26</sup>

### The Commission’s response and recommendation

- 7.16 The Commission is of the view that there must be greater clarity concerning those interactions with children that registered sex offenders must report to the police. Most members of the community are in ‘contact’ with children on a daily basis, even if only in the supermarket or on public transport. Is an offender obliged to report ‘contact’ of this nature if it is ‘unsupervised’—perhaps in the sense that the child is not under the direct supervision of a parent, guardian or teacher—and occurs on three separate days in a 12-month period? The answer to that question is not clear.
- 7.17 It is not fair to either the police or registered sex offenders for the current level of uncertainty surrounding ‘unsupervised contact’ with children to continue. In some circumstances, the police might feel the need to collect and give the Department of Human Services a significant amount of information that does not identify a particular child or children, while in others a registered sex offender might risk being prosecuted for failing to comply with their reporting obligations if inadvertent contact with a child is not reported.
- 7.18 The Sex Offenders Registration Act should clearly describe the contact with children that registered sex offenders must report to the police.

### Define the types of contact with children that must be reported

#### Remove ‘unsupervised’

- 7.19 It seems impossible to devise a meaningful definition of the term ‘*unsupervised*’ contact’. Retaining this term within the Act will only perpetuate confusion and misunderstanding about the type of contact with children that registered sex offenders are required to report.
- 7.20 The existing obligation is simply too vague for inclusion in a statute of this nature because different people will have a different understanding of the meaning of ‘unsupervised’. Therefore, the Commission recommends the removal of the term ‘unsupervised’.

#### Remove ‘regular’

- 7.21 There appear to be two reasons for the current requirement that registered sex offenders must report only ‘regular’ unsupervised contact with children. They are:
- to exclude contact with children that is merely incidental, for example, in the street or on public transport, and
  - to limit the information provided to Victoria Police to that relating to contact with particular children which might be of concern.
- 7.22 The existing definition of ‘regular’ as three days in any 12-month period is arbitrary. Any new definition of ‘regular’ devised by the Commission would be equally arbitrary. The Commission believes that if the type of contact with children that registered sex offenders are required to report is adequately defined, there will be no need for that contact to be ‘regular’, however defined, in order to be reportable. One instance of a particular type of contact will be sufficient to activate the reporting obligation.

24 Consultation 16 (Sex Offenders Registry Liaison, Department of Human Services).

25 Consultation 26 (Child Protection, Department of Human Services, Eastern Region).

26 See, eg, Submission 15 (Law Institute of Victoria).

## Define the mode and circumstances of contact with children that registered sex offenders must report

- 7.23 The Commission believes that registered sex offenders should continue to be obliged to report the names and ages of any children with whom they have ‘contact’, as well as the addresses of those children and any other means of contacting them. In some instances, the registered sex offender may not know the full name, age or address of the child with whom they have been having contact. However, as much detail should be provided as possible, and may include the child’s mobile phone number or email address.
- 7.24 ‘Contact’ should be clearly defined in the Sex Offenders Registration Act, to clarify the reporting obligation for both Victoria Police and registered sex offenders and to ensure that the information collected is useful for child protection purposes. The Commission believes that the ‘contact’ with a child that must be reported should include both the mode of contact—for example, whether it is face-to-face, over the telephone or online—and the circumstances in which that contact occurs.
- 7.25 When describing the mode of contact with children that registered sex offenders should be required to report, the Commission recommends a definition based on the definition of ‘contact’ in Part 5 of the Sex Offenders Registration Act.<sup>27</sup> This will cover particular types of physical contact, verbal communication and written communication, whether in person, by telephone or over the internet. Physical contact should include both physical proximity and touching. The registered sex offender being present in the same dwelling as the child would constitute physical proximity.<sup>28</sup>
- 7.26 Defining the circumstances of the contact that a registered sex offender must report is more difficult. The definition should include any contact, of a defined mode, where the registered sex offender is supervising, caring for, visiting or forming a relationship with the child, but exclude any incidental or one-off contact the offender may have with a child, for example, on public transport or in the street.
- 7.27 The reason for this recommendation is that the Department of Human Services can only usefully investigate any child protection concerns where there is an identified child or children who may be at some risk of harm because of the nature of that child’s contact with a registered sex offender. Further, it would be unnecessarily onerous and resource-intensive to require registered sex offenders to report all incidental contact with any children.
- 7.28 Registered sex offenders should be required to report all contact where they are supervising a child, caring for a child, or visiting or residing at<sup>29</sup> a dwelling where a child or children are present. This type of contact may arise in circumstances where the registered sex offender is:
- a relative of the child or of the child’s parent or carer
  - a friend, partner or acquaintance of the child’s parent or carer, or
  - someone with occasional responsibility for the child, such as babysitting the child or taking them to school.
- 7.29 Some other types of contact outside of the familial or domestic setting should also be reported. These types of contact may not involve a caring, supervisory or visiting aspect, but involve an attempt to establish a relationship with the child that is more than incidental. While the Commission is of the view that an offender should not be required to report being served by a child at the supermarket or sitting near a child on public transport, a registered sex offender should be required to report:
- attempting to befriend a child, including via social media sites such as Facebook and MySpace
  - exchanging contact details with a child.

27 Part 5 of the *Sex Offenders Registration Act 2004* (Vic) excludes registered sex offenders from child-related employment.

28 As discussed below, this type of physical proximity could involve the registered sex offender visiting a household where children are present or residing in the same household as children.

29 Residing with children is dealt with below at [7.30]–[7.34].

### Include 'residing with a child or children' as one type of contact that must be reported

- 7.30 The Commission is of the view that registered sex offenders should continue to be required to report the names and ages of any children who reside in the same household as them. The Sex Offenders Registration Act already requires this form of contact to be reported.<sup>30</sup> However, the Commission recommends some amendments to the current reporting requirement.
- 7.31 Residing in the same household as a child is currently defined as residing together for three days, whether consecutive or not, in any period of 12 months.<sup>31</sup> As with reports of 'regular unsupervised contact', it is unclear whether this 12-month period refers to a calendar year or to 12 months from the first day of residing together.<sup>32</sup> A literal interpretation suggests that it is the latter. Registered sex offenders are required to report residing with a child within one day—presumably within one day of the third day of residing together.<sup>33</sup> It seems that a registered sex offender must keep a record of all days for which they have resided in the same household as a particular child, and calculate whether these days have fallen in one 12-month period.
- 7.32 The Commission considers this definition unhelpful. Although it requires registered sex offenders to report residing in the same house as a child or children within one day of the third occurrence in a 12-month period, this may be months after the first and second occasions on which the registered sex offender has stayed under the same roof as a child. From a child protection perspective, the child or children could have been at risk of harm on either of these earlier occasions without any requirement for the offender to have made a report. Any attempt to redefine 'residing with a child' by number of days or length of time is equally arbitrary.
- 7.33 To resolve this difficulty, the Commission recommends that 'residing with a child or children' be included as one type of contact that registered sex offenders are required to report. With the new definition of 'contact' that the Commission is proposing, there would no longer be any need for a distinction between 'contact with a child' and 'residing with a child'.
- 7.34 Including 'residing with a child' as just one type of contact with a child that a registered sex offender is required to report would eliminate the need for a precise definition of this term and the arbitrary time limits that would accompany such a definition. Any contact that does not fall within 'residing with a child' would be captured by one of the other categories of contact, such as visiting or staying overnight at a dwelling where a child is present.

## Recommendations

31. Registered sex offenders should be required to report the names, ages and addresses of any children with whom they have 'contact', and the means of contacting those children.

30 *Sex Offenders Registration Act 2004* (Vic) ss 14(1)(e), (2)(b).  
31 *Ibid* s 14(2)(b).  
32 The Act does not provide clarification about this: *ibid*.  
33 *Sex Offenders Registration Act 2004* (Vic) s 14(2)(b).

32. The *Sex Offenders Registration Act 2004 (Vic)* should define 'contact' with a child or children for these purposes as:
- (a) any form of physical contact, including physical proximity or touching, or
  - (b) any form of oral communication, including face-to-face, by telephone or over the internet, or
  - (c) any form of written communication, including electronic communication,
- in circumstances where the registered sex offender is:
- (a) supervising or caring for a child or children, or
  - (b) visiting or residing at a dwelling where a child or children are present, including staying overnight, or
  - (c) exchanging contact details with a child or children, or
  - (d) attempting to befriend a child or children.

## Registered sex offenders who are under the age of 18

- 7.35 It would place an onerous burden on registered sex offenders who are under the age of 18 to require them to report all contact of this nature that they have with other children. Much of their social life will involve visiting and staying overnight with children, attempting to befriend other children and exchanging contact details with other children. Many registered sex offenders under the age of 18 would need to make reports almost daily, each time they went to school or added a new friend on Facebook.
- 7.36 For this reason, the Commission recommends in Chapter 6 that the Children's Court should be permitted to alter the reporting obligations of offenders who are under the age of 18, as appropriate in the circumstances. This recommendation would apply to the child contact report, as well as to other reporting obligations.

## Timing of child contact reports

- 7.37 Another difficulty with reporting contact with a child is whether the report should be made before or after the contact occurs. At present, the registered sex offender is required to report 'regular unsupervised contact' retrospectively, as they do not have regular unsupervised contact with a child unless that contact is for three days in any 12-month period.<sup>34</sup> This threshold is not met until the three days contact has occurred.
- 7.38 Reporting contact after it has occurred is not always helpful from a child protection perspective—harm to the child can clearly occur in less than three days and reporting contact after the event does little to protect the child.
- 7.39 Several stakeholders recommended that particular types of contact with a child should be reported prospectively, as this would then allow an assessment to be made of whether that contact should occur.<sup>35</sup> However, other submissions pointed out the problems with this proposal:
- the Sex Offenders Registration Act does not permit police to prohibit the unsupervised contact from occurring, as such contact is not, of itself, unlawful, and
  - unsupervised contact with a child will not always be planned or initiated by the offender.<sup>36</sup>

<sup>34</sup> Ibid s 14(2)(c).

<sup>35</sup> Submissions 7 (CASA Forum); 8 (Royal Australian and New Zealand College of Psychiatrists, Victorian Branch); 11 (CEASE); 19 (Gatehouse Royal Children's Hospital).

<sup>36</sup> This second point was made by the Australian Community Support Organisation and the Law Institute of Victoria in their submissions: Submissions 9 (Australian Community Support Organisation); 15 (Law Institute of Victoria).

- 7.40 The Law Institute of Victoria is opposed to prospective reporting, as it would often be impossible to predict contact and may cause offenders to breach their reporting obligations where contact was unplanned.<sup>37</sup>

## The Commission's response and recommendations

- 7.41 Although there are obvious benefits in requiring registered sex offenders to report contact with a child before it occurs, the Commission believes that it would be practically unworkable to require them to do so. In many instances, it would not be possible for a person to know if and when contact with a child will occur. Further, prospective reporting would impose an onerous burden on the Department of Human Services, as the child protection service would be obliged to counsel parents or guardians about contact between their child and a registered sex offender that might never occur.
- 7.42 In addition, prospective reports would probably be of very limited practical use to police or child protection authorities, as potential offenders are highly unlikely to report any proposed contact with a child they plan to sexually abuse.
- 7.43 The Commission does not recommend prospective reporting. Instead, it recommends retaining the requirement for registered sex offenders to notify police that information about their contact with a child has changed, within one day of the contact occurring. This notification would not be a detailed report of the mode and circumstances of the contact, but simply an indication that the registered sex offender intends to make a full child contact report within seven days. Requiring this notification to be made within one day of the contact occurring is not particularly onerous, as the notification may be made by telephone.<sup>38</sup>
- 7.44 In addition, the more detailed written form in which the Commission recommends the child contact report be made—the child contact report form—would need to be submitted within seven days of the contact occurring.<sup>39</sup>
- 7.45 At present, registered sex offenders are required to make certain reports to police in person, including the initial report, annual report and reporting changes to their place of residence.<sup>40</sup> The Commission considers that the proposed child contact report, to be made within seven days of contact occurring, should be made in person. This is consistent with the recommendation that a court, when making a registration order, should be permitted to authorise a delegate of the Secretary of the Department of Human Services to be present for the child contact report.<sup>41</sup>

## Recommendations

33. Registered sex offenders should be required to make a child contact report when their reporting obligations commence, annually, and when any information about their contact with children changes.
34. Registered sex offenders should be required to:
- (a) within one day of the change, notify the police of any changes to information about their contact with children, and
  - (b) within seven days of the change, provide a written child contact report to the police in person.

37 Submission 15 (Law Institute of Victoria).

38 Currently, reports that are able to be made other than in person may be made to the Chief Commissioner of Police or the Registrar by telephone: *Sex Offenders Registration Act 2004* (Vic) s 23(2); *Sex Offenders Registration Regulations 2004* (Vic) reg 10.

39 See below at [7.51]–[7.55] for discussion and recommendations relating to the form in which the child contact report is to be made.

40 *Sex Offenders Registration Act 2004* (Vic) s 23(1).

41 See Chapter 6 for this recommendation.

## The manner of reporting contact with a child

- 7.46 Due to inconsistent practices in the collection of information from registered sex offenders by police compliance managers, and the requirement that Victoria Police pass on all reports of unsupervised contact with children,<sup>42</sup> the information provided to the Department of Human Services in these reports is of varying quality and utility in conducting a protective investigation.<sup>43</sup>
- 7.47 The Commission has been told by the Department of Human Services that the information it receives about registered sex offenders' contact with children is sometimes not detailed enough, and may not include the nature of the contact, or the identity or whereabouts of the children.<sup>44</sup> The Department has indicated a desire for more targeted information.<sup>45</sup>
- 7.48 Collecting information about the contact that a registered sex offender is having with children is not a typical police function. Some compliance managers may not know the questions to ask to ascertain whether a registered sex offender might pose a risk to a particular child or children. The quality of the information provided to the Department of Human Services depends on whether the police compliance manager is familiar with the process of reporting on child protection matters.<sup>46</sup>
- 7.49 The current policy for all reports of unsupervised contact to be passed from Victoria Police to the Department of Human Services without filtering also means that the Department receives a large amount of information, not all of which will be relevant to investigating protective concerns. The Commission understands that this practice has had significant resource implications for the Department.<sup>47</sup>
- 7.50 In comparison to the many reports of unsupervised contact that the Department of Human Services receives, the number of substantiated reports or reports that result in a protection application is relatively small.<sup>48</sup> This emphasises the need for more targeted information so that the child protection authorities can quickly identify children who might be at risk and take appropriate investigative steps.

## The Commission's response and recommendation

- 7.51 A new mechanism for collecting information from registered sex offenders is required to improve the varying quality of information currently provided to the Department of Human Services by Victoria Police about contact between registered sex offenders and children,.
- 7.52 Clearly defining the type of contact to be reported, and equipping police compliance managers with a series of questions in a form for the registered sex offender to complete, would help to ensure that the Department of Human Services is provided with information that is of use when conducting protective investigations.
- 7.53 The Victoria Police Manual already requires compliance managers to complete a questionnaire when registered offenders are reporting contact with children.<sup>49</sup> A new child contact report form should be devised by the key agencies after consulting organisations with relevant experience working with offenders.
- 7.54 Both Victoria Police and the Department of Human Services should be responsible for designing the child contact report form, as police compliance managers will have primary responsibility for ensuring that registered sex offenders complete it appropriately and the Department of Human Services will use the information it contains to inform its protective investigations.

42 The requirement for Victoria Police to pass on all reports of unsupervised contact with children to the Department of Human Service is discussed in Chapter 9 at [9.33]–[9.38].

43 Consultation 2 (Child Protection, Department of Human Services); 26 (Child Protection, Department of Human Services, Eastern Region).

44 Ibid.

45 Consultation 2 (Child Protection, Department of Human Services).

46 Consultation 26 (Child Protection, Department of Human Services, Eastern Region).

47 Consultation 9 (Principal Practitioner, Department of Human Services).

48 Of the 641 reports of unsupervised contact from the audit, 11 proceeded to protection application and, of these, harm from sexual abuse was the ground for the protection application in five or six of the cases: Consultation 26 (Child Protection, Department of Human Services, Eastern Region).

49 Victoria Police, *Victoria Police Manual: Procedures and Guidelines*, 'Registered Sex Offenders', provided by Victoria Police 11 May 2011, 2.

- 7.55 Both Victoria Legal Aid and the Public Advocate should be consulted, to ensure that the form is comprehensible to the many different people, including some with a disability, who will be required to complete it.

## Recommendation

35. The child contact report should be required to be made in the form jointly devised by the Secretary of the Department of Human Services and the Chief Commissioner of Police, in consultation with other relevant agencies, including Victoria Legal Aid and the Public Advocate.





# Child protection prohibition orders

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## Introduction

- 8.1 Sometimes a person who has completed a sentence following a conviction for a sexual offence involving a child might behave in a way that is lawful but of concern to the police or child protection authorities. Such behaviour could include contacting a child against whom the person has previously committed offences, or frequenting a place where grooming or other offending previously occurred, such as a municipal swimming pool or park.<sup>1</sup> Other Australian jurisdictions have devised a mechanism which enables a court to place restrictions on this type of behaviour.
- 8.2 Child protection prohibition orders provide a preventative mechanism that permits a court to order that a registered offender<sup>2</sup> not engage in certain types of behaviour or employment, go to certain places, or contact certain people. They are similar to other types of preventative orders made under the *Family Violence Protection Act 2008* (Vic) and *Personal Safety Intervention Orders Act 2010* (Vic). Victoria and Tasmania are the only Australian jurisdictions without existing legislation, or plans to introduce legislation, establishing child protection prohibition orders.
- 8.3 Such orders exist in New South Wales, Queensland, Western Australia and the Northern Territory, and operate to prevent a registered offender from engaging in specified conduct.<sup>3</sup> Prohibition orders<sup>4</sup> were introduced in New South Wales in July 2005,<sup>5</sup> in Queensland in June 2008,<sup>6</sup> and have been included in Western Australian and Northern Territory registration Acts since their commencement.<sup>7</sup>
- 8.4 While South Australia does not have prohibition orders, its Magistrates' Court has the power to make paedophile restraining orders which are similar to prohibition orders.<sup>8</sup> South Australia was the first state to introduce orders of this kind in 1996—10 years before its sex offenders registration legislation commenced operation.<sup>9</sup>
- 8.5 The Australian Capital Territory plans to introduce a child protection prohibition order scheme shortly.<sup>10</sup>
- 8.6 The Commission believes that child protection prohibition orders should be available in Victoria, as they would enable Victoria Police to take appropriate action to protect a child who may be at risk of harm from a registered sex offender without child protection authorities having to follow the existing practice of making a protection application in relation to the child.

1 At present, if the conduct is of sufficient seriousness and is directed to an identifiable target, a personal safety intervention order could be sought, or the police could charge the person with stalking: *Personal Safety Intervention Orders Act 2010* (Vic) ss 10, 67; *Crimes Act 1958* (Vic) s 21A. Child protection prohibition orders have the advantage of being able to prohibit conduct that is of concern even if there is not an identifiable target.

2 The term 'registered offender' is used here rather than 'registered sex offender', as offenders may be registered in other states and territories for offences other than sexual offences (see Appendix E for more information). Prohibition orders can generally only be made against offenders who have already been registered, but in Queensland they can be made in respect of offenders who are not registered offenders but would have been registered if their sentence had not expired prior to the commencement of the registration legislation: *Child Protection (Offenders Prohibition Orders) Act 2008* (Qld) s 6, dictionary (definition of 'relevant sexual offender'). If a prohibition order is made in these circumstances, the offender is deemed to be a registered offender for the duration of the prohibition order: *Child Protection (Offenders Prohibition Orders) Act 2008* (Qld) s 36.

3 *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW); *Child Protection (Offenders Prohibition Orders) Act 2008* (Qld); *Community Protection (Offender Reporting) Act 2004* (WA) pt 5; *Child Protection (Offender Reporting and Registration) Act 2004* (NT) pt 5. The New South Wales Act also permits the Commissioner of Police to apply to the court for a contact prohibition order, to prohibit a registered offender from contacting any victim or co-offender of the offence for which they were registered: *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW) ss 16A (definition of 'child contact order'), 16B. The Commission is of the view that the conduct which may be prohibited under the proposed child protection prohibition order would cover this situation, and that an additional contact prohibition order is not necessary.

4 They are called 'child protection prohibition orders' in New South Wales, Western Australia and the Northern Territory, and 'offender prohibition orders' in Queensland.

5 Five years after registration was first introduced in New South Wales, and one year after the registration legislation was substantially amended.

6 Three and a half years after the commencement of the registration scheme in Queensland.

7 *Community Protection (Offender Reporting) Act 2004* (WA) pt 5; *Child Protection (Offender Reporting and Registration) Act 2004* (NT) pt 5.

8 *Summary Procedure Act 1921* (SA) ss 99AA–99AB.

9 *Ibid* s 99AA. The Magistrates' Court may also make 'child protection restraining orders', if someone who lives with a child has ever been convicted of sexual offences or certain drug offences: *Summary Procedure Act 1921* (SA) s 99AAC.

10 Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 16 August 2011, 3258 (Katy Gallagher). Note that this states that a threat to the life of a child will constitute grounds for an order, even though the Australian Capital Territory does not currently allow for registration of people convicted of murdering children: *Crimes (Child Sex Offenders) Act 2005* (ACT) s 16(1). These orders will form part of the Crimes (Child Sex Offenders) Amendment Bill 2011, which, if passed, will also increase the maximum penalty for the offence of failing to comply with reporting obligations: Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 16 August 2011, 3258 (Katy Gallagher).

- 8.7 While child protection prohibition orders restrict the freedom of movement of people who are living in the community after having completed a sentence for an offence involving sexual abuse of a child, they appear to be a reasonable and proportionate limitation to that important freedom if a judicial officer is required to balance the competing interests at stake in an individual case.<sup>11</sup>

## How child protection prohibition orders are made

- 8.8 In all of the relevant Australian jurisdictions, the Commissioner of Police<sup>12</sup> may apply to a court<sup>13</sup> for a prohibition order. The court may make the order if:
- the registered offender poses a risk<sup>14</sup> to the lives<sup>15</sup> or sexual safety of one or more children, or children generally, and
  - making the order will reduce that risk.<sup>16</sup>
- 8.9 In New South Wales, Queensland and the Northern Territory, the offender must have engaged in some kind of concerning behaviour before an order can be made. In these jurisdictions, there must be evidence that the registered offender's conduct poses a risk to the lives or sexual safety of one or more children.<sup>17</sup>
- 8.10 In all of these jurisdictions, the court must consider a range of factors before making an order.<sup>18</sup> In New South Wales, for example, these factors include: the seriousness and nature of the person's past offences, how long ago the offences were committed, and the offender's circumstances so far as they relate to the conduct sought to be prohibited.<sup>19</sup>

## The current alternatives in Victoria

### Child protection orders

- 8.11 In the absence of child protection prohibition orders, the Commission understands that in some instances the Department of Human Services, on discovering that a registered sex offender has moved into a house where children reside, may tell the child's parent that either the registered sex offender must leave or a protection application will be made in relation to the child.<sup>20</sup>
- 8.12 Most child protection applications are commenced by child protection workers taking the child into 'safe custody'—that is, removing the child from their home and bringing them before the Children's Court or a bail justice within 24 hours for a hearing of an application for an interim

11 See *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 12, which protects freedom of movement, and s 7, which sets out the circumstances in which such rights may be limited.

12 *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW) s 4; *Child Protection (Offender Prohibition Order) Act 2008* (Qld) s 6; *Community Protection (Offender Reporting) Act 2004* (WA) s 87; *Child Protection (Offender Reporting and Registration) Act 2004* (NT) s 71.

13 In New South Wales, applications are made to the Local Court: *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW) s 4. In Queensland, applications are made to the Children's Court or Magistrates' Court: *Child Protection (Offender Prohibition Order) Act 2008* (Qld) dictionary (definition of 'court'). In Western Australia, applications are made to the Children's Court or District Court: *Community Protection (Offender Reporting) Act 2004* (WA) s 85 (definition of 'court'). In the Northern Territory, applications are made to the Youth Justice Court or the Court of Summary Jurisdiction: *Child Protection (Offender Reporting and Registration) Act 2004* (NT) s 69 (definition of 'court').

14 In New South Wales, Western Australia and the Northern Territory, it is just 'a risk' that is required: *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW) s 5(1); *Community Protection (Offender Reporting) Act 2004* (WA) s 90(1); *Child Protection (Offender Reporting and Registration) Act 2004* (NT) s 72(1). In Queensland, the test is 'unacceptable risk': *Child Protection (Offender Prohibition Order) Act 2008* (Qld) s 8(1).

15 New South Wales, Queensland, Western Australia and the Northern Territory all require mandatory registration for child homicide and permit discretionary registration if a person poses a risk to lives: *Child Protection (Offenders Registration) Act 2000* (NSW) s 3E(2)(a); *Child Protection (Offender Reporting) Act 2004* (Qld) s 13(2); *Community Protection (Offender Reporting) Act 2004* (WA) s 13(2); *Child Protection (Offender Reporting and Registration) Act 2004* (NT) s 13(3).

16 *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW) s 5(1); *Child Protection (Offender Prohibition Order) Act 2008* (Qld) s 8(1); *Community Protection (Offender Reporting) Act 2004* (WA) s 90(1); *Child Protection (Offender Reporting and Registration) Act 2004* (NT) s 72(1).

17 *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW) s 5(1); *Child Protection (Offender Reporting and Registration) Act 2004* (NT) s 72(1). Queensland requires the person to have engaged in 'concerning conduct': *Child Protection (Offender Prohibition Order) Act 2008* (Qld) s 3 (definition of 'concerning conduct').

18 *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW) s 5(3); *Child Protection (Offender Prohibition Order) Act 2008* (Qld) s 9; *Community Protection (Offender Reporting) Act 2004* (WA) s 90(3); *Child Protection (Offender Reporting and Registration) Act 2004* (NT) s 72.

19 *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW) s 5(3). Additionally, if the court in New South Wales is considering whether to make a prohibition order against a registered offender who is under the age of 18, it may only make the order if satisfied that 'all other reasonably appropriate means of managing the conduct of the person have been considered before the order was sought': s 5(2).

20 Consultation 16 (Sex Offenders Registry Liaison, Department of Human Services).

accommodation order.<sup>21</sup> The Commission understands that the Department of Human Services would then seek a supervision order from the Children’s Court, allowing the child to live with their parent on the condition that the named registered sex offender is not to live in the household.<sup>22</sup>

## Criminal offence

- 8.13 The Commission also notes that it is an offence under the *Crimes Act 1958* (Vic) for a person who has been found guilty of particular sexual offences to be found loitering, without reasonable excuse, near a school, kindergarten, childcare centre or other place frequented by children.<sup>23</sup> This is also a Class 2 registrable offence.<sup>24</sup> The maximum penalty for this offence is five years imprisonment in some circumstances, and two years imprisonment in others.<sup>25</sup>
- 8.14 Although there would be some overlap between this offence and conduct that may result in an application for a child protection prohibition order, if they were introduced in Victoria, child protection prohibition orders are directed to conduct that may be lawful but is of concern to police and child protection authorities. Police could apply for a prohibition order if the conduct in question was not sufficient to warrant a prosecution for the loitering offence, or could not be proved to the criminal standard. Child protection prohibition orders also apply to a broader range of conduct than loitering in particular public places.<sup>26</sup>

## Current interstate practice

- 8.15 Although statistics are not available about how many prohibition orders have been made in all other states and territories, it seems that these orders are being used sparingly in Western Australia and the Northern Territory.<sup>27</sup> New South Wales Police and the Department of Families and Community Services are satisfied with how the orders operate in that jurisdiction, and confirm that these reduce the need for protective intervention by the Department of Families and Community Services.<sup>28</sup>

## The Commission’s response and recommendations

- 8.16 Child protection prohibition orders would provide another important tool for protecting children from sexual abuse by restricting the activities of some registered sex offenders. They are a means of taking a targeted approach to preventing child sexual abuse that is likely to be far more effective than including all people convicted of particular offences in the Sex Offenders Register for an inordinately lengthy period.
- 8.17 These orders also promise less disruption for children at risk of sexual abuse by a registered sex offender. Permitting police to apply for a child protection prohibition order, that could result in a registered sex offender being removed from a nominated household, will probably mean that child protection workers will take fewer children into safe custody in order to shield them from the risk of abuse from an offender who has moved into their home. Child protection prohibition orders would assist the *Sex Offenders Registration Act 2004* (Vic) to fulfil its purpose of protecting children from sexual abuse.<sup>29</sup>

21 *Children, Youth and Families Act 2005* (Vic) s 242. The Department of Human Services can commence a protection application in two ways—by notice or by safe custody: *Children, Youth and Families Act 2005* (Vic) ss 240–3. In 2008–09, 78 per cent of all protection applications in Melbourne were commenced by safe custody: Victorian Law Reform Commission, *Protection Applications in the Children’s Court*, Final Report No 19 (2010) 79.

22 *Children, Youth and Families Act 2005* (Vic) ss 280–1. Protection applications may also result in custody or guardianship of the child vesting in someone other than the child’s parent: pt 4.9.

23 *Crimes Act 1958* (Vic) s 60B.

24 *Sex Offenders Registration Act 2004* (Vic) sch 2.

25 *Crimes Act 1958* (Vic) s 60B(2A).

26 The conduct that may be prohibited by a child protection prohibition order is discussed below at [8.28]–[8.29].

27 In February 2011, the Western Australia Law Reform Commission reported that nine final prohibition orders had been made: Law Reform Commission of Western Australia, *Community Protection (Offender Reporting) Act: Discussion Paper*, Project No 101(2011) 41–2. No prohibition orders were made in the Northern Territory from July 2007 to June 2011.

28 Consultations 20 (NSW Department of Families and Community Services and NSW Police); 21 Child Protection Registry, NSW Police).

29 See recommendation 1 in Chapter 2, which proposes an amendment the purpose of the *Sex Offenders Registration Act 2004* (Vic).

- 8.18 As child protection prohibition orders are civil orders, the Commission considers the appropriate standard of proof to be the balance of probabilities. This is consistent with the approach in other states and territories.<sup>30</sup>
- 8.19 As Victoria Police would be responsible for enforcing child protection prohibition orders, the Chief Commissioner of Police should have the power to apply for these orders. If the Department of Human Services considers that a child protection prohibition order would assist them to resolve protective concerns in relation to a particular child or children, cooperation between Victoria Police and the Department of Human Services will be necessary.

## Recommendations

36. The *Sex Offenders Registration Act 2004 (Vic)* should be amended to permit the Chief Commissioner of Police to apply to the Magistrates' Court or the Children's Court for a child protection prohibition order in respect of a registered sex offender.
37. The court should be permitted to make a child protection prohibition order in respect of a registered sex offender if:
- having regard to the nature and pattern of the registered sex offender's conduct, the court is satisfied on the balance of probabilities that they pose an unacceptable risk to the sexual safety of one or more children or children generally, and
  - making the order will reduce that risk.
38. In determining whether to make a child protection prohibition order, the court should be required to consider the following factors:
- relevant findings of guilt for sexual offences involving children
  - how long ago those offences were committed
  - whether the nature and pattern of behaviour that the registered sex offender is currently engaging in is similar to behaviour which was preparatory to previous, relevant sexual offences involving children
  - the conditions of the registered sex offender's sex offender registration order
  - any other matters that the court considers relevant.

## Making child protection prohibition orders against young offenders

- 8.20 In all states and territories where prohibition orders exist, there are additional factors that the court must take into account when considering whether to make a prohibition order in respect of a registered sex offender who is under the age of 18.
- 8.21 In New South Wales, the Northern Territory and Western Australia, the court is required to take the educational needs of the person into account.<sup>31</sup> In Queensland, the court is required to order an assessment report, which may include information as to the impact an order would have on the child's accommodation, educational, health, cultural or social needs.<sup>32</sup> In Victoria, the Children's Court Clinic should provide the Children's Court with a report of this kind before it makes a prohibition order in respect of a child.

30 *Child Protection (Offenders Prohibition Orders) Act 2004 (NSW)* s 5(1); *Child Protection (Offender Prohibition Order) Act 2008 (Qld)* s 8; *Community Protection (Offender Reporting) Act 2004 (WA)* ss 90, 112; *Child Protection (Offender Reporting and Registration) Act 2004 (NT)* s 72.

31 *Child Protection (Offenders Prohibition Orders) Act 2004 (NSW)* s 5(3)(j); *Child Protection (Offender Reporting and Registration) Act 2004 (NT)* s 72(3)(i); *Community Protection (Offender Reporting) Act 2004 (WA)* s 90(3)(i).

32 *Child Protection (Offender Prohibition Order) Act 2008 (Qld)* s 10.

- 8.22 Additionally, in New South Wales, a prohibition order may only be made against a child if the court is satisfied that 'all other reasonably appropriate means for managing the conduct of the child have been considered before the order was sought'.<sup>33</sup>
- 8.23 Child protection prohibition orders may also contain conditions excluding a registered sex offender from their place of residence. This power extends to child registered sex offenders. In relation to family violence intervention orders or personal safety intervention orders sought against child respondents in Victoria, if the court proposes to exclude the child from their place of residence, it must take into consideration:
- the desirability of the child being supported to gain access to appropriate educational services and health services<sup>34</sup>
  - the desirability of allowing the education, training or employment of the child to continue without interruption<sup>35</sup>
  - the desirability of minimising disruption to the child and the importance of maintaining social networks and support which may be lost if the child were required to leave their place of residence.<sup>36</sup>
- 8.24 Wherever possible, consistency with family violence intervention orders and personal safety intervention orders is desirable, as the Magistrates' Court and Children's Court already have jurisdiction to make intervention orders.<sup>37</sup>
- 8.25 The Commission considers that the safeguards for child respondents in relation to prohibition orders in other states and territories, as well as those from the comparable area of intervention orders, should be put in place if prohibition orders were introduced in Victoria.
- 8.26 Additionally, the Children's Court must consider a number of factors when sentencing a child for any offence.<sup>38</sup> These factors emphasise the desirability of allowing the child to remain at home and maintain their relationships with family, and the need to minimise stigma to the child.<sup>39</sup>
- 8.27 While a child protection prohibition order is not a sentencing order, many of these factors may be of assistance when the court is determining whether to make a prohibition order in respect of a registered sex offender who is a child.

## Recommendations

39. In addition to the factors referred to in Recommendation 38, if the Children's Court is considering whether to make a child protection prohibition order in respect of a registered sex offender who is a child, the Children's Court should be required to consider:
- (a) the desirability of the child being supported to gain access to appropriate educational services and health services
  - (b) the desirability of allowing the education, training or employment of the child to continue without interruption
  - (c) the desirability of minimising disruption to the child and the importance of maintaining social networks and support which may be lost if the child were required to leave their place of residence, and
  - (d) section 362(1) of the *Children, Youth and Families Act 2005* (Vic), so far as it is relevant.

33 *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW) s 5(2).

34 *Family Violence Protection Act 2008* (Vic) s 83(2)(a); *Personal Safety Intervention Orders Act 2010* (Vic) s 71(2)(d).

35 *Family Violence Protection Act 2008* (Vic) s 83(2)(b); *Personal Safety Intervention Orders Act 2010* (Vic) s 71(2)(e).

36 *Family Violence Protection Act 2008* (Vic) s 82(2)(a); *Personal Safety Intervention Orders Act 2010* (Vic) s 71(2)(a).

37 If the respondent is a child, the application should, if practicable, be dealt with by the Children's Court: *Family Violence Protection Act 2008* (Vic) s 146(2); *Personal Safety Intervention Orders Act 2010* (Vic) s 103(2).

38 *Children, Youth and Families Act 2005* (Vic) s 362(1).

39 *Ibid.*

40. The Children’s Court should only be permitted to make a child protection prohibition order in respect of a registered sex offender who is a child if it is satisfied that:
- (a) all other reasonably appropriate means of managing the conduct of the child have been considered before the order was sought, and
  - (b) the child will have appropriate alternative accommodation and appropriate care and supervision.

## Conduct that may be prohibited

- 8.28 None of the Australian jurisdictions with prohibition orders place limits on the conduct that an order can prohibit, but all provide examples of the type of conduct that may be prohibited.<sup>40</sup> They are:
- associating with or contacting specified persons or kinds of persons
  - being in specified locations or kinds of locations
  - engaging in specified behaviour
  - engaging in specified employment or employment of a specified kind.<sup>41</sup>
- 8.29 The Commission considers it appropriate to leave the types of conduct that may be prohibited to the discretion of the court for determination on a case-by-case basis. As in other jurisdictions, the legislation should contain non-exhaustive examples of the types of conduct that may be prohibited, because it is impossible to predict all of the behaviour that might pose a risk to the lives or sexual safety of children.

## Recommendation

41. A child protection prohibition order should be able to prohibit the registered sex offender from:
- (a) associating with or contacting specified persons
  - (b) being in specified locations
  - (c) engaging in specified behaviour, and/or
  - (d) engaging in specified employment.

40 *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW) s 8; *Child Protection (Offender Prohibition Order) Act 2008* (Qld) s 49; *Community Protection (Offender Reporting) Act 2004* (WA) s 93; *Child Protection (Offender Reporting and Registration) Act 2004* (NT) ss 73(1), (5).

41 *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW) s 8; *Child Protection (Offender Prohibition Order) Act 2008* (Qld) s 49; *Community Protection (Offender Reporting) Act 2004* (WA) s 93; *Child Protection (Offender Reporting and Registration) Act 2004* (NT) ss 73(1), (5). There is a bill currently before the Western Australian Parliament that would expand the operation of child protection prohibition orders and enable the court to prohibit a registered offender from residing in certain locations, including their place of residence, or travelling outside Australia without the permission of the Chief Commissioner: *Community Protection (Offender Reporting) Amendment Bill 2011* (WA) cl 32(1). Western Australian prohibition orders can already prohibit a registered offender from entering or remaining in a place even if they have a legal or equitable right to be there: *Community Protection (Offender Reporting) Act 2004* (WA) s 93(4). The new Bill would extend this to the offender’s place of residence: *Community Protection (Offender Reporting) Amendment Bill 2011* (WA) cl 32(2).

## Maximum term of prohibition orders

- 8.30 In all of the jurisdictions, prohibition orders can be made for up to five years in the case of an adult offender, and up to two years in the case of an offender who is under the age of 18.<sup>42</sup> The Commission considers these terms to be appropriate.

## Recommendation

42. The maximum duration of a child protection prohibition order should be five years for adult registered sex offenders and two years for registered sex offenders who are under the age of 18. The duration of a child protection prohibition order should not exceed the period for which the sex offender registration order applies.

## Consent orders

- 8.31 All of the jurisdictions permit prohibition orders to be made with the consent of the Commissioner of Police and the registered offender.<sup>43</sup> In all jurisdictions except the Northern Territory, the court may make a prohibition order by consent without considering the factors it would otherwise be required to consider.<sup>44</sup>
- 8.32 The court is not required to conduct a hearing to make a prohibition order by consent unless it is in the interests of justice to do so.<sup>45</sup> In determining whether a hearing would be in the interests of justice, the court may take into account whether the registered sex offender:
- has received legal advice
  - has impaired intellectual functioning
  - is a person in respect of whom a guardianship order is in force
  - is illiterate or not literate in the English language
  - is subject to some other condition that may prevent them from understanding the effect of consenting to the order.<sup>46</sup>

If prohibition orders were introduced in Victoria, similar considerations should be open to the court.

- 8.33 In Queensland, the court may only make prohibition orders by consent in respect of adult respondents, not children.<sup>47</sup> However, there are examples in Victoria where child respondents may consent to intervention orders, provided the court is satisfied of all of the same matters it would need to be satisfied of in a contested proceeding.<sup>48</sup> This approach should be taken in relation to prohibition orders made with the consent of child respondents.

42 *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW) s 6; *Child Protection (Offender Prohibition Order) Act 2008* (Qld) s 12(1); *Community Protection (Offender Reporting) Act 2004* (WA) ss 91, 3 (definitions of 'young reportable offender' and 'child'); *Child Protection (Offender Reporting and Registration) Act 2004* (NT) ss 74, 3 (definitions of 'young reportable offender' and 'child').

43 *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW) s 10; *Child Protection (Offender Prohibition Order) Act 2008* (Qld) s 21; *Community Protection (Offender Reporting) Act 2004* (WA) s 95; *Child Protection (Offender Reporting and Registration) Act 2004* (NT) s 75.

44 *Ibid.*

45 *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW) ss 10(3)–(4); *Child Protection (Offender Prohibition Order) Act 2008* (Qld) ss 21(3)–(4); *Community Protection (Offender Reporting) Act 2004* (WA) ss 95(3)–(4); *Child Protection (Offender Reporting and Registration) Act 2004* (NT) ss 75(3)–(4).

46 *Ibid.*

47 *Community Protection (Offender Reporting) Act 2004* (WA) s 95.

48 *Family Violence Protection Act 2008* (Vic) s 78(2); *Personal Safety Intervention Orders Act 2010* (Vic) s 64(2).

## Recommendation

43. Child protection prohibition orders should be able to be made with the consent of the Chief Commissioner of Police and the registered sex offender.

## Interim and temporary orders

- 8.34 All jurisdictions permit the court to make an interim or temporary prohibition order if it is necessary to prevent an immediate risk to the lives or sexual safety of children.<sup>49</sup> Interim orders can be made in the absence of the registered offender.<sup>50</sup>
- 8.35 If the court makes an interim or temporary prohibition order, proceedings for a final order must be arranged.<sup>51</sup> In New South Wales, the interim order remains in force until it is revoked or the application is withdrawn or dismissed, whichever occurs first.<sup>52</sup> In Queensland, the order expires either at the end of a period prescribed by the court or when the matter returns to the court for determination on a final order.<sup>53</sup> In Western Australia and the Northern Territory, the interim prohibition order remains in force until the final hearing, unless the application is withdrawn before then.<sup>54</sup>
- 8.36 The Commission acknowledges that it will sometimes be necessary for the police to apply for an interim child protection prohibition order to manage an immediate risk to the sexual safety of a child or children. The Commission proposes that processes followed in interim applications for child protection prohibition orders should be the same as in applications for interim family violence intervention orders and personal safety intervention orders.

## Recommendation

44. The court should be permitted to make an interim child protection prohibition order in the absence of the registered sex offender if the court is satisfied, on the balance of probabilities, that an interim order is necessary to ensure the sexual safety of a child or children. If the court makes an interim child protection prohibition order, it should be required to ensure that a hearing is listed for a decision about the final order as soon as practicable.

49 *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW) s 7; *Child Protection (Offender Prohibition Order) Act 2008* (Qld) s 14; *Community Protection (Offender Reporting) Act 2004* (WA) s 92(1); *Child Protection (Offender Reporting and Registration) Act 2004* (NT) ss 76(1)–(2).

50 *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW) s 7(2); *Child Protection (Offender Prohibition Order) Act 2008* (Qld) s 14; *Community Protection (Offender Reporting) Act 2004* (WA) s 92(4); *Child Protection (Offender Reporting and Registration) Act 2004* (NT) s 76(4).

51 *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW) s 7(2); *Child Protection (Offender Prohibition Order) Act 2008* (Qld) ss 14–16; *Community Protection (Offender Reporting) Act 2004* (WA) ss 93(5)–(6); *Child Protection (Offender Reporting and Registration) Act 2004* (NT) s 76(5).

52 *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW) s 7(6).

53 *Child Protection (Offender Prohibition Order) Act 2008* (Qld) s 18(2).

54 *Community Protection (Offender Reporting) Act 2004* (WA) s 93(7); *Child Protection (Offender Reporting and Registration) Act 2004* (NT) s 76(6).

## Restrictions on publication of proceedings

- 8.37 In other states and territories, applications for interim and final prohibition orders are heard in the absence of the public.<sup>55</sup> In Victoria, however, applications for sensitive orders, such as family violence intervention orders and child protection orders, are generally heard in open court.<sup>56</sup>
- 8.38 Open justice is recognised as one of the most fundamental principles of our legal system.<sup>57</sup> Justice must not only be done, it must also be seen to be done.<sup>58</sup> Additionally, the *Charter of Human Rights and Responsibilities Act 2006* (Vic) protects the right to ‘a fair and public hearing’ in criminal and civil proceedings.<sup>59</sup>
- 8.39 In light of this important principle, the Commission considers it more appropriate to permit the court to make an order placing restrictions on publication of the proceedings rather than to close proceedings to the public. The court has powers to make non-publication orders in relation to family violence intervention orders and personal safety intervention orders.<sup>60</sup>

## Recommendation

45. A court should be permitted to make an order restricting or prohibiting the publication of any information that might lead to the identification of a registered sex offender against whom a child protection prohibition order is sought or made.

## Corresponding prohibition orders

- 8.40 Most jurisdictions recognise child protection prohibition orders made in other Australian jurisdictions. New South Wales, Queensland, Western Australia and the Northern Territory all permit equivalent orders made interstate (and in some cases overseas) to be recognised in their state or territory.<sup>61</sup> New South Wales and Western Australia specify the particular orders they will recognise,<sup>62</sup> while Queensland and the Northern Territory leave this open.<sup>63</sup>
- 8.41 In Queensland and Western Australia, the Commissioner of Police or his or her delegate applies to a court or court registrar for registration of a corresponding order.<sup>64</sup> In the Northern Territory, the Commissioner of Police may enter the details of a corresponding prohibition order on the register; there is no need to apply to a court.<sup>65</sup> The New South Wales regulations simply state that a corresponding prohibition order has effect in New South Wales as if it were an order made by the Local Court—there is no provision specifying how these orders are to be registered with the Local Court.<sup>66</sup> There are provisions in each jurisdiction for varying or revoking a corresponding prohibition order.<sup>67</sup>

55 *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW) s 14; *Child Protection (Offender Prohibition Order) Act 2008* (Qld) s 20; *Community Protection (Offender Reporting) Act 2004* (WA) s 104; *Child Protection (Offender Reporting and Registration) Act 2004* (NT) s 86.

56 See, eg, *Children, Youth and Families Act 2005* (Vic) s 523.

57 The Honourable J J Spigelman, ‘Seen to be Done: The Principle of Open Justice’ (Speech delivered at the 31st Australian Legal Convention, Canberra, 9 October 1999) <[http://www.lawlink.nsw.gov.au/lawlink/supreme\\_court/ll\\_sc.nsf/pages/SCO\\_speech\\_spigelman\\_091099](http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_spigelman_091099)>.

58 *Ibid.*

59 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 24(1).

60 *Family Violence Protection Act 2008* (Vic) ss 166–9; *Personal Safety Intervention Orders Act 2010* (Vic) ss 123–5.

61 *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW) s 19; *Child Protection (Offenders Prohibition Orders) Regulation 2007* (NSW); *Child Protection (Offender Prohibition Order) Act 2008* (Qld) ss 30–1; *Community Protection (Offender Reporting) Act 2004* (WA) s 108; *Community Protection (Offender Reporting) Regulations 2004* (WA) reg 21; *Child Protection (Offender Reporting and Registration) Act 2004* (NT) s 90; *Child Protection (Offender Reporting and Registration) Regulations 2004* (NT) reg 14.

62 *Child Protection (Offenders Prohibition Orders) Regulation 2007* (NSW) reg 3; *Community Protection (Offender Reporting) Act 2004* (WA) s 108; *Community Protection (Offender Reporting) Regulations 2004* (WA) reg 21.

63 *Child Protection (Offender Prohibition Order) Act 2008* (Qld) ss 30–1; *Child Protection (Offender Reporting and Registration) Act 2004* (NT) s 90; *Child Protection (Offender Reporting and Registration) Regulations 2004* (NT) reg 14.

64 *Child Protection (Offender Prohibition Order) Act 2008* (Qld) s 30; *Community Protection (Offender Reporting) Regulations 2004* (WA) reg 22(1).

65 *Child Protection (Offender Reporting and Registration) Regulations 2004* (NT) reg 14.

66 *Child Protection (Offenders Prohibition Orders) Regulations 2007* (NSW) reg 4(1).

67 *Ibid* regs 5–6; *Child Protection (Offender Prohibition Order) Act 2008* (Qld) s 31; *Community Protection (Offender Reporting) Regulations 2004* (WA) reg 25; *Child Protection (Offender Reporting and Registration) Regulations 2004* (NT) reg 14(2).

- 8.42 The Commission considers that mutual recognition of prohibition orders by participating states and territories will strengthen the capacity of these orders to protect children from sexual abuse.

## Recommendation

46. The *Sex Offenders Registration Act 2004 (Vic)* should include a provision recognising child protection prohibition orders made in other states and territories.

## Contravention of prohibition orders

- 8.43 In each relevant jurisdiction it is an offence for a person to fail to comply with a prohibition order without lawful excuse.<sup>68</sup> The maximum penalty for failure to comply is generally two years imprisonment and/or a fine.<sup>69</sup>
- 8.44 The Commission considers that the penalty for the offence of contravening a prohibition order should be consistent with the penalties for the registration offences of failing to report and furnishing false and misleading information,<sup>70</sup> which are also consistent with the penalties for contravening a family violence intervention order and a personal safety intervention order.
- 8.45 When a registered sex offender in respect of whom a prohibition order is made is present at court, they should be given a verbal explanation of their order, and they should be given a written explanation of their order in all cases.<sup>71</sup> It should be a defence to the offence of contravening a prohibition order for the registered sex offender to prove that:
- they have not been served with a copy of the order, or
  - the order has not been explained to them in the terms required by the Act.<sup>72</sup>

## Recommendations

47. If a child protection prohibition order, whether interim or final, has been made against a registered sex offender, the registrar of the court should be required to give the registered sex offender an explanation of the order.
48. If a registered sex offender against whom a child protection prohibition order has been made has been served with a copy of the order and the order has been explained to them, it should be an offence for the registered sex offender to contravene the order. Penalty: level 7 imprisonment (two years maximum) or a level 7 fine (240 penalty units maximum) or both.

68 *Child Protection (Offenders Prohibition Orders) Act 2004 (NSW)* s 13(1); *Child Protection (Offender Prohibition Order) Act 2008 (Qld)* s 38(1); *Community Protection (Offender Reporting) Act 2004 (WA)* s 101(1); *Child Protection (Offender Reporting and Registration) Act 2004 (NT)* s 83(1).

69 Ibid.

70 Recommendations in relation to these offences are discussed in Chapter 6.

71 For a model of such an explanation, see, eg, *Family Violence Protection Act 2008 (Vic)* s 96; *Personal Safety Intervention Orders Act 2010 (Vic)* s 76.

72 See, eg, *Family Violence Protection Act 2008 (Vic)* s 123(1); *Personal Safety Intervention Orders Act 2010 (Vic)* s 100(1).

## Entry and search powers

- 8.46 A police officer who suspects on reasonable grounds that someone has failed to comply with their prohibition order can arrest that person without a warrant in New South Wales, Western Australia and the Northern Territory.<sup>73</sup>
- 8.47 If the Commission's proposed penalty for contravening prohibition orders is adopted, the offence will be a summary offence. This means that police would not have access to the power to enter and search premises without a warrant where they suspect, on reasonable grounds, that a serious indictable offence is being or has been committed.<sup>74</sup>
- 8.48 In light of this limitation, and the approach taken in other Australian states and territories, the Commission considers it appropriate that police officers have the right to enter and search premises when they believe, on reasonable grounds, that a person is contravening a prohibition order. The entry and search power proposed here is consistent with that recommended in relation to the other registration offences of failing to report and furnishing false and misleading information.<sup>75</sup> Police have the same powers where they suspect that someone is contravening a family violence intervention order or personal safety intervention order.<sup>76</sup>

## Recommendation

49. If a member of the police force believes, on reasonable grounds, that a registered sex offender against whom a child protection prohibition order has been made is present at certain premises, they should be permitted to enter and search those premises without warrant if the member of the police force:
- (a) reasonably believes that the person is on the premises in contravention of a child protection prohibition order, or
  - (b) reasonably believes that the person is on the premises and engaging in particular conduct in contravention of a child protection prohibition order, or
  - (c) has the express or implied consent of an occupier to do so.

## Appeals in relation to prohibition orders

- 8.49 It is possible to appeal against decisions in relation to prohibition orders in all jurisdictions where they exist.
- 8.50 In New South Wales, the *Local Court Act 2007* (NSW) sets out the provisions for an offender to appeal against the making of a prohibition order.<sup>77</sup> In Queensland, the Commissioner of Police or the offender may appeal to the Children's Court constituted by a Children's Court judge (for an offender who is under the age of 18) or the District Court (for an offender who is an adult) against a decision made in relation to a prohibition order.<sup>78</sup>

73 *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW) s 13(2); *Community Protection (Offender Reporting) Act 2004* (WA) s 101(2); *Child Protection (Offender Reporting and Registration) Act 2004* (NT) s 83(2).

74 *Crimes Act 1958* (Vic) s 459A.

75 See [6.84]–[6.93] of Chapter 6.

76 *Family Violence Protection Act 2008* (Vic) s 157; *Personal Safety Intervention Orders Act 2010* (Vic) s 114.

77 *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW) note to s 4; *Local Court Act 2007* (NSW).

78 *Child Protection (Offender Prohibition Order) Act 2008* (Qld) s 52.

- 8.51 If a prohibition order is made in Western Australia, the Commissioner of Police or the offender may apply to the court for an order varying or revoking the prohibition order.<sup>79</sup> Leave of the court is required to make such an application.<sup>80</sup> In the Northern Territory, a person aggrieved by the decision of a court to dismiss an application for a prohibition order or to make, vary or revoke a prohibition order may apply to the Supreme Court for a review of the decision.<sup>81</sup>
- 8.52 As a matter of fairness, it should be possible for both the Chief Commissioner of Police and a registered sex offender against whom a child protection prohibition order is made to appeal to the County Court against a decision to make, or not to make, an order and against the terms of any order made.

## Recommendation

50. *The Sex Offenders Registration Act 2004 (Vic)* should set out the procedure for appealing against a decision made in relation to a child protection prohibition order.

## Interaction between prohibition orders and Family Law Act orders

- 8.53 There is potential for child protection prohibition orders to be in conflict with orders concerning who a child may live with and have contact with made in proceedings under Commonwealth legislation—the *Family Law Act 1975* (Cth). Section 109 of the Australian Constitution provides that, where there is an inconsistency between a state and Commonwealth law, the law of the Commonwealth prevails and the law of the state is invalid to the extent of the inconsistency.<sup>82</sup>
- 8.54 This means that, unless the Family Law Act specifically provided otherwise, a Commonwealth parenting order that conflicted with a state child protection prohibition order could operate to override the prohibition order. This situation could arise where a child protection prohibition order specified that a registered sex offender (a child's parent) was not to reside with or come within a certain distance of the child, and a Family Court parenting order simultaneously provided for shared parenting between the offender and the child's other parent.

## Existing provisions in state prohibition order legislation

- 8.55 The only jurisdiction that has sought to deal with potential conflict between prohibition orders and Family Law Act orders is the Northern Territory. The *Child Protection (Offender Reporting and Registration) Act 2004* (NT) specifically provides that prohibition orders have no effect to the extent that they are inconsistent with orders of the Family Court or orders under the *Domestic and Family Violence Act 2007* (NT).<sup>83</sup> This provision applies whether the prohibition order was made before or after the other order.<sup>84</sup> The Act notes that the prohibition order is not inconsistent with another order merely because it imposes a longer term in relation to prohibited conduct than was imposed by the other order.<sup>85</sup>
- 8.56 Although the Commission does not support this approach because it might provide insufficient safeguards for children protected by a prohibition order, any other means of resolving the issue of potential conflict would require amendment to the Family Law Act.

79 *Community Protection (Offender Reporting) Act 2004* (WA) ss 96(1)–(2).

80 *Ibid* ss 96(3)–(4).

81 *Child Protection (Offender Reporting and Registration) Act 2004* (NT) s 84.

82 *Australian Constitution* s 109. The effect of s 109 extends to any court orders made under a Commonwealth law.

83 *Child Protection (Offender Reporting and Registration) Act 2004* (NT) s 89(1). The Northern Territory legislation refers only to the Family Court and not to other courts with jurisdiction under pt VII of the *Family Law Act 1975* (Cth): s 89(1).

84 *Child Protection (Offender Reporting and Registration) Act 2004* (NT) s 89(1).

85 *Ibid* s 89(2).

## Family violence order mechanisms

### Parenting order made before family violence order

- 8.57 The Family Law Act already provides for the interaction between state family violence orders and Family Law Act orders, where the Family Law Act order is made before the state family violence order. 'Family violence orders' for these purposes are orders, including interim orders, made under prescribed laws of the states and territories to protect a person from family violence.<sup>86</sup>
- 8.58 The Act states that
- In proceedings to make or vary a family violence order, a court of a State or Territory that has jurisdiction in relation to this Part may revive, vary, discharge or suspend ... a parenting order, to the extent to which it provides for a child to spend time with a person, or expressly or impliedly requires or authorises a person to spend time with the child.<sup>87</sup>
- 8.59 Recovery orders, injunctions, undertakings, registered parenting plans and recognisances may be revived, varied, discharged or suspended in the same way.<sup>88</sup> Courts that have jurisdiction under these provisions are state and territory courts of summary jurisdiction.<sup>89</sup>
- 8.60 Additionally, the *Family Violence Protection Act 2008* (Vic), for example, has a reciprocal provision, which requires the Magistrates' Court or Children's Court to exercise its power to revive, vary, discharge or suspend any Family Law Act order to the extent of the inconsistency between it and a family violence intervention order.<sup>90</sup>
- 8.61 For this mechanism to operate in relation to child protection prohibition orders, there would need to be an amendment made to the Family Law Act to recognise those orders in the same way as family violence orders and to confer jurisdiction on state and territory courts of summary jurisdiction.

### Parenting order made after family violence order

- 8.62 There are numerous provisions under the Family Law Act which deal with how existing family violence orders are treated in Family Law Act proceedings.
- 8.63 When a decision is to be made under Part VII of the Act in relation to children, if a party to the proceedings is aware that a family violence order applies to the child or any member of the child's family, that party must inform the court of the order.<sup>91</sup> If a person who is not a party to the proceedings knows about a family violence order, they may inform the court of the order.<sup>92</sup>
- 8.64 When making an order under Part VII of the Act, the court must, to the extent that it is possible to do so consistently with the child's best interests, ensure that the order:
- is consistent with any family violence order; and
  - does not expose a person to an unacceptable risk of family violence.<sup>93</sup>
- 8.65 If the court makes a parenting order or any other order or injunction which requires or authorises a person to spend time with a child, and that order or injunction is inconsistent with an existing family violence order, the court must:
- specify in the order that it is inconsistent with an existing family violence order

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86 The prescribed laws under which a family violence order may be made for the purposes of recognition under these provisions are: *Crimes (Domestic and Personal Violence) Act 2007* (NSW), *Property (Relationships) Act 1984* (NSW), *Family Violence Protection Act 2008* (Vic), *Domestic and Family Violence Protection Act 1989* (Qld), *Restraining Orders Act 1997* (WA), *Criminal Law (Sentencing) Act 1988* (SA), *Domestic Violence Act 1994* (SA), *Summary Procedure Act 1921* (SA), *Youth Court Act 1993* (SA), *Family Violence Act 2004* (Tas), *Justices Act 1959* (Tas), *Domestic Violence and Protection Orders Act 2008* (ACT), *Domestic and Family Violence Act 2007* (NT), *Domestic Violence Act 1995* (Norfolk Island). See *Family Law Act 1975* (Cth) s 4 (definition of 'family violence order'); *Family Law Regulations 1984* (Cth) reg 12BB, sch 8.

87 *Family Law Act 1975* (Cth) s 68R(1).

88 *Ibid.*

89 *Ibid* s 68J.

90 *Family Violence Protection Act 2008* (Vic) s 90.

91 *Family Law Act 1975* (Cth) s 60CF(1). Courts with jurisdiction under these provisions are the Family Court, the Family Court of a state, the Northern Territory Supreme Court and the Federal Magistrates Court: s 69H.

92 *Family Law Act 1975* (Cth) s 60CF(2).

93 *Ibid* s 60CG.

- give a detailed explanation in the order of how the contact that it provides for is to take place
  - explain, or arrange for someone else to explain, the order to the parties to the proceedings, the person against whom the family violence order is directed (if not a party to proceedings), and the person protected by the family violence order (if not a party to proceedings).<sup>94</sup>
- 8.66 Within 14 days, copies of the Family Law Act order are to be given to a number of parties, including:
- the registrar or other state or territory court official who last made or varied the family violence order
  - the commissioner of the police force of the state or territory in which the person protected by the family violence order resides
  - a child welfare officer in the state or territory where the person protected by the family violence order resides.<sup>95</sup>
- 8.67 If there is an inconsistency between a Family Law Act order authorising or requiring a person to spend time with a child and a family violence order, the family violence order is invalid to the extent of the inconsistency.<sup>96</sup> Certain courts have jurisdiction under the Family Law Act to hear and determine applications for declarations that the orders are inconsistent.<sup>97</sup>
- 8.68 For these mechanisms to operate in relation to child protection prohibition orders, provisions would need to be inserted into the Family Law Act:
- requiring parties to notify the court of child protection prohibition orders
  - requiring the court to take a prohibition order into account to the extent that it is possible to do so
  - expressly dealing with any inconsistency that remained.
- 8.69 The Commission considers it important that appropriate steps are taken to address the potential for conflict between the proposed new child protection prohibition orders and orders made by courts under the Family Law Act. This matter would be most effectively dealt with by amendments to the Commonwealth legislation that would give child protection prohibition orders the same recognition under the Family Law Act as family violence orders.

## Recommendation

51. The Victorian Attorney-General should request that the Commonwealth Attorney-General consider amendments to the *Family Law Act 1975* (Cth) that would treat child protection prohibition orders in the same way as family violence orders for the purposes of dealing with any conflict between orders made under Commonwealth and Victorian law.

94 Ibid ss 68P(1)–(2).

95 Ibid s 68P(3).

96 Ibid s 68Q(1).

97 Ibid ss 68Q(2)–(3). Courts with jurisdiction to hear such applications are the Family Court, the Family Court of a state, the Northern Territory Supreme Court and the Federal Magistrates Court: s 69H.



# Information sharing

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## Introduction

- 9.1 The Commission's terms of reference direct it to consider 'the management and use of information about registered sex offenders'.<sup>1</sup> The Ombudsman reported that various people had informed him about the limitations of the *Sex Offenders Registration Act 2004* (Vic) concerning information sharing between Victoria Police, Corrections Victoria and the Department of Human Services.<sup>2</sup>
- 9.2 The Sex Offenders Registration Act requires the Chief Commissioner of Police to establish and maintain the Sex Offenders Register.<sup>3</sup> While the Chief Commissioner has limited power to disclose some 'personal information'<sup>4</sup> in the Register,<sup>5</sup> unauthorised disclosure of any 'personal information' is a serious offence.<sup>6</sup>
- 9.3 The information sharing provisions in the Sex Offenders Registration Act are not well aligned with its current purposes. Although the Register was initially designed as a law enforcement tool,<sup>7</sup> it has now become a source of information for child protection authorities and a means of cooperating with other Australian agencies—via CrimTrac—to monitor the movement of registered sex offenders into and out of Victoria. The Sex Offenders Registration Act does not facilitate the timely flow of this information.
- 9.4 This chapter addresses:
- the current law governing disclosures of information about registered sex offenders
  - the provision of information in the Victorian Register to interstate law enforcement agencies and CrimTrac
  - the sharing of information about registered sex offenders' contact with children between Victoria Police and the Department of Human Services
  - the powers of the Department of Human Services and Victoria Police to disclose to a child's parent or carer that someone having contact with their child is a registered sex offender
  - the separate, but related, issue raised by the Ombudsman<sup>8</sup> of the provision of other information about registered sex offenders by Corrections Victoria to the Department of Human Services.

## Current law

- 9.5 Under the Sex Offenders Registration Act, the Chief Commissioner and any other person authorised to have access to the Register are permitted to disclose any 'personal information' in the Register to only three nominated public bodies—a government department, a public statutory authority or a court—for only three purposes:
- for the purpose of law enforcement or judicial functions or activities
  - as required by or under any Act or law, or
  - if the Chief Commissioner or a person authorised to have access to the Register believes on reasonable grounds that to do so is necessary to enable the proper administration of the Sex Offenders Registration Act.<sup>9</sup>

1 The terms of reference are set out on page vi of this report.

2 Ombudsman Victoria, *Whistleblowers Protection Act 2001: Investigation into the Failure of Agencies to Manage Registered Sex Offenders* (2011) 31.

3 *Sex Offenders Registration Act 2004* (Vic) s 62(1).

4 This term is defined in s 3 of the *Sex Offenders Registration Act 2004* (Vic) to mean 'information about an individual whose identity is apparent or can be reasonably ascertained from the information'.

5 *Sex Offenders Registration Act 2004* (Vic) s 64(2).

6 *Ibid* s 64(1).

7 *Ibid* s 1(a); Victoria, *Parliamentary Debates*, Legislative Assembly, 3 June 2004, 1850 (Andre Haermeyer, Minister for Police and Emergency Services).

8 Ombudsman Victoria, above n 2, recommendations 3, 9.

9 *Sex Offenders Registration Act 2004* (Vic) s 64(2). Additionally, the Chief Commissioner is expressly authorised to disclose some personal information held in the Register to the Registrar of Births, Deaths and Marriages.

- 9.6 Any disclosure of personal information held in the Register, other than a disclosure specifically authorised by the Sex Offenders Registration Act, is an offence punishable by a fine or two years imprisonment.<sup>10</sup>

## Disclosing information to CrimTrac

### Authority to disclose to CrimTrac

- 9.7 As discussed in Chapter 2, the Sex Offenders Registration Act is based on model legislation that was agreed upon by the Australasian Police Ministers' Council in support of a national approach to registration.
- 9.8 When announcing that the police ministers had agreed to a nationally consistent approach to registration, the Commonwealth Minister for Justice and Customs said:
- it is critical that governments come together to ensure that child sex offenders who travel across borders are treated in a consistent manner and that no state or territory can be used as a haven for those who wish to commit these crimes.<sup>11</sup>
- 9.9 The model legislation was intended to facilitate the collection and sharing of information. The Minister added:
- Once a national system is implemented, the Commonwealth will also be able to negotiate agreements with other countries for the exchange of information on the movement of registered child sex offenders.<sup>12</sup>
- 9.10 The Australian National Child Offender Register (ANCOR) was established by the CrimTrac agency to support the national approach to registration. Each jurisdiction enters standardised information into the database about offenders registered under its scheme.
- 9.11 The information in ANCOR remains the property of the jurisdiction that provides it, and it is managed in accordance with that jurisdiction's legislation. Victoria and New South Wales maintain their own registries, and upload some of the data into ANCOR. Other jurisdictions use ANCOR to host their registries.
- 9.12 Staff of the Sex Offender Registry in Victoria enter data into ANCOR manually, though the process is expected to be automated when the Register is migrated to a new system.<sup>13</sup> Only 12 Victoria Police personnel have access to ANCOR. A national view of the information in ANCOR is available to registrars and others with 'Registrar' access.<sup>14</sup>
- 9.13 The Commission understands that ANCOR is used for alerting law enforcement agencies to movements by registered offenders across jurisdictional borders. Movements interstate are flagged on the system, alerting the Registrar in the destination jurisdiction. ANCOR is also used by the Australian Federal Police to generate alerts about registered offenders travelling overseas for the Passenger Analysis, Clearance Evaluation (PACE) system used by Australian Customs and Border Protection Services.
- 9.14 The disclosure provisions of the Sex Offenders Registration Act make no allowance for the national dimensions of the registration scheme. The Act does not refer to ANCOR or expressly authorise the Chief Commissioner to disclose information on the Sex Offenders Register to CrimTrac.
- 9.15 Direct disclosure to some other agencies 'for the purpose of law enforcement' is permitted by section 64(2)(a) of the Sex Offenders Registration Act. This provision authorises the Chief Commissioner, or anyone authorised to have access to the Register, to disclose personal information in the Register to a government department, public statutory authority or court for the purpose of law enforcement or judicial functions or activities.<sup>15</sup>

10 *Sex Offenders Registration Act 2004* (Vic) s 64(1).

11 Senator Chris Ellison, Minister for Justice and Customs, 'National Tracking of Child Sex Offenders' (Media Release E81/3, 2 July 2003).

12 *Ibid.*

13 Consultation 8 (Manager, Sex Offenders Registry, Victoria Police).

14 Information provided by Victoria Police and CrimTrac.

15 *Sex Offenders Registration Act 2004* (Vic) s 64(2)(a). The reference to 'law enforcement or judicial functions or activities' is not defined.

- 9.16 CrimTrac is not a government department or public statutory authority. It is an executive agency of the Commonwealth established under section 65 of the *Public Service Act 1999* (Cth). There is no other provision in the Sex Offenders Registration Act that authorises information from the Victorian Register to be included in ANCOR.
- 9.17 The status of CrimTrac as a Commonwealth executive agency, and any concerns about who is accountable for the management of the information it receives from Victoria Police, has not prevented the authorised disclosure of information to it in other circumstances. The exchange of DNA information with CrimTrac for limited purposes is expressly permitted by the *Crimes Act 1958* (Vic),<sup>16</sup> and information about the identity and location of serious sex offenders may be disclosed to CrimTrac under the *Serious Sex Offenders (Detention and Supervision Act 2009)*.<sup>17</sup>
- 9.18 In view of the policy intent of the police ministers when they agreed to adopt a national approach to registration, the omission in the Sex Offenders Registration Act is an anomaly. The Commission notes that disclosure to CrimTrac was not mentioned in the model legislation and only the Australian Capital Territory has specifically authorised it in legislation.<sup>18</sup> However, other jurisdictions do not restrict the entities to which personal information about registered offenders can be disclosed for law enforcement purposes,<sup>19</sup> or to which the Police Commissioner may authorise disclosure.<sup>20</sup> In addition, the question of whether there is a need to authorise disclosure to CrimTrac may not have arisen in the jurisdictions that do not maintain a separate register.<sup>21</sup>
- 9.19 The Commission considers that the Act should be amended to provide a clear authority to disclose personal information from the Sex Offenders Register to CrimTrac in order to facilitate national and international monitoring of the movement of registered offenders.

## Recommendation

52. The Chief Commissioner of Police should be permitted to disclose information from the Sex Offenders Register to the CrimTrac agency where necessary for the purpose of alerting law enforcement agencies in other jurisdictions that a registered sex offender has left, or has reported an intention to leave, Victoria either temporarily or indefinitely.

## Governance of CrimTrac

- 9.20 The Commission is aware that the Commonwealth Government has been actively considering whether CrimTrac should have a legislative base. Concerns about the governance and accountability of the agency have been raised since its inception.
- 9.21 For example, in 2002 the Office of the Victorian Privacy Commissioner said that:
- CrimTrac will be vulnerable to the least secure, least privacy sensitive among its participating jurisdictions. Its transparency and accountability structures should reflect that fact. It is inappropriate that coordination of vast amounts of the personal information of Australians should be centralised, while the accountability for collection, use and quality of that information should be dispersed among participating jurisdictions.<sup>22</sup>

<sup>16</sup> *Crimes Act 1958* (Vic) s 464ZGN.

<sup>17</sup> *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) s 182(2).

<sup>18</sup> *Crimes (Child Sex Offenders) Regulations 2005* (ACT) reg 16(2).

<sup>19</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) s 21E(a).

<sup>20</sup> *Child Protection (Offender Reporting and Registration) Act 2004* (NT) s 66(1)(d); *Child Protection (Offender Reporting) Act 2004* (Qld) s 70(1)(a); *Community Protection (Offender Reporting) Act 2005* (Tas) s 44(2); *Community Protection (Offender Reporting) Act 2004* (WA) s 81(1)(b).

<sup>21</sup> For example, the *Child Sex Offenders Registration Regulations 2007* (SA) simply provide for the registered offender to report a change of travel plans while out of South Australia by writing to the ANCOR section of South Australia Police: reg 11.

<sup>22</sup> Privacy Victoria, *Submission to the Forensic Procedures Review Committee on its Review of Part D of the Crimes Act 1914* (Cth), 5 September 2002, 4.

- 9.22 Among its recommendations, the Office of the Victorian Privacy Commissioner called for a 'clear, uniform, purpose-built statutory basis for the broader CrimTrac system, to be adopted by each participating jurisdiction'.<sup>23</sup>
- 9.23 In 2004, the Australian National Audit Office conducted a performance audit of CrimTrac.<sup>24</sup> Among the findings was that
- after some three years of operation, it is timely for a review of the nature of the relationship between the partners in the CrimTrac initiative, and a clarification of their various roles and responsibilities.<sup>25</sup>
- 9.24 Changes have been made to the governance of CrimTrac since then,<sup>26</sup> and more are being discussed, including a legislative backing. The CrimTrac Strategic Plan 2010–2015 is described as progressing the agency's 'journey towards strengthened governance and streamlined information sharing arrangements, including statutory recognition of CrimTrac'.<sup>27</sup>
- 9.25 The Commission sees merit in providing legislative backing for CrimTrac in order to ensure it is subject to independent scrutiny and is accountable to Parliament for its operations.
- 9.26 Recommendations that would assist in achieving these objectives were made recently by the Joint Parliamentary Committee on the Australian Commission for Law Enforcement Integrity (ACLEI).<sup>28</sup> The Committee examined which agencies should be subjected to the oversight of the ACLEI and presented its final report on the operation of the ACLEI in July 2011.
- 9.27 The Committee had made recommendations in an interim report about the agencies with the highest potential corruption risk.<sup>29</sup> In the final report, it recommended a second tier of jurisdiction of medium risk agencies.
- ACLEI would have the opportunity to establish a relationship with medium-risk agencies that fulfil a law enforcement function of some kind to build resistance to corruption through education, awareness raising, ongoing communication and investigation as appropriate. Those with the highest potential risk should be subjected to ACLEI's oversight, ensuring the application of measures and resources that are commensurate with the degree of risk.<sup>30</sup>
- 9.28 The Committee has recommended that CrimTrac be included within the scope of the new second-tier of jurisdiction.
- Given the value of the information held by CrimTrac to serious and organised criminal networks and the fact that it works closely with Commonwealth, state and territory police agencies, the Committee considers that CrimTrac should be subject to a certain level of ACLEI oversight, and hence should initially be included in a second tier arrangement.<sup>31</sup>
- 9.29 The Commission notes that CrimTrac told the Committee that it supported the recommendation.<sup>32</sup> The Commission is also aware that the Commissioner for Law Enforcement Data Security remains concerned about the accountability mechanisms for CrimTrac.
- 9.30 The recommendation of the Committee to extend the jurisdiction of the ACLEI will introduce a measure of independent scrutiny of the operations of CrimTrac and should be supported.

23 Ibid 25.

24 Australian National Audit Office, *The Implementation of CrimTrac: 2003–04 Performance Audit* (Audit Report No 53, 17 June 2004).

25 Ibid 15. It made a series of recommendations to improve the governance of the agency, all of which were agreed by CrimTrac: at 17–19.

26 For example, in response to the report of the Australian National Audit Office, in 2006 CrimTrac and all police commissioners entered a memorandum of understanding to 'provide an increased understanding of the context of the CrimTrac projects and services and a common goal for all parties to work towards; to set out the expected responsibility of each party in their role as policing agencies of the party': *The Partnership Approach Memorandum of Understanding* (29 June 2006), available at <[http://www.crimtrac.gov.au/documents/partnership\\_mou.pdf](http://www.crimtrac.gov.au/documents/partnership_mou.pdf)>. In 2009, the CrimTrac Board of Management was reconstituted to include police commissioners from all jurisdictions.

27 CrimTrac, *CrimTrac 2015 Strategic Plan* (2010) 6, available at <[http://www.crimtrac.gov.au/documents/CrimTrac\\_2015\\_Strategic\\_Plan\\_Web.pdf](http://www.crimtrac.gov.au/documents/CrimTrac_2015_Strategic_Plan_Web.pdf)>.

28 Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity, Parliament of Australia, *Inquiry into the Operation of the Law Enforcement Integrity Commissioner Act 2006—Final Report* (2011).

29 Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity, Parliament of Australia, *Inquiry into the Operation of the Law Enforcement Integrity Commissioner Act 2006—Interim Report* (2010).

30 Commonwealth, *Parliamentary Debates*, House of Representatives, 7 July 2011, 8000 (Melissa Parke, Member for Fremantle).

31 Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity, *Final Report*, above n 28, 11.

32 Ibid.

## Recommendation

53. The Minister for Police should request the Commonwealth Attorney-General to:
- (a) take steps to provide a statutory basis for the CrimTrac agency that establishes independent audit, investigation and complaints-handling mechanisms, and sanctions for misuse of the information it holds
  - (b) bring the CrimTrac agency within the jurisdiction of the Australian Commission for Law Enforcement Integrity, as recommended by the Commonwealth Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity in July 2011.

## Victoria Police sharing information with the Department of Human Services

- 9.31 The Sex Offenders Registration Act does not expressly authorise the Chief Commissioner of Police to disclose information to the Secretary of the Department of Human Services—the statutory official with primary responsibility for child protection—about any contact with a child that a registered sex offender provides to the police as part of their reporting obligations.
- 9.32 The Commission understands that reports from Victoria Police to the Department of Human Services<sup>33</sup> of unsupervised contact between a registered offender and a child are currently characterised by both the Department of Human Services and Victoria Police as mandatory reports under the *Children, Youth and Families Act 2005* (Vic).<sup>34</sup> This characterisation appears designed to attract the operation of section 64(2)(b) of the Sex Offenders Registration Act, which permits disclosure of ‘personal information’ from the Register to a government department when ‘required by or under any Act or law’.<sup>35</sup>

## Mandatory reporting under the Children, Youth and Families Act

- 9.33 Any person who has a significant concern for the wellbeing of a child, or who believes on reasonable grounds that a child is in need of protection, may make a report to the Department of Human Services.<sup>36</sup> Certain people, including police officers, doctors and teachers, are described as mandatory reporters.<sup>37</sup> 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.<sup>38</sup>
- 9.34 Police and other mandatory reporters are required to report as soon as reasonably practicable after forming the belief that a child is in need of protection, and after each occasion on which they become aware of further grounds for holding that belief.<sup>39</sup> Failure to comply with mandatory reporting obligations is an offence.<sup>40</sup> Reports made in good faith by mandatory reporters do not constitute unprofessional conduct or a breach of professional ethics by the person making the report.<sup>41</sup>

33 Both the Chief Commissioner of Police and the Secretary of the Department of Human Services have the statutory authority to delegate their powers: *Police Regulation Act 1958* (Vic) s 6A; *Children, Youth and Families Act 2005* (Vic) s 17.

34 Consultations 1 (Sex Offenders Registry, Victoria Police); 2 (Child Protection, Department of Human Services); 26 (Child Protection, Department of Human Services, Eastern Region).

35 *Sex Offenders Registration Act 2004* (Vic) s 64(2)(b) (emphasis added).

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

37 *Ibid* s 182.

38 *Ibid* ss 184(1), 162(1)(c)–(d).

39 *Ibid* s 184(1).

40 *Ibid*.

41 *Ibid* s 189(a). Section 189 also provides other protections for people making reports in good faith.

- 9.35 In order for reports of contact between a registered sex offender and a child to be properly characterised as mandatory reports under the Children, Youth and Families Act, the police officer concerned would clearly need to be satisfied on reasonable grounds:
- that the child is at risk of harm from sexual abuse from the registered sex offender, and
  - that the child's parent is unlikely to protect them from that harm.
- 9.36 This level of satisfaction appears to require an individual assessment in each case of both the risk that a registered sex offender poses to a particular child and the likelihood of the child's parents being able to protect the child from the risk of sexual abuse.
- 9.37 At present, the Victoria Police Manual requires police officers to advise the Department of Human Services of all reported contact between a registered offender and a child.<sup>42</sup> This direction to police clearly extends beyond the mandatory reporting obligations in the Children, Youth and Families Act, because no individual assessment of risk is required.
- 9.38 Consequently, reports to the Department of Human Services about unsupervised contact between a registered offender and a child, which are not mandatory reports under the Children, Youth and Families Act, do not appear to be disclosures permitted by section 64(2)(b) of the Sex Offenders Registration Act because they are not 'required by or under any law'.

## The Commission's response and recommendations

### Legislative provisions to permit information sharing

- 9.39 The Commission believes that the Chief Commissioner of Police should have clear legislative authority to pass information to the Secretary of the Department of Human Services about a registered sex offender's contact with an identified child or children. Many people and organisations support such a change.<sup>43</sup>
- 9.40 This step is best taken under the auspices of the Children, Youth and Families Act. Under that Act, the Secretary of the Department of Human Services and all members of the police force are 'protective interveners'.<sup>44</sup> Protective interveners have responsibility for many areas of child protection, including receiving and investigating reports that a child may be at risk of harm, and making protection applications in the Children's Court.<sup>45</sup>
- 9.41 While police no longer perform all of the functions of a protective intervener in practice,<sup>46</sup> the two classes of protective interveners—police and Department of Human Services child protection workers—should be expressly permitted to share information about registered sex offenders who might pose a risk of harm to a particular child or children. The Commission is of the view, however, that it is more appropriate for the information sharing power to vest in the Chief Commissioner, rather than all members of the police force, because of the sensitivity of this information. Of course, the Chief Commissioner would be able to delegate this information-sharing power to officers of an appropriate rank.<sup>47</sup>
- 9.42 As well as permitting the Chief Commissioner to provide child contact reports to the Secretary of the Department of Human Services, the Children, Youth and Families Act should also permit exchange of information about registered sex offenders between the Chief Commissioner and the Secretary of the Department of Human Services when the Secretary is investigating contact between a child or children and a registered sex offender.

42 The Victoria Police Manual states that '[m]embers must always notify Child Protection (DHS) of a registered sex offender's contact with children. DHS may be in possession of significant information about the child that would alter the overall view of risk. Notification is to be seen as a matter of priority': Victoria Police, *Victoria Police Manual: Policy Rules*, 'Registered Sex Offender Management', provided by Victoria Police 11 May 2011, 6.

43 Submissions 3 (Professor Terry Thomas); 7 (CASA Forum); 10 (Office of the Victorian Privacy Commissioner); 11 (CEASE); 13 (Confidential); 14 (Victoria Legal Aid); 15 (Law Institute of Victoria); 19 (Gatehouse Royal Children's Hospital); 26 (Children's Court of Victoria).

44 *Children, Youth and Families Act 2005 (Vic)* s 181. Many of the Secretary's functions as 'protective intervener' have been delegated to employees of the Department of Human Services: *Instrument of Delegation*, signed 26 August 2009, 117–119, copy provided by the Department of Human Services on 24 March 2010.

45 *Children, Youth and Families Act 2005 (Vic)* ss 183, 205, 240–3.

46 *Protocol between the Department of Human Services and Victoria Police (1992)* 3–4.

47 *Police Regulation Act 1958 (Vic)* s 6A.

- 9.43 There may be information held by Victoria Police about a registered sex offender's past convictions that will be of assistance to the Department of Human Services when investigating risk to a particular child. The Department of Human Services has indicated that the following information from Victoria Police is of assistance to protective investigations:
- summaries of registered sex offenders' convictions, which may include information about the complainants' ages
  - witness statements.<sup>48</sup>
- 9.44 While the Department of Human Services already receives information of this nature from Victoria Police, the power to disclose it should be clarified.<sup>49</sup>
- 9.45 Although the primary focus of these recommendations is the transfer of information about registered sex offenders from Victoria Police to the Department of Human Services, there may also be information held by the Department of Human Services that Victoria Police wishes to access. Under the Children, Youth and Families Act, the Secretary of the Department of Human Services<sup>50</sup> must, on request, provide any member of the police force with a 'protection report', when that member of the police force is conducting a criminal investigation that overlaps with a protective investigation.<sup>51</sup> The report that the Secretary provides will deal with matters that are relevant to whether the child is in need of protection.<sup>52</sup>
- 9.46 Therefore, provision of much of the information sought by Victoria Police from the Department of Human Services will already be authorised under the Children, Youth and Families Act. The Department of Human Services may hold additional information about registered sex offenders that does not form part of a 'protection report' but may be of use to Victoria Police. The Department should be permitted to provide information of this nature to Victoria Police. It may include:
- information regarding therapeutic treatment orders and treatment recommendations in relation to young registered sex offenders
  - static and dynamic risk factors
  - details of any additional children that child protection workers may identify when investigating cases where registered sex offenders are in contact with children.
- 9.47 The relevant legislative provisions about sharing child contact reports and other information about registered sex offenders should be included in the Children, Youth and Families Act. It should be possible for the Chief Commissioner of Victoria Police and the Secretary of the Department of Human Services to share information about a registered sex offender as protective interveners where there is an identifiable child who has had, or may be having, contact with that offender.
- 9.48 Section 64(2)(b) of the Sex Offenders Registration Act should also be amended to extend the Chief Commissioner's disclosure power to circumstances where disclosure is 'authorised by or under any Act or law'. At present, that provision only permits disclosure as 'required by or under any Act or law'.<sup>53</sup>
- 9.49 These proposed changes complement the recommendation in Chapter 6 that it should be possible for the court to order, at the time of making a registration order, that a child protection worker from the Department of Human Services may be present when the person makes their child contact reports.

48 Consultations 9 (Principal Practitioner, Department of Human Services); 16 (Sex Offenders Registry Liaison, Department of Human Services); 26 (Child Protection, Department of Human Services, Eastern Region).

49 Consultation 16 (Sex Offenders Registry Liaison, Department of Human Services).

50 This function of the Secretary, like many others, has been delegated to various classes of employees of the Department of Human Services: *Instrument of Delegation*, signed 26 August 2009, 117–119, copy provided by the Department of Human Services on 24 March 2010.

51 *Children, Youth and Families Act 2005 (Vic)* s 207(1).

52 *Ibid* s 555.

53 *Sex Offenders Registration Act 2004 (Vic)* s 64(2)(b) (emphasis added).

## Recommendations

54. The Chief Commissioner of Police should be permitted to provide the Secretary of the Department of Human Services with a copy of the 'child contact report' form submitted by any registered sex offender where the information in the report identifies a particular child or children.
55. The Chief Commissioner of Police and the Secretary of the Department of Human Services should be authorised to exchange information they hold about a registered sex offender when the Secretary is investigating any contact between that offender and a particular child or children.

### Classification of contact reports by the Department of Human Services

- 9.50 At present, the Secretary of the Department of Human Services can determine that various reports to her about children from members of the community and mandatory reporters are 'protective intervention reports' for the purposes of the Children, Youth and Families Act.<sup>54</sup> This characterisation permits the Secretary to activate various responses and powers under that Act.
- 9.51 The Commission believes that the Children, Youth and Families Act should be amended to ensure that the Secretary of the Department of Human Services can also classify any information she receives via a child contact report, or otherwise as proposed in these recommendations, as a 'protective intervention report'.<sup>55</sup>
- 9.52 This classification moves the report to the investigation and assessment phase.<sup>56</sup> The Department's current practice is to classify reports of contact between a registered sex offender and a child as protective intervention reports and transfer them for investigation, unless there is compelling evidence of the child's safety.<sup>57</sup> The Commission seeks to ensure that the Department continues to have the power to investigate such reports. However, as explained in the previous section, it is neither accurate nor helpful to characterise these reports as mandatory reports under the Children, Youth and Families Act.
- 9.53 The Commission considers it more appropriate for these reports to be deemed to be reports involving significant concern for the wellbeing of a child.<sup>58</sup> At present, it is the usual policy of the Department of Human Services to refer child wellbeing reports to the Child and Family Information Referral and Support Team (Child FIRST),<sup>59</sup> or another service, before investigating.<sup>60</sup> A new policy dealing specifically with reports that a registered sex offender has had contact with a child would need to be developed.

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

55 *Ibid* s 34.

56 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>>.

57 Consultation 2 (Child Protection, Department of Human Services).

58 *Children, Youth and Families Act 2005* (Vic) s 28.

59 Child FIRST operates from 24 locations Victoria-wide and refers children, young people and their families to services they need: Department of Human Services, 'Child FIRST: Child & Family Information, Referral & Support Teams' (14 December 2010) <<http://www.cyf.vic.gov.au/family-services/how-to-make-a-referral-to-child-first/first-child-and-family-information-referral-and-support-teams>>.

60 Department of Human Services, 'Receiving and Processing Reports', above n 56, 10–11.

## Recommendation

56. The *Children, Youth and Families Act 2005 (Vic)* should be amended to provide that information obtained by the Secretary of the Department of Human Services about a particular child from a child contact report or from the Chief Commissioner of Police when exercising the powers to share information with the Secretary of the Department of Human Services should be deemed a report to the Secretary under section 28 of the *Children, Youth and Families Act 2005 (Vic)* about the wellbeing of a child.

## Giving information to parents and carers

- 9.54 The Commission understands that child protection workers sometimes feel the need to disclose to a child's parent during a protective investigation that a person having contact with the child is a registered sex offender.<sup>61</sup> This need might arise when a relative who is a registered sex offender moves into a household with children or when a sole parent commences a new relationship with someone who has not disclosed that they are a registered sex offender. In these circumstances, child protection workers sometimes disclose both the fact that someone is a registered sex offender and the nature of their offences.<sup>62</sup>
- 9.55 There are no express powers in the Sex Offenders Registration Act that permit police or child protection workers to inform members of the community that a particular person is a registered sex offender.
- 9.56 In the absence of express authority in the Sex Offenders Registration Act, child protection workers rely on a provision in the Children, Youth and Families Act to make these disclosures. The Child Protection Practice Manual states:
- Although the [Children, Youth and Families Act] authorises disclosure of the information that someone is on the Sex Offender Register, this information should be treated with the strictest of confidentiality and should only be shared with a person outside Child Protection where the disclosure of the information is vital to ensuring a child's best interests. As it is the associated sex offending behaviour that is directly pertinent to the safety of the child ... consideration should be given to whether disclosing the history of sex offending is sufficient, or whether it is essential in the particular case to disclose that the person is a registered sex offender.<sup>63</sup>
- 9.57 It seems that child protection workers rely upon that part of the Children, Youth and Families Act which states that on completion of an investigation, the protective intervener<sup>64</sup> must make a written record of the details and results of the investigation.<sup>65</sup> This record of investigation may then be disclosed to certain people, including:
- the child
  - the child's parents
  - the Secretary of the Department of Human Services
  - the Chief Commissioner of Police

61 Consultations 2 (Child Protection, Department of Human Services); 9 (Principal Practitioner, Department of Human Services); 16 (Sex Offenders Registry Liaison, Department of Human Services).

62 Consultation 9 (Principal Practitioner, Department of Human Services).

63 Department of Human Services, *Protecting Victoria's Children: Child Protection Practice Manual*, 'Children in Contact with Sex Offenders', Advice No 1581 (9 September 2011).

64 As both the Secretary of the Department of Human Services (and her delegates) and all members of the police force are protective interveners, any power on which the Department of Human Services relies to make disclosures would apply equally to all members of the police force. However, a protocol between the Department of Human Services and Victoria Police means that police no longer perform many of the functions of protective interveners, such as writing records of investigation: *Protocol between the Department of Human Services and Victoria Police* (1992) 3–4.

65 *Children, Youth and Families Act 2005 (Vic)* s 206(1).

- anyone authorised in writing by the Secretary or the Chief Commissioner of Police to have access to the record.<sup>66</sup>

9.58 If the fact that a person is a registered sex offender, or the details of their past offending, were included in the record of investigation, disclosure of this information might be authorised by the Children, Youth and Families Act. However, these provisions do not authorise protective interveners to disclose this information to other carers, such as extended family members.

### Interaction between disclosures to parents and laws prohibiting disclosures

9.59 There is the potential for disclosures by the Department of Human Services or Victoria Police to parents about a registered sex offender's contact with their child to be in breach of a suppression order (or non-publication order). This might occur if there is a suppression order in respect of the offender's court proceedings,<sup>67</sup> or when the provisions that prohibit identification of a person against whom a sexual offence is alleged to have been committed apply,<sup>68</sup> or when the relevant parties are under the age of 18.<sup>69</sup>

### Suppression orders

9.60 In certain circumstances, a court may make a suppression order prohibiting the publication of:

- a report of the whole or part of a proceeding, or any information derived from a proceeding, or
- any specified material relevant to a proceeding that is pending in the court.<sup>70</sup>

9.61 It is an offence to publish information in contravention of a suppression order.<sup>71</sup> However, the definition of 'publication' in relation to suppression orders is unclear, so it is not certain whether the Department of Human Services or Victoria Police would ever be 'publishing' information in contravention of a suppression order by telling a child's parent or carer about a registered sex offender's offending and convictions.<sup>72</sup> The type of publication that is prohibited may be specified in the terms of the order.

9.62 Additionally, the offence of contravening a suppression order appears, on the face of the legislation, to be a strict liability offence that requires no knowledge of the order for the offence to be committed.<sup>73</sup> However, the High Court has held that the word 'contravene' implies 'disputation or denial rather than failure to comply with an unknown requirement'.<sup>74</sup> Therefore, it seems that in order to commit the offence, the person in contravention of the order must have known about the order's existence. This raises the question of whether a person commits the offence if they are wilfully blind to the existence of a suppression order.

9.63 The maximum penalty for contravening a suppression order is 1000 penalty units or three months imprisonment.<sup>75</sup>

66 Ibid s 206(2).

67 *Magistrates' Court Act 1989* (Vic) s 126(2)(d); *County Court Act 1958* (Vic) s 80(1)(c); *Supreme Court Act 1986* (Vic) s 18(1)(c). The *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) pt 13 div 1 also prohibits publication of certain information.

68 *Judicial Proceedings Act 1958* (Vic) s 4.

69 *Children, Youth and Families Act 2005* (Vic) s 534.

70 *Magistrates' Court Act 1989* (Vic) s 126(2); *County Court Act 1958* (Vic) s 80(1)(c); *Supreme Court Act 1986* (Vic) s 18(1)(c).

71 *Magistrates' Court Act 1989* (Vic) s 126(4); *County Court Act 1958* (Vic) s 80(4); *Supreme Court Act 1986* (Vic) s 18(4).

72 In *Hogan v Hinch*, the broadcaster Derryn Hinch was convicted of contravening a suppression order in relation to supervision order proceedings when he named certain individuals on the steps of the Victorian Parliament and on his website: *Hogan v Hinch* [2011] HCA 4 (10 March 2011) [1]. The suppression order that Hinch contravened was made under the *Serious Sex Offenders Monitoring Act 2005* (Vic) (repealed). This type of 'publication' is far removed from the type of disclosure contemplated by the Commission, which would permit the Department of Human Services and Victoria Police to notify a child's parent or carer that someone having contact with the child is a registered sex offender.

73 *Magistrates' Court Act 1989* (Vic) s 126(2)(d); *County Court Act 1958* (Vic) s 80(1)(c); *Supreme Court Act 1986* (Vic) s 18(1)(c).

74 *Hogan v Hinch* [2011] HCA 4 (10 March 2011) [78]. Note that although this judgment related to a suppression order made under the *Serious Sex Offenders Monitoring Act 2005* (Vic), the language of 'contravention' is the same as that in the Victorian courts acts.

75 *Magistrates' Court Act 1989* (Vic) s 126(4); *County Court Act 1958* (Vic) s 80(4); *Supreme Court Act 1986* (Vic) s 18(4).

## Non-identification rules in relation to sexual offence complainants

- 9.64 It is also a criminal offence to publish, or cause to be published, any matter that contains any particulars likely to lead to the identification of a person against whom a sexual offence is alleged to have been committed.<sup>76</sup> For these purposes, 'publish' means:
- insert in a newspaper or other periodical publication
  - disseminate by broadcast, telecast or cinematograph, or
  - disclose by any means to any other person, other than for a purpose connected with a judicial proceeding.<sup>77</sup>
- 9.65 This third category of publication is sufficiently broad to include disclosures made to third parties by the Department of Human Services or Victoria Police, and further disclosures made by those third parties. The maximum penalty for this offence, if committed by a person, is 20 penalty units or four months imprisonment, or both.<sup>78</sup> It is a defence to this offence to prove that, at the time of the alleged offence, no complaint had been made to the police, or the publication was with the permission of the court or the complainant.<sup>79</sup>

## Non-publication rules in relation to Children's Court matters

- 9.66 Additionally, it is an offence to publish, or cause to be published:
- a report of a proceeding in the Children's Court containing any particulars likely to lead to the identification of a child or other party to the proceeding, or a witness in the proceeding, except with the permission of the President of the Children's Court, or
  - any matter that contains particulars likely to lead to the identification of a child as the subject of an order made by the Court, except with the permission of the President of the Children's Court or the Secretary of the Department of Human Services.<sup>80</sup>
- 9.67 For these purposes, 'publish' means:
- insert in a newspaper or other periodical publication
  - disseminate by broadcast, telecast or cinematograph, or
  - otherwise disseminate to the public by any means.<sup>81</sup>
- 9.68 The Children, Youth and Families Act provisions clearly prohibit identification of a child who has been convicted of a sexual offence, or against whom a registration order or child protection prohibition order has been made. The penalty for a person who commits either of these offences is 100 penalty units or two years imprisonment.<sup>82</sup>

## Commission's response and recommendations

- 9.69 In certain circumstances, police officers and child protection workers should be permitted to disclose to a child's parent or carer that a person having contact with the child is a registered sex offender. To enable parents and carers to understand the potential risk of harm to their child or children, the disclosure should sometimes include details of the registered sex offender's prior offending. The Commission has been told that the Department of Human Services must sometimes provide additional information to parents and carers for them to fully understand the risk and act protectively.<sup>83</sup>

76 *Judicial Proceedings Act 1958* (Vic) s 4(1A).

77 *Ibid* s 4(1) (definition of 'publish').

78 *Ibid* s 4(2). The maximum penalty for a corporation that commits this offence is 50 penalty units: s 4(2).

79 *Judicial Proceedings Act 1958* (Vic) s 4(1B).

80 *Children, Youth and Families Act 2005* (Vic) s 534(1).

81 *Ibid* s 3 (definition of 'publish').

82 *Ibid* s 534(1).

83 Consultation 9 (Principal Practitioner, Department of Human Services).

- 9.70 The Commission believes that disclosures of this nature should take place with clear statutory authorisation, but within narrowly defined circumstances only. To permit disclosure of this information on anything other than a 'need to know' basis by police and child protection officers of appropriate seniority would encourage sensationalism within some sectors of the media and facilitate vigilante action within some sectors of the community.
- 9.71 Disclosure of this information in some instances should permit parents and carers to take appropriate protective action. It might also circumvent the need for intrusive and unsettling intervention by child protection authorities, such as the Department of Human Services removing a child from their parent and making a protection application in the Children's Court with the aim of securing a supervision order that would have the effect of removing the registered sex offender from the child's household.<sup>84</sup>
- 9.72 Given the sensitivity of the information that would be disclosed, the Commission recommends that the Secretary of the Department of Human Services and the Chief Commissioner of Police authorise only officers of a particular grade or rank (designated officers) to make these disclosures. Further, disclosures should only be made if the designated officer believes, on reasonable grounds, that the disclosure is necessary to ensure the safety and wellbeing of the child. The Commission's proposals draw upon guided disclosures for child protection purposes in the United Kingdom.<sup>85</sup>
- 9.73 Designated officers should not be permitted to make such disclosures if doing so would be in breach of a suppression order, or provisions prohibiting the identification of victims of sexual offences or defendants who are under the age of 18. The Chief Commissioner of Police and the Secretary of the Department of Human Services should develop guidelines to assist designated officers to:
- ascertain whether a suppression order applies in a particular case and, if so, what information can be disclosed to a child's parent or carer
  - ensure that no information is disclosed to a child's parent or carer that may lead to the identification of a person against whom a sexual offence is alleged to have been committed or a defendant or respondent who is under the age of 18, in contravention of the rules discussed above.
- 9.74 In order to assist the child's parent or carer to respond to a disclosure under these provisions, the designated officer should be required to refer the child's parent or carer to an appropriate counselling service. The Commission does not believe it is necessary to recommend at this stage that there be a specific criminal sanction if a child's parent or carer discloses information they have received about a person being a registered sex offender.
- 9.75 However, parents and carers, like designated officers, must comply with suppression orders and laws concerning identification of victims of sexual offences and children who are, or have been, parties to proceedings. As unauthorised disclosure by a parent or carer of a person's status as a registered sex offender would be a matter of considerable concern, the Commission suggests that the Chief Commissioner and the Secretary of the Department of Human Services keep this matter under ongoing review. They are both well placed to recommend legislative action if unauthorised disclosures occur.
- 9.76 To make it clear that any disclosures made under these provisions are directed to the protection of identifiable children, they should be authorised under the Children, Youth and Families Act. Further, the Sex Offenders Registration Act should be amended to permit these disclosures by designated officers under the Children, Youth and Families Act.

84 The Department of Human Services can commence a protection application in two ways—by notice or by safe custody: *Children, Youth and Families Act 2005* (Vic) ss 240–3. In 2008–09, 78 per cent of all protection applications in Melbourne were commenced by safe custody, which involves the child being removed from the home by child protection workers and brought before the Children's Court or a bail justice within 24 hours for a hearing of an application for an interim accommodation order: *Children, Youth and Families Act 2005* (Vic) s 242; Victorian Law Reform Commission, *Protection Applications in the Children's Court*, Final Report No 19 (2010) 79. The recommendation that child protection prohibition orders be introduced in Victoria, discussed in Chapter 8, is also directed to this aim.

85 *Criminal Justice Act 2003* (UK) c 44, s 327A. See Appendix F for a discussion of this scheme.

## Recommendations

57. The *Children, Youth and Families Act 2005 (Vic)* should be amended to give the Secretary of the Department of Human Services and the Chief Commissioner of Police the power to authorise officers of a designated rank or grade to disclose to a parent or carer of a child who is having contact with a registered sex offender:
- (a) that the person is a registered sex offender
  - (b) details of the offending that led to registration of that person, and
  - (c) the duration and the conditions of registration.
- The Sex Offenders Registration Act should be amended to permit such disclosures made under the *Children, Youth and Families Act 2005 (Vic)*.
58. The designated officers should be permitted to make a disclosure only if they believe, on reasonable grounds, that disclosure of the information to a parent or carer is necessary to ensure the safety and wellbeing of the child.
59. The *Children, Youth and Families Act 2005 (Vic)* should provide that it is an offence for:
- (a) a person to make a disclosure of this kind without having been authorised to do so, or
  - (b) a designated officer to make a disclosure of this kind that is not in accordance with the relevant provisions.

### The test for limiting disclosure

- 9.77 Disclosures of this nature could have grave consequences for the registered sex offender, particularly for their living arrangements and relationships. Therefore, the Commission proposes that, if a designated officer intends to make a disclosure of this kind to a child's parent or carer, that officer should be required to make all reasonable efforts to notify the registered offender prior to making the disclosure. This step will permit registered sex offenders to be involved in the process and prepare themselves for the possible effects of the disclosure. Research from the United Kingdom illustrates the need for any disclosure scheme to complement the rehabilitation of registered sex offenders.<sup>86</sup>
- 9.78 However, if the designated officer believes on reasonable grounds that notifying the registered sex offender before making a disclosure to a parent or carer would endanger the life or safety of any person, they should be permitted to dispense with this requirement.

## Recommendation

60. The *Children, Youth and Families Act 2005 (Vic)* should provide that a designated officer who intends to make a disclosure to a parent or carer must make all reasonable efforts to notify the registered sex offender prior to making that disclosure unless the designated officer believes on reasonable grounds that to do so would endanger the life or safety of any person.

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Brian Stout, Hazel Kemshall and Jason Wood, 'Building Stakeholder Support for a Sex Offender Public Disclosure Scheme: Learning from the English Pilots' (2011) 50(4) *Howard Journal of Criminal Justice* 406, 416.

## Corrections Victoria sharing information with the Department of Human Services

- 9.79 The Ombudsman’s report identified the need for information about registered sex offenders held by Corrections Victoria to be shared with the Department of Human Services to assist in investigating protective concerns.<sup>87</sup> The Ombudsman made two recommendations about this matter:
- Victoria Police should develop a protocol with the Department of Human Services and Corrections Victoria for the release and sharing of information on registered sex offenders.
  - Corrections Victoria should ensure the timely provision of assessment reports when requested by the Department of Human Services or Victoria Police to assist in the identification of risks posed to children by registered sex offenders.<sup>88</sup>
- 9.80 Corrections Victoria is a service agency within the Department of Justice.<sup>89</sup> The Minister for Corrections has various powers to authorise the disclosure of information held by Corrections Victoria.<sup>90</sup> Additionally, the Secretary of the Department of Justice has various information disclosure powers and functions under the *Corrections Act 1986 (Vic)*, and may delegate these to the Corrections Commissioner and others.<sup>91</sup> As Corrections Victoria is not a legal entity, and the Secretary of the Department of Justice is responsible for much of the information disclosure under the Corrections Act, it is appropriate that any legislative amendments to authorise disclosure of information held by Corrections Victoria to the Department of Human Services confer the relevant powers on the Secretary of the Department of Justice.
- 9.81 The Commission understands that an administrative process has been developed to facilitate the timely provision of risk summary reports from Corrections Victoria to the Department of Human Services and Victoria Police. It is important to note that Corrections Victoria does not hold information in relation to all registered sex offenders, only those who have served custodial sentences or community based orders.
- 9.82 At present, the Department of Human Services requests and receives the following information held by Corrections Victoria in relation to some registered sex offenders:
- sentencing remarks from the registered sex offender’s court proceedings, where available
  - summaries of risk assessment reports that were prepared for court proceedings or other purposes.<sup>92</sup>
- 9.83 Where the sentencing remarks are matters of public record, provision of these to the Department of Human Services is uncontroversial. The risk summary reports provided by Corrections Victoria to the Department of Human Services include:<sup>93</sup>
- details of the person’s order or sentence
  - details of an actuarial risk assessment (Static-99) conducted in respect of the person, assessing the person’s risk of re-offending relative to other sex offenders of the same gender
  - details of other risk assessments conducted in respect of the person<sup>94</sup>
  - the person’s attendance at and participation in treatment programs.

The risk summary report may also include the outcome of any treatment program attended by the person, and factors which may lead to the person offending again.<sup>95</sup>

87 Ombudsman Victoria, above n 2.

88 Ibid recommendations 3, 9.

89 Department of Justice, *Corrections Victoria* (22 June 2011) <<http://www.justice.vic.gov.au/home/about+us/our+organisation/business+area+profiles/justice+-+corrections+vic+corrections+vic>>.

90 See, eg, *Corrections Act 1986 (Vic)* ss 30, 91.

91 Ibid ss 7–8, 30A, 30G, 79H.

92 Another purpose for which a risk assessment report may be prepared is for the Serious Sex Offender Review Board, to assist it in determining whether to advise the Secretary of the Department of Justice to make a supervision order application or refer the matter to the Director of Public Prosecutions for a detention order application.

93 De-identified risk summary report, provided by the Department of Justice, 30 November 2011.

94 The example risk summary report that the Commission was provided contained details of combined actuarial and structured professional judgment risk assessments, in addition to the Static-99. Risk assessment tools are discussed in Chapter 4.

95 De-identified risk summary report, provided by the Department of Justice, 30 November 2011.

- 9.84 Corrections Victoria currently provides information to the Department of Human Services in accordance with an Instrument of Authority, signed by the Minister for Corrections. In accordance with the Corrections Act, the Instrument of Authority permits various office holders within Corrections Victoria to disclose or communicate confidential information relating to registered sex offenders to the Secretary of the Department of Human Services and various delegates of the Secretary.<sup>96</sup> Corrections Victoria may provide such information as sought by the Department of Human Services under certain provisions of the Children, Youth and Families Act.<sup>97</sup>
- 9.85 There is a separate Instrument of Authority that permits Corrections Victoria to disclose risk summary reports and other information to the Chief Commissioner of Police and various delegates.<sup>98</sup>

### Disclosures of health information under the Health Records Act

- 9.86 The Health Privacy Principles in the *Health Records Act 2001* (Vic) provide, in general terms, that organisations must not use or disclose health information—including information or an opinion about an individual’s mental or psychological health<sup>99</sup>—for a purpose other than that for which it was collected.<sup>100</sup> However, information may be disclosed if the disclosure is required, authorised or permitted, expressly or impliedly, by or under law.<sup>101</sup>
- 9.87 Disclosing health information to the Department of Human Services, to enable it to conduct a protective investigation, will usually be a purpose other than that for which the information was collected.<sup>102</sup> For such disclosures to be lawful, they must be ‘required, authorised or permitted under law’.<sup>103</sup> The Instrument of Authority signed by the Minister for Corrections is one possible legal authority under which the disclosures are authorised.
- 9.88 The Commission understands that Corrections Victoria does not consider information contained in the risk summary report to be health information or to engage the provisions of the Health Records Act. However, it is possible that information about treatment outcomes could be considered an opinion about an individual’s mental or psychological health and, therefore, considered to be health information. For this reason, disclosures of risk summary reports should be clearly authorised by legislation.
- 9.89 Given the sensitive nature of the information in question, it would be appropriate for the Children, Youth and Families Act to authorise such disclosures only when the Department of Human Services is conducting a protective investigation following a report of contact between a registered sex offender and a particular child or children. A legislative provision should be inserted into the Children, Youth and Families Act to clearly define the circumstances in which Corrections Victoria may disclose health information about registered sex offenders to the Department of Human Services.

### Consistency with the Australian Psychological Society’s Code of Ethics

- 9.90 Additionally, Corrections Victoria clinicians must abide by professional ethical standards, such as the Australian Psychological Society’s (APS) Code of Ethics. The Commission understands that Corrections Victoria takes the view that this Code of Ethics precludes it from providing the Department of Human Services with detailed information collected by clinicians in the course of treating a registered sex offender, whether in custody or elsewhere. While there is no suggestion that the Department of Human Services wishes to access Corrections Victoria’s clinical files, there is a need to ensure that the provision of risk summary reports and other information does not conflict with the Code of Ethics.

96 *Corrections Act 1986* (Vic) ss 30(3)(b), 91(3); *Instrument of Authority*, Minister for Corrections Andrew McIntosh, signed 9 May 2011. The previous Instrument of Authority, signed by the former Minister for Corrections Bob Cameron, relied on *Corrections Act 1986* (Vic) s 91(1)(e).

97 *Children, Youth and Families Act 2005* (Vic) ss 35, 192.

98 *Instrument of Authority*, Minister for Corrections Andrew McIntosh, signed 9 May 2011.

99 *Health Records Act 2001* (Vic) s 3 (definition of ‘health information’). It seems that information or an opinion relating to an individual’s risk of committing a sexual offence in the future, and the factors which may increase or decrease that risk, may be considered health information for these purposes.

100 *Health Records Act 2001* (Vic) sch 1 cl 2.2.

101 *Ibid.*

102 The clinician will usually have collected the information for the purpose of treating the registered sex offender or assessing them for a supervision order application.

103 *Health Records Act 2001* (Vic) sch 1 cl 2.2.

- 9.91 The APS Code of Ethics specifies that ‘psychologists safeguard the confidentiality of information obtained during their provision of psychological services’.<sup>104</sup> However, the Code permits psychologists to disclose confidential information obtained in the provision of services ‘where there is a legal obligation to do so’.<sup>105</sup> Therefore, if amendments were made to the Children Youth and Families Act requiring disclosure of information in certain circumstances, Corrections Victoria clinicians would be permitted to provide information under their Code of Ethics.
- 9.92 At the beginning of the professional relationship, psychologists are also required to inform patients of:
- the limits to confidentiality, and
  - foreseeable uses of the information collected in the course of the relationship.<sup>106</sup>
- The Commission understands that Corrections Victoria clinicians already forewarn sex offenders that information they provide may be passed on to the Department of Human Services.

### Use of information by the Department of Human Services in protection application proceedings

- 9.93 The Children’s Court supports the provision of all relevant materials to the Department of Human Services.<sup>107</sup> The Court also questions the admissibility of the risk summary report in proceedings before it. Although the Children, Youth and Families Act permits the Family Division of the Children’s Court to ‘inform itself on a matter in such manner as it thinks fit, despite any rules of evidence to the contrary’,<sup>108</sup> it must nevertheless make decisions on the best available evidence when matters are contested.<sup>109</sup> Full assessment reports should be provided to the Department of Human Services for the purposes of making a protection application in the Children’s Court.
- 9.94 The Secretaries of the Department of Justice and Department of Human Services have already developed an administrative process for the timely sharing of particular information under the Ministerial Authority. They should continue to develop policies and procedures to facilitate the passage of information under the proposed legislative amendments.

## Recommendations

61. The *Children, Youth and Families Act 2005* (Vic) should be amended to codify the existing Ministerial Authority that permits Corrections Victoria to provide risk summary reports and assessment reports to the Department of Human Services.
62. The *Children, Youth and Families Act 2005* (Vic) should authorise the Secretary of the Department of Justice to disclose risk summary reports or assessment reports in relation to a registered sex offender where the Secretary of the Department of Human Services has requested the information because the Secretary of the Department of Human Services holds concerns about the risks posed to a particular child or children by that registered sex offender.
63. The Secretaries of the Departments of Human Services and Justice should develop protocols identifying the reports that can be disclosed and establishing procedures to ensure the speedy provision of relevant information.

104 Australian Psychological Society, *Code of Ethics* (2007) A5.1.  
 105 Ibid A5.2(b).  
 106 Ibid A5.3.  
 107 Submission 26 (Children’s Court of Victoria).  
 108 *Children, Youth and Families Act 2005* (Vic) s 215(1)(d).  
 109 Submission 26 (Children’s Court of Victoria).



# Accountability and review

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## Introduction

- 10.1 The *Sex Offenders Registration Act 2004* (Vic) established a new means of responding to a profound social problem—child sexual abuse. Commenting on the Act soon after it commenced, the Minister for Police and Emergency Services observed that it was ‘legislation which to some extent takes us into uncharted territory’. He added that ‘it is always difficult to anticipate all the different possibilities’.<sup>1</sup>
- 10.2 The Victorian Parliament had no Australian research to call on when the scheme was devised in 2004. It now appears to have outgrown initial expectations in size and to have an evolving purpose. It is based on an unproven—and probably unprovable—assumption that people convicted of sexually abusing children will be less likely to re-offend if they are required to provide reports to the police about their personal details, their movements and some of their interactions with children.
- 10.3 The Sex Offenders Registration Act has been amended on a number of occasions since 2004. It has also been complemented (and to some extent overtaken) by other protective schemes that target particular problem areas: high risk offenders and those who gain unsupervised access to children via their work or community activities. Seven years after the commencement of the Act, there is still no published Australian research about the effect of sex offender registration schemes on offender behaviour.
- 10.4 This report, and the Ombudsman’s February 2011 report,<sup>2</sup> have permitted the Parliament to receive some information about the operation and impact of the scheme. Such opportunities for review are not built into the Sex Offenders Registration Act. The Director, Police Integrity has had a limited role in monitoring the management of information in the Sex Offenders Register, but the findings are not public. There is no provision for a general review of the effectiveness of the registration scheme.
- 10.5 This chapter discusses the existing mechanism for monitoring the administration of the Act, the need for regular independent statutory reviews of the scheme and the desirability of longitudinal research into the effects of registration.

## The role of the Director, Police Integrity

- 10.6 The Sex Offenders Registration Act provides for very limited scrutiny of the registration scheme. One of the statutory purposes of the Act is to empower the Director, Police Integrity to monitor compliance with Part 4.<sup>3</sup>
- 10.7 Part 4 of the Act requires the Chief Commissioner of Police to establish and maintain the Sex Offenders Register and control access to the information it contains. It also enables registered sex offenders to seek a copy of the information in the Register that they have provided in the course of meeting their reporting obligations, and make corrections if necessary.
- 10.8 The role of the Director, Police Integrity has been to ensure that the Chief Commissioner meets the requirements in Part 4 when managing the information in the Sex Offenders Register. In practice, the Office of Police Integrity has conducted one compliance inspection each year.<sup>4</sup>
- 10.9 There is no independent monitoring of police compliance with the remainder of the Act. Most notably, the Director, Police Integrity has no power to monitor compliance with Part 3, which regulates the collection of information. As a result, there has been no external scrutiny of compliance with the provisions concerning the manner of reporting, including those that grant the registered offender the right to privacy and support when making a report<sup>5</sup> and empower

1 Victoria, *Parliamentary Debates*, Legislative Assembly, 25 May 2005, 1408 (Tim Holding, Minister for Police and Emergency Services).

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

3 *Sex Offenders Registration Act 2004* (Vic) s 1(1)(c). In fact, the provision refers to the ‘Police Ombudsman’ rather than the Director, Police Integrity. Six weeks after the Act commenced, the responsibilities of the Police Ombudsman were transferred to the Director, Police Integrity. While new provisions setting out the Director’s role and powers were inserted, the statutory purpose at s 1(1)(c) was not updated: *Major Crime (Investigative Powers) Act 2004* (Vic) ss 100–3. The relevant provisions in the *Sex Offenders Registration Act 2004* (Vic) are ss 66A–66D.

4 Inspections of compliance with Part 4 have been conducted every year since the 2005–06 financial year.

5 *Sex Offenders Registration Act 2004* (Vic) s 24.

the police to obtain fingerprints, fingerscans and photographs.<sup>6</sup> Nor has the Office of Police Integrity monitored notification to registered offenders of their obligations,<sup>7</sup> the calculation of reporting periods<sup>8</sup> or the destruction of material when a reporting period ends.<sup>9</sup>

- 10.10 The Chief Commissioner may monitor these activities internally, and complaints about the actions or behaviour of police members can be made to the Victoria Police Ethical Standards Department. Any complaints about conduct that breaches an information privacy principle in the *Information Privacy Act 2000* (Vic) may be referred to the Privacy Commissioner to investigate and conciliate.<sup>10</sup> However, by confining scrutiny by the Office of Police Integrity to Part 4, the Act fails to provide for ongoing independent monitoring of the way in which the reporting obligations under the registration scheme are administered.
- 10.11 The Commission believes that it would advance the interests of all people affected by the operations of the Sex Offenders Registration Act for Part 3 to be regularly monitored.

## Recommendation

64. The compliance monitoring currently undertaken by the Director, Police Integrity should be extended to include compliance with Part 3 of the *Sex Offenders Registration Act 2004* (Vic).

### Transfer of the functions of the Director, Police Integrity

- 10.12 A bill currently before Parliament will, if passed, repeal the *Police Integrity Act 2008* (Vic) and in doing so transfer the functions of the Director, Police Integrity under the Sex Offenders Registration Act to the new Independent Broad-based Anti-corruption Commission.<sup>11</sup> The new commission will have the power to investigate corruption in the police force, the judiciary and the public sector generally.<sup>12</sup>
- 10.13 The new commission will have broader focus and greater responsibilities to investigate corrupt conduct than the Director, Police Integrity.<sup>13</sup> The ongoing function of monitoring compliance with provisions of the sex offenders registration scheme may be peripheral to the new commission's core business. If so, the function may be better transferred to the Ombudsman when the Office of Police Integrity ceases to exist.
- 10.14 The Ombudsman has the independence and skills to assess the performance of Victoria Police in administering the registration scheme, and the function would align with his other responsibilities. The office is responsible for enhancing the accountability of government agencies to the public and is already required to monitor compliance by police with Division 3 of Part 4 of the *Melbourne City Link Act 1995* (Vic),<sup>14</sup> and by approved general inspectors with Part 2A of the *Prevention of Cruelty to Animals Act 1986* (Vic).<sup>15</sup> The Ombudsman initially performed the role of Director, Police Integrity—including monitoring compliance with Part 4 of the Sex Offenders Registration Act—until the Office of Police Integrity was re-established as an independent body under the Police Integrity Act.

6 Ibid ss 27–9.

7 Ibid s 50.

8 Ibid ss 32–8.

9 Ibid s 30.

10 The Office of the Privacy Commissioner has advised that no formal complaints have been made under the *Information Privacy Act 2000* (Vic). Inquiries they have received have been referred to Victoria Police.

11 *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) (not yet commenced); Independent Broad-based Anti-corruption Commission Amendment (Investigative Functions) Bill 2011 (Vic) pt 3 cl 16.

12 *Independent Broad-based Anti-corruption Commission Act 2011* (Vic); Independent Broad-based Anti-corruption Commission Amendment (Investigative Functions) Bill 2011 (Vic).

13 *Independent Broad-based Anti-corruption Commission Act 2011* (Vic). The Act has not yet commenced.

14 *Ombudsman Act 1973* (Vic) s 13(2AA).

15 Ibid s 13(2AAA).

## Publication of compliance reports

- 10.15 The Director, Police Integrity may give the Minister for Police and Emergency Services a written report about compliance with Part 4 of the Act at any time.<sup>16</sup> The reports do not have to be made public and none have been released.
- 10.16 In 2005, the former Director, Police Integrity reported to the Minister and the Chief Commissioner on 'a number of problems with the Register in its establishment phase'. The Minister subsequently announced that he had appointed a former Chief Commissioner of Police, Mr Neil Comrie, to review the requirements and arrangements for the establishment of the Register. The Comrie report has not been publicly released.<sup>17</sup>
- 10.17 The Commission considers that the damage to public confidence in the administration of the registration scheme following the Ombudsman's 2011 report is likely to be improved by introducing more transparent monitoring processes. The Deputy Privacy Commissioner has stated that he would strongly support a requirement that compliance reports be tabled in Parliament.<sup>18</sup>
- 10.18 In addition, although the compliance inspections conducted by the Office of Police Integrity have not always identified major problems,<sup>19</sup> the recommended expansion of the monitoring role will increase the significance of the reports that are prepared. Publication of the reports will strengthen the effect of compliance monitoring as an accountability mechanism and provide an early warning of systemic issues that may require a broader response.

## Recommendation

65. Compliance monitoring reports to the Minister by the Director, Police Integrity (or any agency to which the compliance monitoring function is transferred) should be required to be tabled in Parliament.

## Reports about the operation of the scheme

- 10.19 To ensure that relevant and useful information is collected and is available for the purposes of external monitoring and evaluation, there is merit in providing for regular reports of basic core data to Parliament. Not only would they inform community understanding of the nature and risks of sexual offending, the reports could encourage further academic and professional studies that would help to redress the paucity of research into the effectiveness of sex offender registration schemes in Australia.
- 10.20 Accountability mechanisms rely on timely and accurate data. The poorer the amount and quality of data about the operation of the scheme, the harder it is to determine whether it is operating in compliance with the legislation. Similarly, a lack of reliable data on which to base the evaluation hampers the task of determining whether the legislation is achieving its purpose.
- 10.21 In preparing this report, the Commission encountered difficulty in gathering information about the operation of the registration scheme. Some information had not been collected and some was too difficult to retrieve for technical reasons associated with the manner in which the Register has been maintained.
- 10.22 The Ombudsman's report prompted all agencies involved in the management of registered sex offenders to review the way they handle information about these people. New information

<sup>16</sup> *Sex Offenders Registration Act 2004* (Vic) s 66D. The Chief Commissioner must be given a copy of any report.

<sup>17</sup> Office of Police Integrity, *Annual Report 2005–2006* (2006) 25.

<sup>18</sup> Submission 10 (Office of the Victorian Privacy Commissioner).

<sup>19</sup> The inspection in 2007–08 led to the finding that 'the OPI's regulatory compliance officer was satisfied with the overall integrity of the files inspected': Office of Police Integrity, *Annual Report 2007–2008* (2008) 42.

management systems planned or recently introduced by Victoria Police will increase their capacity to collect and analyse details about registered sex offenders in future.

- 10.23 In the Northern Territory, the Commissioner of Police must report to the Minister for Police, Fire and Emergency Services, within three months of the end of each financial year, data about the Northern Territory registration scheme as specified in the *Child Protection (Offender Reporting and Registration) Act 2004* (NT). The data includes details of the number of registered offenders, how many of them committed further registrable offences during the year, the number of prohibition orders issued, the number of prosecutions for offences under the relevant legislation and other information about the operation of the scheme.<sup>20</sup> The Minister must table the report within three sitting days of receiving it.<sup>21</sup> A copy of the most recent report, for the 2010–11 financial year, is at Appendix G.
- 10.24 A similar reporting obligation could be placed on the Chief Commissioner of Victoria Police. The details of the required data should largely be determined by the Minister, but essential baseline information could be prescribed in the Act.

## Recommendations

66. The Chief Commissioner of Police should be required to report to the Minister for Police data about the operation of the registration scheme, current as at the end of the financial year, within three months of the end of the financial year. The Minister should be required to table the report within 14 days of receiving it.
67. The data in the Chief Commissioner's report to the Minister for Police on the operation of the scheme should include information about:
- (a) the number of registered offenders in total, and those added during the past financial year, by category of offence and length of reporting period
  - (b) the number of prosecutions during the financial year for offences under the Act, by offence
  - (c) the number of registered offenders who were sentenced for a subsequent Category 1, 2 or 3 offence during the financial year
  - (d) the number of special conditions on registration orders; extensions of registration orders; and child protection prohibition orders made during the year
  - (e) any other statistical information about the operation of the scheme as determined by the Minister.

## Independent review of the operation and effectiveness of the Act

- 10.25 The Sex Offenders Registration Act established, for the first time in Victoria, a scheme that imposed obligations on offenders after they had completed their sentences. It extended the reach of the law beyond punishing offenders to managing the risk that those who have completed their sentences for certain crimes may re-offend. It gave Victoria Police a new responsibility to monitor members of the community in the absence of any complaint or evidence that they have committed an offence.
- 10.26 The effectiveness of the scheme is uncertain, and the police and child protection resources it requires will continue to increase markedly if the scheme remains in its current form. However, there is no statutory requirement to review the operation and impact of the legislation and

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*Child Protection (Offender Reporting and Registration) Act 2004* (NT) s 93(1).  
Ibid s 93(3).

- report to the Minister and Parliament. The Commission considers that the protection of our children is too important not to periodically review the performance of the scheme.
- 10.27 The role currently performed by the Director, Police Integrity is not sufficient for this purpose. Even if expanded to include ongoing monitoring of compliance with Part 3 of the Act, as the Commission has recommended, the role would not extend to reviewing the effectiveness of the registration scheme.
- 10.28 Although Victoria Police is responsible for collecting and compiling information about registered sex offenders, the purposes of the registration scheme can be achieved only by the effective collaboration of Victoria Police, the Department of Justice and the Department of Human Services. Any assessment of whether the scheme is effective needs to take into account the impact of the related legislation that those agencies administer and, in particular, the *Working with Children Act 2005* (Vic) and the *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic). The interaction with the *Children, Youth and Families Act 2005* (Vic) should also be considered.
- 10.29 In the Commission's view, the ongoing compliance monitoring currently undertaken by the Director, Police Integrity should be augmented by periodic external review of the effectiveness of the legislation. The review would examine whether the scheme is achieving its purpose in the context of other protective legislation and child protection programs, and could extend to identifying any unintended consequences for the justice system, such as contributing to delays in court proceedings.
- 10.30 Statutory reviews have been required in other jurisdictions. In New South Wales, the responsible Minister was required to review the *Child Protection (Offenders Registration) Act 2000* (NSW) five years after the date of assent and ascertain whether 'the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives'.<sup>22</sup> When the Act was amended in 2004, a provision was inserted requiring the Minister to review the provisions about child protection orders within two years of the provisions commencing, and table the report in Parliament.<sup>23</sup> A requirement for a further review of the Act and its policy objectives within five years was inserted by amendments in 2007.<sup>24</sup>
- 10.31 A review of the 'operation and effectiveness' of the *Community Protection (Offender Reporting) Act 2004* (WA) by the responsible Minister in Western Australia is currently underway. The Act requires the review to be conducted within five years of commencement.<sup>25</sup> A similar obligation applies to the Minister responsible for the Tasmanian registration scheme.<sup>26</sup> In all cases, the legislation requires a report of the review to be tabled in Parliament.
- 10.32 These are examples of some of the reforms that could usefully be adopted in Victoria. They provide for an assessment of whether the legislation is achieving its purpose and ensure accountability through the Minister to Parliament. However, the legislation does not provide for periodic reviews and does not require external or independent scrutiny.
- 10.33 Periodic reviews of the Victorian legislation would enable the Parliament to monitor its effectiveness in a changing environment. For example, the impact of other preventative legislation may require adjustments to the way in which the registration scheme is targeted. New methods of sex offender management may suggest changes to reporting obligations. Importantly, regular reviews would build on the data that can be used to measure the effectiveness of the legislation.
- 10.34 The practice in other jurisdictions to conduct a review of the relevant legislation after five years of operation allows for a reasonable period of time for systems to be introduced and for a useful amount of data to be collected. The Commission considers that a system of rolling five-year reviews should be introduced in Victoria. However, to enable the impact of introducing five-year reporting periods for registered sex offenders to be assessed, the first review should

22 *Child Protection (Offenders Registration) Act 2000* (NSW) s 26 (as originally enacted).

23 *Child Protection (Offenders Registration) Amendment Act 2004* (NSW) s 3E.

24 *Child Protection (Offenders Registration) Act 2000* (NSW) s 26(2) provides that the review is to be undertaken as soon as possible five years from the date of assent to the *Child Protection (Offenders Registration) Amendment Act 2007* (NSW).

25 *Community Protection (Offender Reporting) Act 2004* (WA) s 115. The Commission understands that the review will be completed early in 2012.

26 *Community Protection (Offender Reporting) Act 2005* (Tas) s 52. The review is due to be held soon, as it must be conducted as soon as practicable after the fifth anniversary of the commencement of the Act.

be conducted seven years after the proposed reforms to the registration scheme come into effect.

- 10.35 The reviews should be conducted by independent experts with the necessary skills and resources to assess the operation and effect of the legislation. As the success of the registration scheme depends on the combined efforts of the courts, the police and government agencies, the reviewers will need to understand how they interact as well as how they are separately affected. They will also need to take into account the views of practitioners, academics, members of the community who are affected by the scheme and others with direct experience of its operations.
- 10.36 The report should be made to the responsible Minister, who should then table it in Parliament.

## Recommendation

68. The Minister for Police should cause an independent review of the operation and effectiveness of the *Sex Offenders Registration Act 2004 (Vic)* to be conducted as soon as practicable seven years after the proposed revised scheme commences, and every five years thereafter. The report should be tabled in Parliament.

## National longitudinal research project

- 10.37 The management of sex offenders is a complex and dynamic field of public policy. It is difficult to determine the impact of registration on offender behaviour, as distinct from the effect of other factors such as treatment and rehabilitation programs, sentencing practices and demographic change. Moreover, there has been very little research into this area. Further research could contribute to an understanding of the extent to which sex offender registration schemes discourage re-offending.
- 10.38 Ideally, the research should be conducted over a period of time that allows for the behaviour of a sample of offenders to be followed and trends to be identified. It should be objective, authoritative and conducted by independent researchers.
- 10.39 As all Australian states and territories have registration schemes, and encounter similar challenges and public expectations, the research could inform legal policy in all jurisdictions and reinforce national initiatives. The Commission considers that there would be benefits to state and territory governments in shared learning and cost efficiencies if the research were conducted as a national project under the auspices of police ministers.

## Recommendation

69. The Minister for Police should propose to the Ministerial Council on Policing and Emergency Management—Police that an appropriate body or individual researchers be engaged to conduct longitudinal research into the effect of Australia's sex offender registration schemes on recidivism.



# Transitional arrangements

**152** Introduction

**152** Submissions and consultations

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## Introduction

- 11.1 Implementation of the Commission’s proposed changes to the sex offenders registration scheme would result in two very different schemes for two groups of people—those already on the Sex Offenders Register and those placed on the Register by a court order under the refined scheme—unless the new arrangements can be applied to those people now on the Register.
- 11.2 There is a need for consistency in the way sex offenders are managed under a registration scheme, regardless of the time at which they were registered. The absence of appropriate transitional arrangements would prolong the inefficiency and expense caused by the current undifferentiated approach to the selection of offenders for inclusion in the Register. Transitional arrangements are also necessary as a matter of fairness to those people who are now included in the Register so that they are treated in the same way as later offenders.
- 11.3 The major differences between the current scheme and the revised scheme proposed by the Commission are set out in Table 7 at the end of this chapter.
- 11.4 In Chapter 5, the Commission discussed the reasons for recommending that people who commit sexual offences against adults should no longer be eligible for inclusion in the Register, and for recommending a graded individual assessment scheme for use when determining whether people who have been found guilty of committing sexual offences against children should be included in the Register.
- 11.5 In Chapter 6, the Commission discussed the reasons for recommending shorter reporting periods and for recommending that judges and magistrates have access to a broader range of reporting conditions when making a sex offender registration order.
- 11.6 These proposed changes to the means of selecting people for inclusion in the Register, to the duration of the reporting obligations, and to the reporting conditions that a registered sex offender must comply with should be applied to existing registrants through a transitional process that is rigorous, efficient, transparent and fair.

## Submissions and consultations

- 11.7 Transitional arrangements were raised in various consultations.<sup>1</sup> Some people felt that those who are already registered should be able to seek review of the continuing need for registration,<sup>2</sup> ideally by the court that sentenced the person for the offences that led to inclusion in the Register.<sup>3</sup> However, the need to consider the workload of the courts was also emphasised in consultations because so many registered sex offenders are likely to seek review if this option is open to them.<sup>4</sup> The County Court pointed out that it could potentially be ‘swamped with applications’.<sup>5</sup>
- 11.8 The Criminal Bar Association of Victoria suggested that another approach would be to deem all current registered sex offenders to be in the category that applied to them under the proposed revised scheme.<sup>6</sup> However, this approach would mean that some offenders would be automatically de-registered or receive drastically reduced reporting periods without any consideration of their individual circumstances.

## Commission’s conclusions and recommendations

- 11.9 The Commission considered a number of options when searching for an appropriate transitional process. As well as the two options mentioned above, the Commission also considered whether a determination by the Chief Commissioner of Police, reviewable by the Victorian Civil and Administrative Tribunal (VCAT), was a feasible transitional mechanism.

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1 Consultations 12 (Judge David Jones AM, Adult Parole Board); 17 (County Court of Victoria); 24 (Magistrates’ Court of Victoria and Children’s Court of Victoria); 28 (Criminal Bar Association of Victoria).

2 Ibid.

3 Consultations 12 (Judge David Jones AM, Adult Parole Board); 24 (Magistrates’ Court of Victoria and Children’s Court of Victoria); 28 (Criminal Bar Association of Victoria).

4 Consultations 24 (Magistrates’ Court of Victoria and Children’s Court of Victoria); 28 (Criminal Bar Association of Victoria).

5 Consultation 17 (County Court of Victoria).

6 Consultation 28 (Criminal Bar Association of Victoria).

- 11.10 The option of returning to the sentencing court would be extremely time consuming and resource intensive. It would also contribute to further delays in the criminal courts. The option of deeming all registered sex offenders to be in the category that applied to them under the proposed revised scheme lacks rigour. It is a mechanistic approach to an undertaking that demands individual assessment, both in terms of the need for continued registration and of the reporting obligations that should be imposed.
- 11.11 The option of a transitional determination by the Chief Commissioner of Police is not supportable for three reasons. First, it is not a traditional police function to make decisions about applying preventative mechanisms to individuals convicted of particular offences. Second, there would be an appearance of a conflict of interest, and perhaps a real conflict in some instances, if the Chief Commissioner were asked to make decisions about the continued inclusion of people in a scheme that the Chief Commissioner administered. The involvement of the Chief Commissioner in decisions of this nature would also probably attract expensive judicial review litigation in some circumstances. Third, the likely cost of the process, especially when coupled with a right of review in VCAT, would not be an efficient use of public resources.

### **The way forward: A Sex Offenders Registration Review Panel**

- 11.12 A further, preferred, option identified by the Commission is to establish a panel of experts to review the circumstances of each existing registered sex offender in order to determine how that person should be dealt with under the proposed new scheme. The Commission believes that this process can be rigorous, efficient, transparent and fair. The Criminal Bar Association of Victoria supported the proposal of panel review.<sup>7</sup>
- 11.13 The Commission proposes that the panel be comprised of a retired judge, a health professional who is experienced in treating child sex offenders, and at least one other person with experience making decisions about the management of offenders, such as a current or former member of the Adult Parole Board. A panel of this nature should bring appropriate experience to the task of making transitional decisions.
- 11.14 There are fair and transparent means of making the transitional process efficient. If the panel is directed to apply the rebuttable presumption that offenders should be transferred to the category that applies to them under the proposed revised scheme unless other arrangements might be more appropriate, many cases could be dealt with after considering documentary evidence and in the absence of any hearing.
- 11.15 This process would be fair for those offenders who would be transferred to the appropriate category under the proposed revised scheme because many would experience shorter reporting periods and none would be given longer reporting periods. It would be transparent in the sense that interested persons would know that the usual, but rebuttable, rule was that offenders would be transferred to the category that applies to them under the proposed revised scheme unless the expert panel were of the view that the offender's circumstances justified departure from that rule.
- 11.16 Fairness could be maintained in those cases where the panel was of the opinion that it might be appropriate to depart from the 'usual rule' by giving the offender and a delegate of the Chief Commissioner of Police an opportunity to be heard before any final determination was made. The panel could then tailor suitable conditions after hearing from the offender and the Chief Commissioner, who would be representing the public interest.

## Recommendations

70. *The Sex Offenders Registration Act 2004 (Vic)* should establish a Sex Offenders Registration Review Panel. The Panel should comprise a retired judge, a health professional with experience in the treatment and management of child sex offenders, and at least one other person with significant experience in making decisions about the management of offenders.
71. The role of the Sex Offenders Registration Review Panel should be to review all registrations under the *Sex Offenders Registration Act 2004 (Vic)* prior to the amendments.

### Powers of the Sex Offenders Registration Review Panel

- 11.17 The primary aim of the transitional arrangements should be to ensure that the child protection benefits that result from strengthening the scheme are not lost by continuing with an unmanageably large Register that is not sufficiently focused on those offenders who pose the greatest risk of harm to children. These proposed panel reviews will remove people from the Register who do not present a risk and they will also ensure equal treatment for all registrants.
- 11.18 The panel must be given an appropriate range of powers when reviewing offenders who are already on the Register. The panel should be permitted to reduce the length of existing registration periods to bring them into line with the duration of orders under the three revised categories, to impose any additional conditions on a registrant that a court could impose under the proposed revised arrangements and to terminate an offender's reporting obligations if they would have expired under the proposed revised arrangements or when the panel is of the view that no useful protective purpose is served by requiring an offender to continue to report. Those young people who are currently subjected to lengthy reporting obligations after being found guilty of 'sexting', or of having a 'consensual' sexual relationship with an underage partner, could be eligible for termination of registration by the panel.
- 11.19 The jurisdiction of the Sex Offenders Registration Review Panel should not extend to interstate, corresponding registered offenders. The Commission does not believe that interstate registrants should be encouraged to re-locate in order to benefit from any changes to Victoria's legislation. Victoria should continue to require interstate offenders who re-locate to remain on the Register for the period determined by the law in the original jurisdiction.

## Recommendations

72. The Sex Offenders Registration Review Panel should be permitted to terminate the registration of any person, other than an interstate or corresponding registrable offender, who was registered for an offence that is no longer a registrable offence in Victoria.
73. The Panel should be permitted to suspend the reporting obligations of any person who would be permitted to seek suspension of their reporting obligations under the new registration scheme due to physical or cognitive impairment.

74. The Sex Offenders Registration Review Panel should not be permitted to terminate an existing registration for an offence that is a Category 1 offence under the new registration scheme unless:
- (a) an exception would apply under the new registration scheme, or
  - (b) the offender was a child at the time of the finding of guilt for the Category 1 offence and the Panel is satisfied that no useful protective purpose is served by the registration continuing.
75. The Sex Offenders Registration Panel should be permitted to terminate an existing registration for:
- (a) an offence that is a Category 2 or 3 offence under the new registration scheme, where a finding of guilt was made when the offender was an adult, or
  - (b) an offence that is a Category 2 or 3 offence under the new registration scheme, where a finding of guilt was made when the offender was a child,
- if it is satisfied that no useful protective purpose is served by the registration continuing.

- 11.20 As discussed in Chapter 6, the Commission has been unable to discover the reasons for the Sex Offenders Registration Act's current reporting periods.<sup>8</sup> The Commission has recommended standard reporting periods of five years and three years, with provisions for the Chief Commissioner of Police to apply for an extension of an offender's registration order. There would be no limit on the number of times a registration order could be extended. It is desirable that initial reporting periods under the revised scheme and extension periods for offenders registered under the current scheme are the same.

## Recommendation

76. The Sex Offenders Registration Review Panel should be permitted to reduce the reporting period of a registered sex offender under the existing scheme so that it corresponds with the reporting period accorded to the same offence under the new provisions.
- 11.21 The Commission considers it desirable that the panel have the ability to impose the same additional conditions on an existing registered sex offender's registration as a sentencing court would be able to impose when making a registration order under the refined scheme. The additional conditions, discussed in Chapter 6, are:
- A requirement to report in person more frequently than as prescribed in the Act.
  - Where the court is satisfied that the person has a cognitive disability or mental illness, a requirement that the person must be accompanied by an independent third person, assigned by the Office of the Public Advocate, when making a report in person.
  - A requirement to attend and participate in rehabilitation programs that provide behavioural guidance and assist with integration into the community.

- Authorising the presence of a delegate of the Secretary of the Department of Human Services in her capacity as a protective intervener when a person makes a child contact report to a delegate of the Chief Commissioner of Police.
- 11.22 The panel should have the flexibility to add some or all of these conditions at the time of review, where appropriate.

## Recommendation

77. The Sex Offenders Registration Review Panel should be permitted to impose any of the conditions provided for in the new registration scheme if it is satisfied that this would reduce the risk of the registered sex offender committing a Category 1, 2 or 3 offence during the period for which the order would apply.

### Procedures of the Sex Offenders Registration Review Panel

- 11.23 It will be necessary for the panel to review all registered sex offenders who currently live in the community, as well as those who are presently in custody and whose reporting obligations will commence when they are released. As at 1 December 2011, there were 3475 people in these two categories.
- 11.24 It is important that the panel process is both fair and efficient. People have a common law right to a fair hearing when a court, tribunal or public official has the power to make a decision that affects their 'rights, interests and legitimate expectations'.<sup>9</sup> It is possible to remove this right by legislation in particular circumstances,<sup>10</sup> as occurs, for example, in relation to determinations by the Adult Parole Board.<sup>11</sup>
- 11.25 It would be an elaborate and expensive process for the panel to conduct hearings for the 3475 people who should be dealt with under any transitional arrangements. As many of these people are likely to have the length of their reporting period reduced and experience no change to their reporting conditions, any decision of the panel would not adversely affect their rights, interests and legitimate expectations. In these circumstances, it is appropriate to permit the panel to make a transitional determination that is favourable to the registrant without conducting a formal hearing. The panel should be permitted to make determinations in these cases after considering appropriate documentary evidence.
- 11.26 When, after considering documentary evidence, the panel makes a preliminary determination that it might not reduce a registered sex offender's reporting period so that it corresponds with the proposed new arrangements, or that additional reporting conditions might be warranted, the offender should have the right to appear before it. There should be a right to legal representation in these circumstances.
- 11.27 The Chief Commissioner of Police should have a right to be heard by the panel in such instances in order to represent the public interest.

<sup>9</sup> *Kioa v West* (1985) 159 CLR 550, 584 (Mason J). There is a large body of case law and academic commentary dealing with the 'threshold test' for determining when the rules of procedural fairness, or natural justice, apply: see Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (Lawbook Co, 4th ed, 2009) 403–517.

<sup>10</sup> *Kioa v West* (1985) 159 CLR 550, 584 (Mason J).

<sup>11</sup> *Corrections Act 1986* (Vic) s 69(2).

## Recommendation

78. The Sex Offenders Registration Review Panel should be permitted to make decisions favourable to the registered sex offender without a hearing, but in any other circumstances the offender should have a right to be heard by the Panel before any decision that might be adverse to that person's interests is made. The Chief Commissioner of Police should have a right to be heard by the Panel in such instances in order to represent the public interest.

- 11.28 The Commission believes that it should be possible to appeal from any decision of the panel to the court that found the person guilty of the offences that led to inclusion in the Sex Offenders Register. This step will bring transparency and rigour to the panel review process.

## Recommendation

79. The Chief Commissioner of Police and the registered sex offender should have the right to review any decision of the Panel in the court in which the offender was found guilty of the offences that led to inclusion in the Sex Offenders Register.

**Table 7—Proposed changes to the registration scheme that will affect existing registered sex offenders**

Current scheme	Proposed revised scheme
Reporting obligations for 8 years, 15 years or life for adult offenders and 4 years or 7.5 years for offenders who are under the age of 18. No provision for extensions.	Registration for 5 years or 3 years, with no limit to the number of extensions that may be sought by the Chief Commissioner of Police.
Mandatory registration in most instances.	Structured individual assessment of each case, so that the higher the category of the offence, the greater the expectation that the court will make a registration order.
Standard reporting conditions apply. No conditions devised for particular offenders such as behavioural support.	Individualised conditions such as behavioural support may be ordered by the court in addition to the standard reporting conditions.
Applies to sexual offences committed against or involving adults and children, and bestiality offences.	Applies only to sexual offences committed against or involving children.



# Appendices

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## Appendix A: Submissions

1	Law Council of Australia
2	Name withheld
3	Professor Terry Thomas
4	Sonya Karo
5	Troy McDonald
6	CrimTrac
7	CASA Forum
8	Royal Australian and New Zealand College of Psychiatrists, Victorian Branch
9	Australian Community Support Organisation
10	Office of the Victorian Privacy Commissioner
11	CEASE
12	Australian Capital Territory Ombudsman
13	Confidential
14	Victoria Legal Aid
15	Law Institute of Victoria
16	Mental Health Legal Centre Inc
17	Victorian Equal Opportunity and Human Rights Commission
18	Liberty Victoria
19	Gatehouse Royal Children's Hospital
20	Confidential
21	Confidential
22	Confidential
23	Emeritus Professor Paul Mullen
24	Criminal Bar Association of Victoria
25	The Hon Justice Alan Blow OAM
26	Children's Court of Victoria
27	Institute of Legal Executives Victoria
28	Monash Law Students' Society's Just Leadership Program
29	Dr Astrid Birgden
30	Confidential
31	Name withheld
32	Name withheld

## Appendix B: Consultations

1	Sex Offenders Registry, Victoria Police
2	Child Protection, Department of Human Services
3	Dr Danny Sullivan and Professor James Ogloff
4	SOCIT Project, Victoria Police
5	Office of Public Prosecutions
6	Victoria Legal Aid
7	Nexus, Victoria Police
8	Manager, Sex Offenders Registry, Victoria Police
9	Principal Practitioner, Department of Human Services
10	Adult Parole Board
11	CrimTrac
12	The Hon David Jones AM, Adult Parole Board
13	Emeritus Professor Paul Mullen
14	Justice Health
15	Manager, Youth Legal Service, Victoria Legal Aid
16	Sex Offenders Registry Liaison, Department of Human Services
17	County Court of Victoria
18	Sex Offender Management, Department of Justice
19	Australian Community Support Organisation Inc
20	New South Wales Department of Families and Community Services and New South Wales Police
21	Child Protection Registry, New South Wales Police
22	Commonwealth Department of Public Prosecutions
23	Professor Tony Ward
24	Magistrates' Court of Victoria and Children's Court of Victoria
25	Law Institute of Victoria
26	Child Protection, Department of Human Services, Eastern Region
27	The Hon Justice Simon Whelan, Chairperson, Adult Parole Board
28	Criminal Bar Association
29	Australian Federal Police
30	Crime Victims Support Agency

## Appendix C: Current categorisation of registrable offences

Registrable offences result in the offender becoming a registered sex offender. They are divided into four classes and listed in schedules 1 to 4 of the *Sex Offenders Registration Act 2004* (Vic).

Class 1 and Class 2 offences are sexual offences involving children (except for the one offence of bestiality in Class 2). They result in the mandatory registration of adult offenders and the registration of child offenders where the court makes a sex offender registration order.

Class 3 and Class 4 offences are sexual offences committed by a serious sexual offender against someone other than a child. A serious sexual offender, for the purposes of the Sex Offenders Registration Act, is someone who has been sentenced for two or more of the offences listed in the schedules.<sup>1</sup> Class 3 and Class 4 offences may result in registration if the sentencing court is satisfied, beyond reasonable doubt, that the offender poses a risk to the sexual safety of others or the community and consequently makes a sex offender registration order.

An offence that is not listed in a schedule may still result in registration under a sex offender registration order if the sentencing court is satisfied, beyond reasonable doubt, that the offender poses a risk to the sexual safety of others or the community.

Additional Class 1, 2, 3 and 4 offences may be prescribed by regulation. To date, this has not occurred.

The lists of offences in schedules 1 to 4 are summarised below. The Sex Offenders Registration Act refers to both current and some historical offences. This appendix contains a list of the offences as they currently exist at law.

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### Class 1 offences

Many of the offences listed in schedule 1 can be committed against either adults or children but, to be a Class 1 offence, the offence must have been committed against a child.

#### *Crimes Act 1958* (Vic)

s 38	Rape
s 44	Incest: an act of sexual penetration with a person whom the perpetrator knows to be his or her child or other lineal descendant or step-child
s 45(1)	Sexual penetration of a child under the age of 16
s 48(1)	Sexual penetration of a 16- or 17-year-old child
s 51(1)	Sexual penetration of a person with a cognitive impairment by a person who provides medical or therapeutic services
s 51(2)	Sexual penetration of a person with a cognitive impairment by providers of special programs
s 38A	Compelling sexual penetration
s 47A	Persistent sexual abuse of a child under the age of 16
s 49A	Facilitating sexual offences against children
	An offence against a provision of the <i>Crimes Act 1958</i> (Vic) repealed or amended before 1 October 2004 the elements of which would have constituted the elements of any of the above offences
s 60AC	Aggravated sexual servitude against a person under the age of 18

## Crimes Act 1914 (Cth)

s 50BA	Sexual intercourse with a child under the age of 16 outside Australia <sup>2</sup>
s 50BB	Inducing a child under the age of 16 to engage in sexual intercourse with a third party outside Australia in the presence of the defendant <sup>3</sup>
s 50DA	Benefiting from an offence involving child sex tourism <sup>4</sup>
s 50DB	Encouraging an offence involving child sex tourism <sup>5</sup>

## Criminal Code Act 1995 (Cth)

s 270.6	Causing a child to enter or remain in sexual servitude
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## Other

	Any offence under a law of a foreign jurisdiction that, if it had been committed in Victoria, would have constituted an offence of a kind listed in schedule 1
	An offence an element of which is an intention to commit an offence of a kind listed in schedule 1
	An offence of attempting, or of conspiracy or incitement, to commit an offence of a kind listed in schedule 1
	An offence that, at the time it was committed, was a Class 1 offence for the purposes of the <i>Sex Offenders Registration Act 2004</i> (Vic) or, in the case of an offence committed before 1 October 2004, was an offence of a kind listed in schedule 1 <sup>6</sup>

## Class 2 offences

Many of the offences listed in schedule 2 can be committed against either adults or children, but to be a Class 2 offence, the offence must have been committed against a child (except for the offence of bestiality).<sup>7</sup>

## Crimes Act 1958 (Vic)

s 39	Indecent assault
s 40(1)	Assault with intent to rape
s 47(1)	Indecent act with a child under the age of 16
s 49(1)	Indecent act with a 16- or 17-year-old child
s 51(2)	Indecent act with a person with a cognitive impairment by providers of medical or therapeutic services
s 52(2)	Indecent act with a person with a cognitive impairment by providers of special programs
s 53	Administration of a drug to a person with the intention of engaging in sexual penetration or an indecent act with that person (or facilitating another person to do so)

2 This section of the *Crimes Act 1914* (Cth) has been repealed: *Crimes Legislation Amendment (Sexual Offences Against Children) Act 2010* (Cth) pt 1. The offence is now covered by *Criminal Code Act 1995* (Cth) s 272.8(1).

3 This section of the *Crimes Act 1914* (Cth) has been repealed: *Crimes Legislation Amendment (Sexual Offences Against Children) Act 2010* (Cth) pt 1. The offence is now covered by *Criminal Code Act 1995* (Cth) s 272.8(2).

4 That is, an offence against pt IIIA of the *Crimes Act 1914* (Cth). This part has been repealed: *Crimes Legislation Amendment (Sexual Offences Against Children) Act 2010* (Cth) pt 1. The offence is now covered by *Criminal Code Act 1995* (Cth) s 272.18. The offence is now benefiting from sexual offences against children outside Australia.

5 That is, an offence against pt IIIA of the *Crimes Act 1914* (Cth). This part has been repealed: *Crimes Legislation Amendment (Sexual Offences Against Children) Act 2010* (Cth) pt 1. The offence is now covered by *Criminal Code Act 1995* (Cth) s 272.19. The offence is now encouraging sexual offences against children outside Australia.

6 The law in Victoria in relation to sexual offences has changed significantly over a number of decades and some historical offences have been renamed or no longer exist at law. The purpose of this provision is to ensure that the historical offences are brought within the ambit of the *Sex Offenders Registration Act 2004* (Vic), where the substance of the historical and current offences is the same. Schedule 1 of the *Sex Offenders Registration Act 2004* (Vic) lists a number of references in the *Sentencing Act 1991* (Vic) to offences that no longer exist at law.

7 Currently, a child is unable to commit bestiality under the *Crimes Act 1958* (Vic), as that offence can only be perpetrated by a man or a woman: *Crimes Act 1958* (Vic) s 59. Further, an act of bestiality involving a child as a victim would fall within *Crimes Act 1958* (Vic) s 38A(2)(b)—compelling a victim to take part in an act of bestiality. The effect of including bestiality in Class 2 is unclear, because an offence involving a child being forced to engage in an act of bestiality would be the Class 1 offence of compelling a victim to take part in an act of bestiality: *Crimes Act 1958* (Vic) s 38A(2)(b).

s 54	Owner, occupier or manager of premises inducing or knowingly allowing a child under the age of 17 to enter or remain on the premises for the purpose of taking part in an unlawful act of sexual penetration
s 55	Taking a child away or detaining a child against their will with the intention of getting married to that child or taking part in an act of sexual penetration with that child, or with the intention that the child should marry or take part in an act of sexual penetration with another person
s 56	Abducting a child from their lawful carer with the intention that the child should take part in an act of sexual penetration outside marriage
s 57	Procuring a child to take part in an act of sexual penetration by threats, intimidation or any fraudulent means
s 58	Procuring a person under 16 years old to take part in an act of sexual penetration or an indecent act
s 59	Bestiality: offences involving sexual penetration of or by an animal <sup>8</sup>
s 60AE	Aggravated deceptive recruiting for commercial sexual services, where the offence is aggravated because it was committed against someone under the age of 18
s 60B(2)	Loitering near a school, kindergarten or childcare centre without reasonable excuse after having been found guilty of an offence of a sexual nature
s 68(1)	Production of child pornography
s 69	Inviting, procuring, causing or offering a minor to be in any way concerned in the making of child pornography
s 70(1)	Knowingly possessing child pornography
s 70AC	Inviting, procuring, causing or offering a minor to be in any way concerned in a sexual performance involving payment of the minor or any other person
s 76	Burglary where the offender entered the building as a trespasser with the intent to commit a sexual or indecent assault on a child
s 77	Aggravated burglary where the offender entered the building as a trespasser with the intent to commit a sexual or indecent assault on a child

### Sex Work Act 1994 (Vic)

s 5(1)	Causing or inducing a child to take part in an act of sex work, whether as the sex worker or client
s 6(1)	Receiving payment knowing that it or any part of it has been derived, directly or indirectly, from sexual services provided by a child
s 7(1)	Entering into or offering to enter into an agreement under which a child is to provide sexual services
s 11(1)	Owner, occupier or manager of premises allowing a child to remain on the premises for the purpose of taking part in an act of sex work, whether as the sex worker or client

### Classification (Publications, Films and Computer Games) (Enforcement) Act 1995 (Vic)

s 57A	Knowingly using an online information service to publish or transmit child pornography
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### Other

	An offence against a provision of an Act amended or repealed before 1 October 2004 of which the necessary elements at the time it was committed consisted of elements that constitute any of the offences referred to above
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### Crimes Act 1914 (Cth)

s 50BC	Sexual conduct involving a person under the age of 16 outside Australia <sup>9</sup>
s 50BD	Inducing a child under the age of 16 to be involved in sexual conduct with a third party outside Australia <sup>10</sup>

<sup>8</sup> As noted above, the effect of including bestiality in Class 2 is unclear, because an offence involving a child being forced to engage in an act of bestiality would be the Class 1 offence of compelling a victim to take part in an act of bestiality: *Crimes Act 1958* (Vic) s 38A(2)(b).

<sup>9</sup> This section of the *Crimes Act 1914* (Cth) has been repealed: *Crimes Legislation Amendment (Sexual Offences Against Children) Act 2010* (Cth) pt 1. The offence is now covered by *Criminal Code Act 1995* (Cth) s 272.9(1).

<sup>10</sup> This section of the *Crimes Act 1914* (Cth) has been repealed: *Crimes Legislation Amendment (Sexual Offences Against Children) Act 2010* (Cth) pt 1. The offence is now covered by *Criminal Code Act 1995* (Cth) s 272.9(2).

### **Criminal Code Act 1995 (Cth)**

s 270.7	Deceptive recruiting for sexual services
s 271.4	Trafficking children into or out of Australia
s 271.7	Domestic trafficking in children
s 474.19(1)	Using a carriage service to access, transmit or solicit child pornography
s 474.20(1)	Possessing, controlling, producing, supplying or obtaining child pornography material with the intent to commit an offence under s 474.19
s 474.22(1)	Using a carriage service to access, transmit or solicit child abuse material
s 474.23(1)	Possessing, controlling, producing, supplying or obtaining child abuse material with the intent to commit an offence under s 474.22
s 474.26	Using a carriage service to procure a person under 16 years of age with the intention of engaging in sexual activity
s 474.27	Using a carriage service to groom persons under 16 years of age

### **Customs Act 1901 (Cth)**

s 233BAB	Intentional importation of child pornography or child abuse material
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### **Other**

	Any offence under a law of a foreign jurisdiction that, if it had been committed in Victoria, would have constituted an offence of a kind listed in schedule 2
	An offence an element of which is an intention to commit an offence of a kind listed in schedule 2
	An offence of attempting, or of conspiracy or incitement, to commit an offence of a kind listed in schedule 2
	An offence that, at the time it was committed, was a Class 2 offence for the purposes of the <i>Sex Offenders Registration Act 2004</i> (Vic) or, in the case of an offence committed before 1 October 2004, was an offence of a kind listed in schedule 2 <sup>11</sup>

## **Class 3 offences**

Many of the offences listed in schedule 3 are similar to the Class 1 offences, but committed against adults rather than children.

### **Crimes Act 1958 (Vic)**

s 38	Rape
s 44	Incest: an act of sexual penetration with a person whom the perpetrator knows to be their child or other lineal descendant or step-child
s 51(1)	Sexual penetration of a person with a cognitive impairment by a provider of medical or therapeutic services
s 52(1)	Sexual penetration of a person with a cognitive impairment by a person who provides special programs
s 38A	Compelling another person to take part in an act of sexual penetration
	An offence against a provision of the <i>Crimes Act 1958</i> (Vic) repealed or amended before 1 October 2004 the elements of which would have constituted the elements of any of the above offences

11 The law in Victoria in relation to sexual offences has changed significantly over a number of decades and some historical offences have been renamed or no longer exist at law. The purpose of this provision is to ensure that the historical offences are brought within the ambit of the *Sex Offenders Registration Act 2004* (Vic) where the substance of the historical and current offences is the same. Schedule 3 of the *Sex Offenders Registration Act 2004* (Vic) lists a number of references in the *Sentencing Act 1991* (Vic) to offences that no longer exist at law.

## Other

	Any offence under a law of a foreign jurisdiction that, if it had been committed in Victoria, would have constituted an offence of a kind listed in schedule 3
	An offence an element of which is an intention to commit an offence of a kind listed in schedule 3
	An offence of attempting, or of conspiracy or incitement, to commit an offence of a kind listed in schedule 3
	An offence that, at the time it was committed, was a Class 3 offence for the purposes of the <i>Sex Offenders Registration Act 2004</i> (Vic) or, in the case of an offence committed before 1 October 2004, was an offence of a kind listed in schedule 3 <sup>12</sup>

## Class 4 offences

Many of the offences listed in schedule 4 are similar to the Class 2 offences, but committed against adults rather than children.

### *Crimes Act 1958* (Vic)

s 39	Indecent assault
s 40(1)	Assault with intent to rape
s 51(2)	Indecent act with a person with a cognitive impairment by providers of medical or therapeutic services
s 52(2)	Indecent act with a person with a cognitive impairment by providers of special programs
s 53	Administration of a drug to a person with the intention of engaging in sexual penetration or an indecent act with that person (or facilitating another person to do so)
s 55	Taking a person away or detaining a person against their will with the intention of getting married to that person or taking part in an act of sexual penetration with that person, or with the intention that the person should marry or take part in an act of sexual penetration with another person
s 57	Procuring a person to take part in an act of sexual penetration by threats, intimidation or any fraudulent means
s 60AB	Sexual servitude: causing another person to provide sexual services by use of force, threat, unlawful detention, fraud, misrepresentation or enforcing an excessive debt
s 60AD	Deceptive recruiting for commercial sexual services
s 76	Burglary where the offender entered the building as a trespasser with the intent to commit a sexual or indecent assault
s 77	Aggravated burglary where the offender entered the building as a trespasser with the intent to commit a sexual or indecent assault
	An offence against a provision of the <i>Crimes Act 1958</i> (Vic) repealed or amended before 1 October 2004 the elements of which would have constituted the elements of any of the above offences

## Other

	Any offence under a law of a foreign jurisdiction that, if it had been committed in Victoria, would have constituted an offence of a kind listed in schedule 4
	An offence an element of which is an intention to commit an offence of a kind listed in schedule 4
	An offence of attempting, or of conspiracy or incitement, to commit an offence of a kind listed in schedule 4
	An offence that, at the time it was committed, was a Class 4 offence for the purposes of the <i>Sex Offenders Registration Act 2004</i> (Vic) or, in the case of an offence committed before 1 October 2004, was an offence of a kind listed in schedule 4 <sup>13</sup>

12 The law in Victoria in relation to sexual offences has changed significantly over a number of decades and some historical offences have been renamed or no longer exist at law. The purpose of this provision is to ensure that the historical offences are brought within the ambit of the *Sex Offenders Registration Act 2004* (Vic), where the substance of the historical and current offences is the same. Schedule 3 of the *Sex Offenders Registration Act 2004* (Vic) lists a number of references in the *Sentencing Act 1991* (Vic) to offences that no longer exist at law.

13 The law in Victoria in relation to sexual offences has changed significantly over a number of decades and some historical offences have been renamed or no longer exist at law. The purpose of this provision is to ensure that the historical offences are brought within the ambit of the *Sex Offenders Registration Act 2004* (Vic) where the substance of the historical and current offences is the same. Schedule 4 of the *Sex Offenders Registration Act 2004* (Vic) lists a number of references in the *Sentencing Act 1991* (Vic) to offences that no longer exist at law.

# Appendix D: Proposed categorisation of offences under the refined registration scheme

Rationale for the three categories

Category 1 offences are:

- all penetrative offences involving a child complainant (rape, sexual penetration, incest, sexual intercourse with a child outside Australia)
- persistent sexual abuse of a child (which may or may not involve penetration, but usually does; both state and Commonwealth offences)
- engaging in sexual activity with a child using a carriage service (which may or may not involve penetration)
- procuring a child to take part in an act of sexual penetration or indecent act.

Category 2 offences are all of the sexual offences involving a child victim, other than those penetrative offences that fall within Category 1, where the offender is involved in the sexual activity, either in person or via a carriage service.

Category 3 offences are largely sexual offences involving a child victim that do not fall within Categories 1 or 2. Category 3 includes the very serious offences of facilitating sexual offences against children committed by third parties, where the offender is not involved in the sexual activity, either in person or via a carriage service.

State and Commonwealth offences involving production of child pornography and child abuse material are in Category 2, and those involving possession and sharing of child pornography and child abuse material are in Category 3.

Category 1 and 2 offences are treated as equally serious for the purposes of registration. Category 1 offences will result in registration in all but exceptional circumstances, and Category 2 offences attract a strong presumption in favour of registration, unless it would serve no useful protective purpose. Once a registration order has been made in respect of a Category 1 or 2 offence, the same period of registration (five years) applies to each. Greater individual assessment is proposed in respect of Category 3 offences, recognising that despite the seriousness of these offences and the manner in which they may be dealt with in sentencing, the offender may not pose a risk of committing sexual offences against children.

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## Category 1: Existing registrable offences

### *Crimes Act 1958 (Vic)*

s 38	Rape
s 44	Incest
s 45(1)	Sexual penetration of a child under the age of 16
s 48(1)	Sexual penetration of a child aged 16 or 17 who is under the person's care, supervision or authority
s 38A	Compelling sexual penetration

s 47A	Persistent sexual abuse of a child under the age of 16
s 58(1)	Person aged 18 years or more procuring a child under the age of 16 to take part in an act of sexual penetration or an indecent act with them or another person
s 58(3)	Person aged 18 years or more procuring a child aged 16 or 17, who is under their care, supervision or authority, to take part in an act of sexual penetration or an indecent act with them or another person

### ***Criminal Code Act 1995 (Cth)***

s 272.8(1)	Sexual intercourse with a child under the age of 16 outside Australia
s 272.8(2)	Person causing a child to engage in sexual intercourse with a third party outside Australia in their presence

## **Category 1: New registrable offences**

### ***Criminal Code Act 1995 (Cth)***

s 272.11	Persistent sexual abuse of a child outside Australia
s 474.25A	Using a carriage service for sexual activity <sup>1</sup> with a child under the age of 16
s 474.25B	Aggravated offence of using a carriage service for sexual activity with a child under the age of 16, where the offence is aggravated because the child has a mental impairment or is under the care, supervision or authority of the person

## **Category 2: Existing registrable offences**

### ***Crimes Act 1958 (Vic)***

s 39	Indecent assault
s 40(1)	Assault with intent to rape
s 47(1)	Indecent act with a child under the age of 16
s 49(1)	Indecent act with a child aged 16 or 17 years who is under the person's care, supervision or authority
s 53	Administration of a drug with the intention of engaging in sexual penetration or an indecent act
s 55	Abduction of a person with the intent of marrying them or taking part in an act of sexual penetration
s 56	Abducting a child under the age of 16 against the will of a person who has lawful charge of the child with the intention that the child should take part in an act of sexual penetration outside marriage
s 68(1)	Production of child pornography

### ***Criminal Code Act 1995 (Cth)***

s 272.9	Sexual activity (other than sexual intercourse) with a child outside Australia
s 272.14	Procuring a child to engage in sexual activity outside Australia, whether or not with themselves
s 271.4	Trafficking of children into or out of Australia <sup>2</sup>
s 271.7	Domestic trafficking in children
s 474.26	Using a carriage service to procure a person under 16 years of age with the intention of engaging in a sexual activity
s 474.27	Using a carriage service to groom a person under 16 years of age
s 474.20(1)	Producing child pornography material with the intent to commit an offence under s 474.19
s 474.23(1)	Producing child abuse material with the intent to commit an offence under s 474.22

1 'Sexual activity' includes 'sexual intercourse': *Criminal Code Act 1995 (Cth)* dictionary (definition of 'sexual activity'). 'Sexual intercourse' is further defined, and may involve penetration: s 272.4.

2 This is a preparatory offence, similar to administration of drugs (above). It is included in Category 2 because it can be preparatory to the offender themselves engaging in sexual offending against the trafficked child.

### Category 3: Existing registrable offences

#### *Crimes Act 1958 (Vic)*

s 49A	Facilitating sexual offences against children
s 54	Owner, occupier or manager of premises inducing or knowingly allowing a child under the age of 17 to enter or remain on the premises for the purpose of taking part in an unlawful act of sexual penetration
s 58(2)	Person aged 18 years or more procuring another person to take part in an act of sexual penetration or an indecent act outside marriage with a child under the age of 16
s 60AC	Aggravated sexual servitude (committed against a person under the age of 18 years)
s 60AE	Aggravated deceptive recruiting for commercial sexual services (committed against a person under the age of 18 years)
s 60B(2)	Loitering near a school, kindergarten or childcare centre without reasonable excuse after having been found guilty of an offence of a sexual nature
s 69	Inviting, procuring, causing or offering a minor to be in any way concerned in the making of child pornography
s 70(1)	Knowingly possessing child pornography
s 70AC	Inviting, procuring, causing or offering a minor to be in any way concerned in a sexual performance involving payment of the minor or any other person

#### *Sex Work Act 1994 (Vic)*

s 5(1)	Causing or inducing a child to take part in an act of sex work, whether as the sex worker or client
s 6(1)	Receiving payment knowing that it or any part of it has been derived, directly or indirectly, from sexual services provided by a child
s 7(1)	Entering into or offering to enter into an agreement under which a child is to provide sexual services
s 11(1)	Owner, occupier or manager of premises allowing a child to remain on the premises for the purpose of taking part in an act of sex work, whether as the sex worker or client

#### *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995 (Vic)*

s 57A	Knowingly using an online information service to publish or transmit child pornography
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#### *Criminal Code Act 1995 (Cth)*

s 272.18	Benefiting from an offence involving child sex tourism
s 272.19	Encouraging an offence involving child sex tourism
s 270.6	Causing a child to enter or remain in sexual servitude
s 270.8 <sup>1</sup>	Aggravated deceptive recruiting for sexual services (committed against a child)
s 474.19(1)	Using a carriage service to access, transmit or solicit child pornography
s 474.20(1)	Possessing, controlling, supplying or obtaining child pornography material with the intent to commit an offence under s 474.19
s 474.22(1)	Using a carriage service to access, transmit or solicit child abuse material
s 474.23(1)	Possessing, controlling, supplying or obtaining child abuse material with the intent to commit an offence under s 474.22

#### *Customs Act 1901 (Cth)*

s 233BAB	Intentional importation of child pornography or child abuse material
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<sup>3</sup> The current *Sex Offenders Registration Act 2004* (Vic) incorrectly lists s 270.7 as a Class 2 offence—if the offence is committed against a child, it is always aggravated, therefore s 270.8 (aggravated deceptive recruiting) should be listed as the registrable offence.

## Appendix E: Registration and other mechanisms to manage sex offenders in Australian states and territories

### Registration of offenders

	Victoria	New South Wales	Northern Territory	Queensland
<b>Act</b>	<i>Sex Offenders Registration Act 2004</i> (Vic)	<i>Child Protection (Offenders Registration) Act 2000</i> (NSW)	<i>Child Protection (Offender Reporting and Registration) Act 2004</i> (NT)	<i>Child Protection (Offender Reporting) Act 2004</i> (Qld)
<b>Commencement</b>	October 2004	October 2001, with major amendments September 2005	January 2005	January 2005
<b>Head of the police force maintains a register</b>	Yes (s 62)	Yes (s 19)	Yes (s 64)	Yes (s 68)
<b>Mandatory registration of adults who commit certain offences</b>	Yes: for sexual offences against children (s 6, schs 1–2)	Yes: for sexual offences against children, child homicide and kidnapping (s 6, schs 1–2)	Yes: for sexual offences against children and child homicide (ss 3A, 3 (definition of ‘Class 1 offence’ and ‘Class 2 offence’))	Yes: for sexual offences against children and child homicide (s 5, schs 1–2)
<b>Discretionary registration of adults who commit certain offences</b>	Yes: the court may make an order to register an adult who has been found guilty of any offence if it is satisfied, beyond reasonable doubt, that the person poses a risk to the sexual safety of one or more persons or the community (s 11)	Yes: the court may make an order to 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 children or children generally (ss 3D, 3E)	Yes: the court may make an order to 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 children or children generally (s 13)	Yes: the court may make an order to 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 children or children generally (s 13)

Western Australia	Australian Capital Territory	Tasmania	South Australia
<i>Community Protection (Offender Reporting) Act 2004 (WA)</i>	<i>Crimes (Child Sex Offenders) Act 2005 (ACT)</i>	<i>Community Protection (Offender Reporting) Act 2005 (Tas)</i>	<i>Child Sex Offenders Registration Act 2006 (SA)</i>
February 2005	December 2005	March 2006	October 2007
Yes (s 80)	Yes (s 117)	Yes (s 43)	Yes (s 60)
Yes: for sexual offences against children and child homicide (s 6, schs 1–2)	Yes: for sexual offences against children and kidnapping and homicide, where the kidnapping or homicide is connected to a sexual offence (s 10, schs 1–2)	No	Yes: for sexual offences against children and kidnapping and homicide, where the kidnapping or homicide is connected to a sexual offence (s 6, sch 1 pts 2–3)
Yes: the court may make an order to 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 (s 13)	Yes: the court may make an order to 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 of one or more people or of the community (s 16)	Yes: for sexual offences against children and adults, and other offences such as kidnapping and stalking, the court must make an order to register an adult who has been found guilty, unless it is satisfied that the adult does not pose a risk of committing a listed offence in the future (s 6) For all other offences, the court may make an order to register an adult if it is satisfied that the adult poses a risk of committing a listed offence in the future (s 7)	Yes: the court may make an order to 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 of any child or children (s 9(3))

	Victoria	New South Wales	Northern Territory	Queensland
<b>Mandatory registration of children who commit certain offences</b>	No (s 6(3)(a))	Yes, except for several listed offences (s 3A(2)(c))	No (s 11(1)(a))	Yes, except for several listed offences (s 5(2)(c))
<b>Discretionary registration of children who commit certain offences</b>	Yes: all registration of children is discretionary. The court may make an order to register a child who has been found guilty of any offence if it is satisfied, beyond reasonable doubt, that the child poses a risk to the sexual safety of one or more persons or the community (ss 6(3)(a), 11)	Yes: registration of children for most sexual offences against children, child homicide and kidnapping is mandatory, but for all other offences, the court may make an order to register a child if it is satisfied that the child poses a risk to the sexual safety or lives of one or more children or children generally (ss 3A(2)(c), 3D, 3E)	Yes: all registration of children is discretionary. The court may make an order to register a child who has been found guilty of any offence, if it is satisfied that the child poses a risk to the sexual safety or lives of one or more children or children generally (ss 11(1)(a), 13)	Yes: registration of children for most sexual offences against children and child homicide is mandatory, but for all other offences, the court may make an order to register a child if it is satisfied that the child poses a risk to the sexual safety or lives of one or more children or children generally (ss 5(2)(c), 13)
<b>Reporting obligations</b>	Registered offenders are required to report various personal details and any 'regular unsupervised contact'—that is, three or more days in any 12-month period—they have with children (s 14) <sup>1</sup>	Very similar to Victoria (s 9)	Very similar to Victoria, but 'regular unsupervised contact' with a child is defined as 14 or more days in any 12-month period, rather than 3 or more days (s 16) Recent amendments require offenders to report travel, telephone and internet details (s 16(1)(l)–(p)), <sup>2</sup> as in Victoria	Very similar to Victoria (s 16) The period for 'regular unsupervised contact' with a child has recently been reduced from 14 days in any 12-month period to 3 days in any 12-month period, whether consecutive or not (s 16(2)(b)) Recent amendments also require offenders to report telephone, internet and passport details, <sup>3</sup> as in Victoria
<b>Length of reporting period for adults</b>	Depending on the number and type of offences, registration periods for adults are 8 years, 15 years or life (s 34)	Same as Victoria (s 14A) <sup>4</sup>	Same as Victoria (s 37)	Same as Victoria (s 36)

<sup>1</sup> See Chapter 3 for a discussion of Victoria's reporting obligations.

<sup>2</sup> *Child Protection (Offender Reporting and Registration) Legislation Amendment Act 2010* (NT) s 5, commenced March 2011.

<sup>3</sup> *Child Protection (Offender Reporting) and Other Legislation Amendment Act 2010* (Qld) s 8, commenced July 2011.

<sup>4</sup> Under the original 2000 Act, the reporting periods were 8 years, 10 years, 12 years, 15 years and life: *Child Protection (Offenders Registration) Act 2000* (NSW) ss 14(2)–(3), (5). The second reading speech for the Bill indicates that these periods reflect first-time and repeat offending and were based upon registration periods in the United States: New South Wales, *Parliamentary Debates*, Legislative Assembly, 1 June 2000, 6475 (Paul Whelan).

Western Australia	Australian Capital Territory	Tasmania	South Australia
Yes, except for a single child pornography offence (s 6(4))	Yes, except for two listed offences (s 9(1)(c))	No	No (s 6(3)(a))
Yes: registration of children for most sexual offences against children and child homicide is mandatory, but for all other offences, the court may make an order to register a child if it is satisfied that the child poses a risk to the sexual safety or lives of one or more people or people generally (ss 6(4), 13)	Yes: registration of children for most sexual offences against children and kidnapping and homicide, where the kidnapping or homicide is connected to a sexual offence, is mandatory, but for all other offences, the court may make an order to register a child if it is satisfied that the child poses a risk to the sexual safety of one or more people or of the community (ss 9(1)(c), 16)	Yes: all registration of children is discretionary. For sexual offences against children and adults, and other offences such as kidnapping and stalking, the court must make an order to register a child who has been found guilty, unless it is satisfied that the child does not pose a risk of committing a listed offence in the future (s 6) For all other offences, the court may make an order to register an child if it is satisfied that the child poses a risk of committing a listed offence in the future (s 7)	Yes: all registration of children is discretionary. The court may make an order to register a child who has been found guilty of any offence, if it is satisfied that the child poses a risk to the sexual safety of any child or children (ss 6(3)(a), 9(3))
Very similar to Victoria (s 26)	Similar to Victoria, but registered offenders are not required to report telephone and internet details (s 59)	Very similar to Victoria, but also requires registered offenders to report details of any surgery or cosmetic procedure that has substantially altered their appearance (s 17) Recent amendments require offenders to report internet details and applications for a change of name, <sup>5</sup> as in Victoria	Very similar to Victoria, but registered offenders are also required to report their internet passwords and access codes (s 13(1)(p))
Same as Victoria (s 46)	Same as Victoria (s 16)	Same as Victoria (s 24)	Same as Victoria (s 34)

	Victoria	New South Wales	Northern Territory	Queensland
<b>Length of reporting period for children</b>	Depending on the number and type of offences, the reporting periods for children are 4 years or 7.5 years—half the period of registration of an adult, with a limit of 7.5 years (s 35)	Same as Victoria (s 14B)	Same as Victoria (s 38)	Same as Victoria (s 37)
<b>Frequency of reports</b>	Registered offenders are required to make an initial report, an annual report and a report whenever particular details change (ss 14, 16–17)	Same as Victoria (ss 9A, 10–11)	Same as Victoria (ss 14, 18–19)	Same as Victoria (ss 14, 18–19)
<b>Suspension of reporting obligations</b>	Offenders who are registered for life may apply to the Supreme Court after 15 years to have their reporting obligations suspended (s 39) The Chief Commissioner of Police may apply to the Supreme Court at any time for an order to suspend any registered offender’s reporting obligations (s 39A) <sup>6</sup> There is no provision for registered offenders, other than those registered for life, to apply for suspension of their reporting obligations	Offenders who are registered for life may apply to the Administrative Decisions Tribunal after 15 years to have their reporting obligations suspended (s 16) There is no provision for registered offenders with shorter reporting periods to apply for suspension of their reporting obligations	Offenders who are registered for life may apply to the Supreme Court after 15 years to have their reporting obligations suspended (ss 41–2) There is no provision for registered offenders with shorter reporting periods to apply for suspension of their reporting obligations	Offenders who are registered for life may apply to the Supreme Court after 15 years to have their reporting obligations suspended (ss 41–2) There is no provision for registered offenders with shorter reporting periods to apply for suspension of their reporting obligations
<b>Police approval required for registered offender to change name</b>	Yes: pt 5A	Yes: pt 3A	No	No

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This provision was inserted in 2009: *Justice Legislation Further Amendment Act 2009* (Vic) s 35. The second reading speech stated that if the Supreme Court made an order under these provisions, the Sex Offenders Registration Act should specify that the reporting period would continue to run while the obligations were suspended: Victoria, *Parliamentary Debates*, Legislative Assembly, 11 August 2009 (Bob Cameron, Minister for Police and Emergency Services) 2579. The Sex Offenders Registration Act does not reflect this.

Western Australia	Australian Capital Territory	Tasmania	South Australia
Same as Victoria (s 47)	Same as Victoria (s 89)	Same as Victoria (s 25)	Registration periods for children are the same as registration periods for adults (s 34)
Same as Victoria, but the Commissioner of Police may require the registered offender to report more frequently than annually (ss 24, 28–9)	Same as Victoria (ss 22, 37, 54)	Same as Victoria, but the Registrar may direct the registered offender to report at times other than annually in the calendar month when they were first registered (ss 16–18)	Same as Victoria (ss 11, 15–16)
<p>Offenders who are registered for life may apply to the District Court after 15 years to have their reporting obligations suspended (ss 51–3)</p> <p>There is no provision for registered offenders with shorter reporting periods to apply for suspension of their reporting obligations</p> <p>However, the Commissioner of Police may suspend a person’s reporting obligations in certain circumstances if they were registered as the result of an offence committed as a child (s 61)</p>	<p>Offenders who are registered for life may apply to the Supreme Court after 15 years to have their reporting obligations suspended (ss 95–7)</p> <p>There is no provision for registered offenders with shorter reporting periods to apply for suspension of their reporting obligations</p>	<p>Offenders who are registered for life may apply to the Magistrates’ Court after 15 years to have their reporting obligations suspended (ss 28–9)</p> <p>There is no provision for registered offenders with shorter reporting periods to apply for suspension of their reporting obligations</p>	<p>Offenders who are registered for life may apply to the Supreme Court after 15 years to have their reporting obligations suspended (s 37)</p> <p>There is no provision for registered offenders with shorter reporting periods to apply for suspension of their reporting obligations</p>
No	No	Yes: s 44A	No

	Victoria	New South Wales	Northern Territory	Queensland
<b>Oversight and review of the scheme</b>	Limited requirement for the Director, Police Integrity to monitor police compliance with pt 4 of the Act (ss 66A–66D)	<p>The Ombudsman was required to review the Act two years after the Act’s commencement (in 2001), and the Minister for Police and Emergency Services was then required to conduct a review into the policy objectives of the Act and table a report in Parliament (ss 25–6 of the original 2000 Act). Both of these reviews have been completed</p> <p>The 2004 amendments inserted a provision requiring the Minister to review the provisions about child protection registration orders only, within two years of those provisions commencing, and table a report in Parliament (s 3E of the 2004 amending Act)</p> <p>Another review provision was inserted by amendments in 2007, requiring the Minister to review the Act and its policy objectives within five years and table a report in Parliament (s 26 of the current Act)</p>	Each financial year, the Commissioner for Police must report to the Minister for Police, Fire and Emergency Services on various aspects of the registration scheme, and the Minister must table the report in Parliament (s 93)	No requirement for the Act or its operation to be reviewed

## Other mechanisms to manage sex offenders

	Victoria	New South Wales	Northern Territory	Queensland
<b>Working with children checks</b>	A current assessment notice, valid for five years, is required for child-related employment and volunteering: <i>Working with Children Act 2005</i> (Vic)	A once-off background check of employees in relevant fields is required and prohibited persons are excluded from child-related employment: <i>Child Protection (Prohibited Employment) Act 1998</i> (NSW)	A current ‘ochre card’ working with children clearance notice, valid for two years, is required for child-related work: <i>Care and Protection of Children Act 2007</i> (NT)	A current ‘blue card’, valid for two years, is required for child-related employment and volunteering: <i>Commission for Children and Young People and Child Guardian Act 2000</i> (Qld)
<b>Post-sentence detention and supervision</b>	Provision for post-sentence supervision and detention orders in respect of offenders serving a sentence of imprisonment for a relevant sexual offence: <i>Serious Sex Offenders (Detention and Supervision) Act 2009</i> (Vic)	Provision for extended supervision orders and continuing detention orders in respect of offenders serving a sentence of imprisonment for a serious sexual offence or offence of a sexual nature: <i>Crimes (Serious Sex Offenders) Act 2006</i> (NSW)	No	Provision for continuing supervision and detention of offenders serving a sentence for a serious sexual offence: <i>Dangerous Prisoners (Sexual Offenders) Act 2003</i> (Qld)
<b>Child protection prohibition orders<sup>7</sup></b>	No	Yes: <i>Child Protection (Offenders Prohibition Orders) Act 2004</i> (NSW)	Yes: <i>Child Protection (Offender Reporting and Registration) Act 2004</i> (NT) pt 5	Yes: <i>Child Protection (Offenders Prohibition Orders) Act 2008</i> (Qld)

Western Australia	Australian Capital Territory	Tasmania	South Australia
The Minister for Police must carry out a review of the operation and effectiveness of the Act, as soon as practicable five years from the date of commencement and table the report in Parliament (s 155)	No requirement for the Act or its operation to be reviewed	The Minister for Police and Emergency Management must carry out a review of the operation and effectiveness of the Act, as soon as practicable five years from the date of commencement and table the report in Parliament (s 52)	No requirement for the Act or its operation to be reviewed

Western Australia	Australian Capital Territory	Tasmania	South Australia
A current working with children check, valid for three years, is required for child-related work: <i>Working with Children (Criminal Record Checking) Act 2004 (WA)</i>	No requirement, but organisations may require employees or volunteers to obtain a National Police Certificate	No requirement, but organisations may require employees or volunteers to obtain a National Police Certificate	Certain employers and authorities must obtain a National Police Certificate for employees engaging in child-related work or volunteering: <i>Children's Protection Act 1993 (SA)</i> :
Provision for post-sentence supervision and detention orders in respect of offenders serving a sentence of imprisonment for a serious sexual offence: <i>Dangerous Sexual Offenders Act 2006 (WA)</i>	No	No	No
Yes: <i>Community Protection (Offender Reporting) Act 2004 (WA)</i> pt 5	Proposed: Crimes (Child Sex Offenders) Amendment Bill 2011 (ACT)	No	Similar orders: <i>Summary Procedure Act 1921 (SA)</i> ss 99AA, 99AAC

# Appendix F: Registration and other mechanisms for managing sex offenders in overseas jurisdictions

## Introduction

- 1.1 The United States and United Kingdom were among the first countries to use registration as a mechanism for managing sex offenders after they had served their sentence. Aspects of the modern registration scheme in Victoria are directly derived from the early United Kingdom scheme, which was adopted, in varied form, in New South Wales in 2000.<sup>1</sup>
- 1.2 Through research and consultation, the Commission has identified a number of distinctive developments in both the United Kingdom and United States. Notably, the United States imposes strict residence restrictions on registered offenders and information about registered offenders must be made publicly accessible on the internet. There are also a number of restrictive civil orders available in the United Kingdom, and a limited capacity for police to disclose information about registered offenders to the public.
- 1.3 Both the United States and United Kingdom require mandatory registration upon conviction for most sexual offences, including adult-victim offences. Registers in these jurisdictions have consequently become very large. The United States also has a comprehensive civil commitment scheme for 'sexually dangerous offenders', which is discussed here.

## Registration in the United States

### Historical development

- 1.4 The United States was the first country in the world to register sex offenders, with the first sex offender register developed there in the 1940s.<sup>2</sup> Sex offender registers continued to appear across the United States and in 1994,<sup>3</sup> national legislation mandating state registration of sex offenders was introduced.<sup>4</sup>
- 1.5 The first federal registration legislation<sup>5</sup> 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>6</sup> The local law enforcement agencies were to be notified of any change of address<sup>7</sup> and were required to send an address verification form to the offender annually for 10 years.<sup>8</sup> States had to implement the registration scheme within three years, or would lose 10 per cent of their federal crime control funding.<sup>9</sup>

1 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. 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 first recommended 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.

2 Terry Thomas, *The Registration and Monitoring of Sex Offenders A Comparative Study* (Routledge, 2011) 37.

3 Ibid.

4 The *Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act*, enacted as part of the *Violent Crime Control and Law Enforcement Act of 1994*, § 170101, Pub L No 103–322, 108 Stat 1796.

5 *Violent Crime Control and Law Enforcement Act of 1994*, § 170101, Pub L No 103–322, 108 Stat 1796.

6 Ibid § 170101(a)(1)(A).

7 Ibid § 170101(b)(3)(A).

8 Ibid §§ 170101(a)(1)(A), (a)(3)(A).

9 Ibid § 170101(f).

- 1.6 In January 1996, an amendment to the 1994 Act<sup>10</sup> required state law enforcement agencies to 'release relevant information' about registered offenders 'that is necessary to protect the public'.<sup>11</sup> Failure to comply with the amendments would again lead to a loss of federal funding.<sup>12</sup>
- 1.7 In 2006, the registration scheme was again amended at the federal level.<sup>13</sup> This time, the amendments included a requirement that states make all information about registrable offenders readily accessible to the public via an internet site, or again risk losing a percentage of federal funding.<sup>14</sup> States have been slow to comply with the 2006 amendments;<sup>15</sup> only four are 'substantially compliant' to date.<sup>16</sup> However, it should be noted that many states already had publicly accessible sex offender registers before the enactment of this legislation.

## Registration in the United States is much more expansive and restrictive than in Victoria

- 1.8 Today, the United States sex offender register is the largest in the world.<sup>17</sup> From figures published in June 2011, the United States has 739,853 registered sex offenders.<sup>18</sup> This is approximately 236 registered offenders per 100,000 head of population.<sup>19</sup> This is compared to 56 registered offenders per 100,000 head of population in Australia,<sup>20</sup> and 74 registered offenders per 100,000 head of population in Victoria.<sup>21</sup> It is interesting to note that of the 739,853 registered sex offenders in the United States, 106,216 are in California.<sup>22</sup> The reason for this appears to be that California developed the first sex offender register in 1947, and has had lifetime registration of all sex offenders ever since.<sup>23</sup>
- 1.9 The number and type of offences captured by the United States registration schemes are much broader than those captured by the Victorian registration scheme. In the United States, registration is mandatory for people convicted of a 'sex offense', defined broadly as 'a criminal offense that has an element involving a sexual act or sexual contact with another'.<sup>24</sup> This appears to include adult-victim offences. Registration of young offenders, aged 14 or older, is mandatory if they are convicted of offences of particular seriousness.<sup>25</sup>

10 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.

11 42 USC § 14071(d).

12 Thomas, above n 2, 47.

13 42 USC §§ 16901–16991 (2010). This is known as the *Adam Walsh Child Protection and Safety Act*.

14 42 USC §§ 16918, 16925 (2010).

15 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. The National Conference of State Legislatures raised concerns that, by enacting the Adam Walsh Act, the federal government 'may have violated federalist doctrine by overstepping its bounds in dictating state policy and practice': at 205. Further, the Californian Sex Offender Management Board suggested that a 10 per cent loss of funding would be far less than the cost of implementing the Adam Walsh Act: National Conference of State Legislatures, *Cost Benefit Analyses of SORNA Implementation* (January 2010) <<http://www.ncsl.org/?tabid=19499>>. See also, Justice Policy Institute, *What Will it Cost the States to Comply with the Sex Offender Registration and Notification Act?* (2006); National Conference of State Legislatures, *SORNA Noncompliance Penalties*, <<http://www.ncsl.org/Portals/1/documents/cj/jagstatedollars.pdf>>.

16 This is despite more than 250 bills having been enacted since 2007 by states attempting to comply with the national requirements: Donna Lyons, *Sex Offender Law: Down to the Wire* (June 2011) National Conference of State Legislatures <<http://www.ncsl.org/default.aspx?tabid=230399>>. The compliant states are Delaware, Florida, Ohio and South Dakota. Note that despite not being 'substantially compliant', many more states do have publicly accessible Registers. See, eg, New York State Division of Criminal Justice Services, *Search Public Registry of Sex Offenders* <[http://www.criminaljustice.ny.gov/SomsSUBDirectory/search\\_index.jsp](http://www.criminaljustice.ny.gov/SomsSUBDirectory/search_index.jsp)>.

17 While each state has a separate register, the United States Department of Justice and Federal Bureau of Investigation coordinate the state Registers into a single National Sex Offender Public Website: United States Department of Justice, *Dru Sjodin National Sex Offender Public Website (NSOPW)* <<http://www.nsopw.gov/Core/Portal.aspx?AspxAutoDetectCookieSupport=1>>; 42 USC § 16919(a) (2010).

18 National Centre for Missing and Exploited Children, *Map of Registered Sex Offenders in the United States* (17 June 2011).

19 Ibid.

20 According to CrimTrac, there were 12,596 people on the Australian National Child Offender Register (ANCOR) as at 1 March 2011: CrimTrac, *Child Protection Services: Australian National Child Offender Register (ANCOR)* (2011) <[http://www.crimtrac.gov.au/our\\_services/ChildProtectionServices.html](http://www.crimtrac.gov.au/our_services/ChildProtectionServices.html)>. The Australian population data available closest to this date was 22,477,400: Australian Bureau of Statistics, *Australian Demographic Statistics: December Key Figures* (23 June 2011) <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/3101.0>>. There is a three month gap here between population data and registration data.

21 As at 1 December 2011, 4165 people had been registered in Victoria since the scheme commenced: statistics provided by Victoria Police. On the most recent figures available, Victoria's population in March 2011 was 5,605,600: Australian Bureau of Statistics, *Australian Demographic Statistics: March Key Figures* (29 September 2011) <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/3101.0>>, Table 4. There is an eight month gap here between the registration data and overall population data.

22 National Centre for Missing and Exploited Children, *Map of Registered Sex Offenders in the United States*, above n 18.

23 State of California Department of Justice, *Sex Offender Registration and Exclusion Information* (2009) <<http://www.meganslaw.ca.gov/sexreg.aspx>>.

24 42 USC § 16911 (2010).

25 Ibid § 16911(8).

- 1.10 Depending on the offences committed, the registration periods are 15 years, 25 years and life.<sup>26</sup> These periods can be reduced if the offender maintains a 'clean record'.<sup>27</sup> In addition to the more expansive array of offences that trigger mandatory registration in the United States, these lengthy registration periods also contribute to the size of the register.
- 1.11 In the United States, there are as many as 100,000 registered offenders who are 'whereabouts unknown'.<sup>28</sup> This amounts to 13.5 per cent of all registered offenders in the United States. The reason that some offenders 'disappear' appears to be a combination of:
- harsh penalties imposed for failure to report
  - community notification, which involves the publication of offenders' addresses
  - residence restrictions placed on offenders in many states.

### Harsh penalties for breach of registration requirements

- 1.12 Each state is required to impose a mandatory minimum penalty of 12 months imprisonment for offenders who fail to comply with their reporting obligations.<sup>29</sup> In addition to the penalty the state chooses to impose, a person registered for a federal offence who does not comply with their reporting obligations can be subject to an additional federal penalty—a maximum of 10 years imprisonment.<sup>30</sup>

### Community notification

- 1.13 Victoria's Sex Offenders Register is a closed register, with the information it contains available only to the limited class of people who have 'access' to the Register and to government departments, public statutory authorities or courts, to which lawful disclosures of information are made.<sup>31</sup> The United States requires full public access, via the internet, to all information kept about offenders on each state register,<sup>32</sup> including:
- the offender's name
  - the offender's residential address
  - the offender's workplace address
  - the address of an educational institution where the offender is a student
  - the offender's licence plate number and a description of their vehicle<sup>33</sup>
  - the offender's physical description
  - the provision defining the offence of which the offender was convicted
  - the criminal history of the offender, including: the date of all convictions; status of parole, probation or supervised release; registration status; the existence of any outstanding warrants for the person
  - a current photograph of the offender
  - a set of fingerprints and palm prints of the offender
  - a DNA sample
  - a photocopy of the offender's driver licence.<sup>34</sup>

26 Ibid § 16915(a).

27 Ibid § 16915(b).

28 National Centre for Missing and Exploited Children, *Sex Offender Tracking* (2011) <[http://www.missingkids.com/missingkids/servlet/PageServlet?LanguageCountry=en\\_US&PageId=3893](http://www.missingkids.com/missingkids/servlet/PageServlet?LanguageCountry=en_US&PageId=3893)>.

29 42 USC § 16913(e) (2010).

30 18 USC § 2250 (2010). There are some federal sexual offences which lead to registration, but it appears that an offender will be placed on the state register where the federal offence was committed: 18 USC ch 109A (2010). As noted above, there is a federal Register, but it is a collection of information from the state Registers: United States Department of Justice, *Dru Sjodin National Sex Offender Public Website (NSOPW)* <<http://www.nsopw.gov/Core/Portal.aspx?AspxAutoDetectCookieSupport=1>>; 42 USC § 16919(a) (2010).

31 *Sex Offenders Registration Act 2004* (Vic) ss 63–4.

32 42 USC § 16918(a) (2010).

33 Ibid § 16914(a).

34 Ibid § 16914(b).

- 1.14 States are, however, exempt from publicly disclosing some information: the names of any victims, the offender's social security number, any reference to arrests that did not result in conviction and the names of offenders' employers or educational institutions.<sup>35</sup>
- 1.15 Each state website is to include a warning that  
 information on the site should not be used to unlawfully injure, harass, or commit a crime against any individual named in the registry or residing or working at any reported address. The warning shall note that any such action could result in civil or criminal penalties.<sup>36</sup>

### The negative effects of community notification

- 1.16 There has been extensive research in the United States into whether community notification is effective in reducing sexual re-offending and protecting the community. Much of the research has found that community notification does not reduce recidivism and has a number of negative consequences.
- 1.17 A 2008 study followed 550 sex offenders released from custody between 1990 and 2000.<sup>37</sup> The study found no evidence that registration deters non-registered people from committing sexual offences.<sup>38</sup> However, it found that registration does reduce sexual offending by registered sex offenders against people who are close to them, but not against strangers.<sup>39</sup> The authors suggest that this effect of registration is achieved by law enforcement agencies monitoring offenders.<sup>40</sup> The authors conclude that even as a registry grows, there continues to be a reduction in the number of sexual offences, suggesting that:  
 although large registries are surely costly, police are not being overwhelmed to the point that an additional registrant reduces the overall effectiveness of the system.<sup>41</sup>
- 1.18 A 2009 review of the existing research into registration and community notification found that:  
 Regarding specific deterrence, the weight of the evidence indicates the laws have no statistically significant effect on recidivism ... we tentatively conclude that existing research does not offer much policy guidance on the specific deterrent effect of registration/ notification laws.<sup>42</sup>
- 1.19 Other researchers have found that registration, when coupled with community notification, may actually increase recidivism.<sup>43</sup> Community notification may indirectly increase an offender's likelihood of re-offending in two ways:
- Fear of public harassment may cause offenders to 'go underground', isolating them and consequently making them more dangerous.<sup>44</sup>
  - Community notification may be detrimental to an offender's treatment and rehabilitation, as it places responsibility for abuse prevention on the community rather than on the offender.<sup>45</sup>

Decreasing offenders' compliance and increasing their likelihood of re-offending is clearly counter to the purposes of registration.<sup>46</sup>

35 Ibid § 16918(b)–(c).

36 Ibid § 16918(f).

37 Kristen Zgoba et al, *Megan's Law: Assessing the Practical and Monetary Efficacy* (New Jersey Department of Corrections, December 2008). Submission 29 (Dr Astrid Birgden) discusses this study.

38 J J Prescott and Jonah Rockoff, 'Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?' (2008) 54(1) *Journal of Law and Economics* 161, 180. The study found, however, that notification laws may deter non-registered individuals from sexual offending: 164–5, 181.

39 J J Prescott and Jonah Rockoff, 'Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?' (2008) 54(1) *Journal of Law and Economics* 161, 180–4.

40 Ibid 180.

41 Ibid 181 (n 34).

42 Washington State Institute for Public Policy, *Does Sex Offender Registration and Community Notification Reduce Crime? A Systematic Review of the Research Literature* (June 2009). Specific deterrence relates to deterrence of the individual offenders subject to registration and community notification laws, rather than deterrence of the general public from committing sexual offences.

43 Prescott and Rockoff, above n 39, 181.

44 Autumn Long, 'Sex Offender Laws of the United States and United Kingdom: Flawed Systems and Needed Reforms' (2009) 18 *Transnational Law and Contemporary Problems* 145, 151; Michael Petrunik, 'The Hare and the Tortoise: Dangerousness and Sex Offender Policy in the United States and Canada' (2003) 45 *Canadian Journal of Criminology and Criminal Justice* 43, 61.

45 Jill Levenson, 'Policy Interventions Designed to Combat Sexual Violence: Community Notification and Civil Commitment' (2003) 12(3–4) *Journal of Child Sexual Abuse* 17, 24.

46 Autumn Long, 'Sex Offender Laws of the United States and United Kingdom: Flawed Systems and Needed Reforms' (2009) 18 *Transnational Law and Contemporary Problems* 145, 151; Michael Petrunik, 'The Hare and the Tortoise: Dangerousness and Sex Offender Policy in the United States and Canada' (2003) 45 *Canadian Journal of Criminology and Criminal Justice* 43, 61.

- 1.20 In 1996, a review of one of the early community notification schemes in Washington State reported harassment of offenders in three and a half per cent of notifications, including: an offender's residence being burned down; other property damage; violent assaults; verbal threats.<sup>47</sup> Two men on the sex offender register in Maine were shot dead in 2006 by someone who had accessed the register to find their details.<sup>48</sup> Other researchers have identified murders linked to public sex offender registers.<sup>49</sup> Community notification may also affect family members of registered sex offenders, who may be physically assaulted, threatened, ridiculed or ostracised.<sup>50</sup>

## Residence restrictions

- 1.21 Although not federally mandated, many states of the United States impose restrictions on where registered sex offenders may live.<sup>51</sup> Residence restrictions vary in each state, but usually prohibit sex offenders from living between 500 and 2000 feet from a school, play area, park, day care centre or school bus stop.<sup>52</sup>
- 1.22 Recent research suggests that the justifications for residence restrictions—including that offenders prey on children they do not know, choose victims from near their homes and will abide by residence restrictions—are unsubstantiated.<sup>53</sup> Further, research suggests that residence restrictions not only fail to reduce recidivism, but may actually increase sexual offending by alienating offenders and causing them psychological harm.<sup>54</sup>
- 1.23 As Keri Burchfield, an academic, recently stated:
- residence restrictions have the potential to force sex offenders into sparsely populated rural areas, away from social supports, cluster them into small spaces like apartment complexes or trailer parks, or force them 'off the map' because they cannot or will not comply with the policy.<sup>55</sup>
- 1.24 As in the case of community notification, residence restrictions may also have an impact on the families of registered sex offenders.<sup>56</sup>

## The negative effects of residence restrictions: California case study

- 1.25 Analysing statistics of registered sex offenders who are on state parole and living in the community, the California Sex Offender Management Board recently found that 32 per cent of those registered offenders are homeless.<sup>57</sup> From November 2006, when residence restrictions came into force in California, the number of homeless parolees has increased 24-fold.<sup>58</sup> Unsurprisingly, transient registered offenders are more often non-compliant with their reporting obligations than other registered offenders.<sup>59</sup>
- 1.26 Residence restrictions in California prohibit registered sex offenders from living within 2000 feet of 'any public or private school or park where children regularly gather'.<sup>60</sup> In addition to this, local jurisdictions can add their own restrictions.<sup>61</sup>

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47 Scott Matson and Roxanne Lieb, *Community Notification in Washington State: 1996 Survey of Law Enforcement* (1996) 15.  
48 Thomas, above n 2, 141. One of the men killed was registered for having sexual intercourse with his 15-year-old girlfriend: at 141.  
49 See, eg, Wayne Logan (2009) *Knowledge as Power: Criminal Registration and Community Notification Laws in America* (Stanford University Press, 2009); Autumn Long, 'Sex Offender Laws of the United States and United Kingdom: Flawed Systems and Needed Reforms' (2009) 18 *Transnational Law and Contemporary Problems* 145, 151.  
50 Richard Zevitz and Mary Farkas, 'Sex Offender Community Notification: Managing High Risk Criminals or Exactng Further Vengeance?' (2000) 18 *Behavioural Sciences and the Law* 375, 383; Jill Levenson and Richard Tewksbury, 'Collateral Damage: Family Members of Registered Sex Offenders' (2009) 34 *American Journal of Criminal Justice* 54.  
51 In a book published in June 2011, Terry Thomas states: 'Well over half of all US states now have some type of universal residency restriction policies for registered sex offenders': Thomas, above n 2, 128. As of 2005, states with residence restrictions included Alabama, Arkansas, California, Florida, Georgia, Illinois, Indiana, Iowa, Kentucky, Louisiana, Ohio, Oklahoma, Oregon and Tennessee: Jill Levenson and Leo Cotter, 'The Impact of Sex Offender Residence Restrictions: 1000 Feet from Danger or One Step from Absurd?' (2005) 49(2) *International Journal of Offender Therapy and Comparative Criminology* 168, 168.  
52 Jill Levenson and Leo Cotter, 'The Impact of Sex Offender Residence Restrictions: 1000 Feet from Danger or One Step from Absurd?' (2005) 49(2) *International Journal of Offender Therapy and Comparative Criminology* 168, 168.  
53 Keri Burchfield, 'Residence Restrictions' (2011) 10(2) *Criminology and Public Policy* 411, 414.  
54 Ibid.  
55 Ibid.  
56 Jill Levenson and Richard Tewksbury, 'Collateral Damage: Family Members of Registered Sex Offenders' (2009) 34 *American Journal of Criminal Justice* 54, 62.  
57 California Sex Offender Management Board, *Homelessness among California's Registered Sex Offenders* (2011) 4. The report stated that 'data is not available' regarding the effect of residence restrictions on those registered offenders who are on county probation (approximately 10 000) and those who are not under any form of criminal justice system supervision (approximately 50 000): at 4.  
58 California Sex Offender Management Board, *Homelessness among California's Registered Sex Offenders* (2011) 4–5.  
59 Ibid 23–4.  
60 Ibid 4.  
61 Ibid 8.

- 1.27 In its report, the California Sex Offender Management Board finds that not only is there an absence of evidence that residence restrictions reduce re-offending,<sup>62</sup> '[t]here is compelling evidence which suggests that residence restrictions are actually counterproductive with regard to increasing community safety'.<sup>63</sup>

## Conclusions

- 1.28 Empirical data does not demonstrate the effectiveness of a broad, all-encompassing registration scheme, community notification laws and stringent residence restrictions. There is, however, data to suggest that these measures may drive sex offenders underground and lead to high rates of non-compliance with a registration scheme.
- 1.29 The sheer size of United States registers and the very high rate of registered offenders—a rate that is around four times the rate in Australia, and three times the rate in Victoria<sup>64</sup>—illustrate the resource implications of mandatory, indiscriminate registration of offenders, based solely on the offence they have committed, for lengthy periods of time.

## Registration in the United Kingdom<sup>65</sup>

### Historical development

- 1.30 Registration of sex offenders began in 1997 in the United Kingdom, with the enactment of the *Sex Offenders Act 1997* (UK). This act formed the basis for Australia's first registration scheme in New South Wales in 2000.<sup>66</sup> Under United Kingdom legislation, registration is referred to as 'notification'. There is no mention of a register in the United Kingdom legislation.<sup>67</sup>
- 1.31 Under the 1997 legislation, offenders were required to report their name and address to police, in writing or in person, when convicted<sup>68</sup> of one of 14 sexual offences, including adult-victim offences.<sup>69</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>70</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>71</sup>
- 1.32 In 1998, sex offender orders were introduced, which could restrict the behaviour of registered sex offenders.<sup>72</sup> Police could apply to a magistrate for an order if a registered sex offender had acted in such a way as to suggest the order was necessary to protect the public.<sup>73</sup>
- 1.33 In 2000, the registration scheme was further amended, placing additional requirements on offenders and increasing penalties for failing to comply with reporting obligations.<sup>74</sup>
- 1.34 In 2003, the *Sexual Offences Act 2003* (UK) substantially overhauled registration in the United Kingdom. The Act created a number of new offences and made many of them registrable offences.<sup>75</sup> The number of offences that give rise to the notification requirements was increased from 14 to 58.<sup>76</sup> The amendments added to the details which registered offenders were

62 Ibid 9–13.

63 Ibid 14.

64 See the figures above at [1.8].

65 The provisions discussed here apply to England and Wales, and most apply in modified form in Scotland and Northern Ireland. For ease of discussion, the term 'United Kingdom' is used without minor geographical inconsistencies being discussed.

66 See [1.8] above.

67 Thomas, above n 2, 2.

68 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, above n 2, 64.

69 *Sex Offenders Act 1997* (UK) c 51, sch 1, ss 2(3), (5).

70 Ibid ss 2(1)–(2).

71 Ibid s 4(2).

72 *Crime and Disorder Act 1998* (UK) c 37.

73 Ibid ss 2–4. These orders are similar to child protection prohibition orders in Australia, discussed in Chapter 8 of this report.

74 *Criminal Justice and Court Services Act 2000* (UK) c 43, s 66, sch 5. The amendments included a requirement that offenders report travel plans to police: sch 5 cl 4. These amendments also created Multi-Agency Public Protection Arrangements, discussed below from [1.39].

75 *Sexual Offences Act 2003* (UK) c 42, sch 3.

76 Ibid.

required to report,<sup>77</sup> decreased the number of days they had in which to report changes<sup>78</sup> and introduced annual reporting.<sup>79</sup> Interestingly, there has never been a requirement in the United Kingdom to report unsupervised contact with children. Registration in the United Kingdom is mandatory<sup>80</sup> for sexual offences committed against both children and adults, by both children and adults.

## Orders and mechanisms for managing registered sex offenders in the United Kingdom that do not exist in Victoria

- 1.35 With 44,159 registered offenders, the England and Wales register is substantially larger than that in either Australia or Victoria.<sup>81</sup> However, there is a comparable rate of registration to that in Victoria, with 80 registered offenders per 100,000 head of population.<sup>82</sup>
- 1.36 There are police powers, civil orders and administrative mechanisms available in the United Kingdom to monitor and manage the behaviour of registered sex offenders.

### Power of entry

- 1.37 Under the Sexual Offences Act, a senior police officer in England or Wales may apply to a justice of the peace for a warrant authorising a constable to enter and search an offender's premises.<sup>83</sup> For a warrant to be granted, the justice of the peace must be satisfied that it is necessary for a constable to enter and search the premises and that, on at least two occasions, a constable has sought entry to the premises to search them and has been unable to obtain entry.<sup>84</sup> There is an equivalent provision in Scotland, under which an application for a warrant is made to the sheriff.<sup>85</sup>

### Multi-Agency Public Protection Arrangements

- 1.38 Multi-Agency Public Protection Arrangements (MAPPA)<sup>86</sup> 'are a set of statutory arrangements to assess and manage the risk posed by certain sexual and violent offenders'.<sup>87</sup>
- 1.39 There are 42 MAPPA areas in England and Wales.<sup>88</sup> The responsible authority for each area, made up of senior representatives from police, probation and prisons,<sup>89</sup> must 'establish arrangements' for managing relevant sexual and violent offenders and other people who, by reason of offences committed by them, may cause serious harm to the public.<sup>90</sup>
- 1.40 There are three classes of offenders who are eligible for management under MAPPA:
- registered sex offenders
  - violent offenders
  - other dangerous offenders who do not fit into the other two classes.<sup>91</sup>

77 Ibid ss 84–5.

78 Ibid s 83(1).

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

80 The Sexual Offences Act introduced a small amount of judicial discretion to registration for the first time, with the court in Scotland being permitted to register someone for an offence other than a registrable offence 'where there was a significant sexual aspect to the offender's behaviour in committing the offence': *Sexual Offences Act 2003* (UK) c 42, sch 3 'Scotland' para 60.

81 This figure is from 31 October 2010: United Kingdom Home Office, *Impact Assessment: Increasing the Notification Requirements of Registered Sex Offenders under Part 2 of the Sexual Offences Act 2003* (14 June 2011) 6.

82 The population of England and Wales in mid-2010 was 55,240,000: Office for National Statistics, *Vital Statistics: Population and Health Reference Tables* (Autumn 2011) Table 1.2. This rate is compared to 74 registered offenders per 100,000 head of population in Victoria.

83 *Sexual Offences Act 2003* (UK) c 42, s 96B(1).

84 Ibid s 96B(2).

85 Ibid s 96A.

86 This is the name given to these arrangements in England, Wales and Scotland. Similar arrangements are called Multi-Agency Sex Offender Risk Assessment and Management Meetings in Northern Ireland.

87 Ministry of Justice, *Multi-Agency Public Protection Arrangements Annual Report 2009/10* (27 October 2010) 1.

88 Ibid.

89 *Criminal Justice Act 2003* (UK) c 44, s 325(1) (definition of 'responsible authority').

90 Ibid s 325(2).

91 Ministry of Justice, above n 87, 1. See also *Criminal Justice Act 2003* (UK) c 44, ss 325(1) (definition of 'relevant sexual or violent offender'), 327.

- 1.41 In establishing arrangements to assess and manage risks posed by these offenders, the responsible authority is to act in cooperation with a number of agencies,<sup>92</sup> which, in return, must cooperate with the responsible authority to the greatest extent possible.<sup>93</sup>
- 1.42 There are two lay advisers to each responsible authority, and the responsible authority must exercise its functions in consultation with these lay advisers.<sup>94</sup>
- 1.43 There are three levels at which offenders subject to MAPPA can be managed:
- Level 1 Ordinary Agency Management—offenders are subject to the usual management arrangements applied by the agency that has the lead role in supervising them.
  - Level 2 Active Multi-agency Management—risk management plans for these offenders require the active involvement of several agencies via regular multi-agency public protection meetings.
  - Level 3 Active Multi-agency Management—again, active involvement of several agencies is required to manage the offender and senior staff from those agencies are required to authorise the use of special services (such as specialised accommodation).<sup>95</sup>
- 1.44 The overwhelming majority of offenders are managed at level 1.<sup>96</sup> Offenders who are considered of high enough risk to be managed at level 2 or 3 will be the subject of interagency meetings,<sup>97</sup> but even then are not involved in the management process at all.

### Limited community notification

- 1.45 In 2010, a nationwide scheme was implemented in England and Wales, which enables members of the public to ask their local MAPPA responsible authority—comprising representatives from police, probation and prisons—whether identified people who have contact with children are child sex offenders.<sup>98</sup> The scheme was based on a successful 2008 pilot.<sup>99</sup>
- 1.46 Under the relevant legislative provisions, each local area MAPPA responsible authority is required to ‘consider whether to disclose information in its possession about the relevant previous convictions of a child sex offender<sup>100</sup> managed by it to any member of the public’.<sup>101</sup>
- 1.47 There is a presumption that the responsible authority should disclose this information where:
- a child sex offender managed by it poses a risk of causing serious harm to a child or children, and
  - the disclosure is necessary for the purpose of protecting a child or children from serious harm.<sup>102</sup>

A member of the public does not need to make an inquiry in order for a disclosure to be made or for the presumption to operate.<sup>103</sup>

92 The agencies are: all youth offending teams in the area; Ministers of the Crown exercising functions in relation to social security, child support, war pensions, employment and training; all local education authorities in the area; all local housing authorities or social services authorities in the area; all registered social landlords who provide or manage residential accommodation housing relevant to sexual and violent offenders or other people who, by reason of offences committed by them, may cause serious harm to the public; every Health Authority or Strategic Health Authority in the area; every Primary Care Trust or Local Health Board in the area; every NHS Trust in the area; every person designated by the Secretary of State as a provider of electronic monitoring devices. *Criminal Justice Act 2003* (UK) c 44, ss 325(3), (6).

93 *Criminal Justice Act 2003* (UK) c 44, s 325(3).

94 *Ibid* ss 326(2)–(3).

95 Ministry of Justice, above n 87, 2.

96 *Ibid*. At March 2010, there were 48,338 MAPPA-eligible offenders, of whom 92 per cent were level 1, 7.5 per cent were level 2 and 0.5 per cent were level 3.

97 Ministry of Justice, above n 87, 2. See, eg, West Yorkshire Probation Trust, *High Risk Offenders* (27 October 2010) <<http://www.westyorksp probation.org.uk/content.php?pageid=204>>; London Probation Trust, *Public Protection: MAPPA* <[http://www.london-probation.org.uk/what\\_we\\_do/public\\_protection\\_mappa.aspx](http://www.london-probation.org.uk/what_we_do/public_protection_mappa.aspx)>.

98 United Kingdom Home Office, *National Rollout of Scheme to Protect Children* (2 August 2010) <<http://www.homeoffice.gov.uk/media-centre/press-releases/national-rollout-scheme-protect>>. Note that while all registered sex offenders are eligible to be managed under MAPPA, the disclosure provisions only apply to child sex offenders: *Criminal Justice Act 2003* (UK) c 44, s 327A(1).

99 Hazel Kemshall and Jason Wood et al, ‘Child Sex Offender (CSOR) Public Disclosure Pilots: A Process Evaluation 2nd Edition’ (Research Report No 32, Home Office, March 2010).

100 ‘Child sex offender’ is defined as someone who has committed an offence listed in sch 34A: *Criminal Justice Act 2003* (UK) c 44, ss 327B(3) (definition of ‘child sex offence’), (4) (definition of ‘child sex offender’).

101 *Criminal Justice Act 2003* (UK) c 44, s 327A(1).

102 *Ibid* ss 327A(2)–(3). The definition of ‘serious harm’ is serious physical or psychological harm.

103 *Criminal Justice Act 2003* (UK) c 44, s 327A(4).

- 1.48 When making a disclosure, the responsible authority may disclose such information about the offender's previous convictions to the member of the public as it considers appropriate, and may impose conditions to prevent the member of the public from disclosing the information to any other person.<sup>104</sup> However, there are no sanctions for a breach of these conditions.
- 1.49 This is a much more limited community notification mechanism than that which operates in the United States. The Home Office has described this as disclosure 'in a controlled way' to a variety of people, including head teachers, leisure centre managers, employers and landlords, as well as parents.<sup>105</sup>

### Civil orders

- 1.50 There are a number of post-sentence civil orders in the United Kingdom that may be made in respect of a registered sex offender. Some of them appear to fulfil the role that might be played by sentence, parole or a post-sentence detention or supervision order in Victoria.

### Travel restrictions

- 1.51 A chief officer of police can apply to a magistrates' court for a foreign travel order in respect of a person who has been convicted of a particular sexual offence and, since conviction,<sup>106</sup> has acted in such a way that it is necessary for an order to be made.<sup>107</sup> The offences in respect of which a foreign travel order can be made are primarily sexual offences against children under the age of 16.<sup>108</sup>
- 1.52 A foreign travel order can prevent the offender from:
- travelling to a particular country outside the United Kingdom, or
  - travelling to any country outside the United Kingdom, other than one named in the order, or
  - travelling to any country outside the United Kingdom.<sup>109</sup>
- 1.53 The order can operate for up to six months.<sup>110</sup> Breach of a foreign travel order is punishable by imprisonment.<sup>111</sup>

### Sexual offences prevention orders: Restricting the conduct of convicted sex offenders

- 1.54 The Sexual Offences Act introduced sexual offences prevention orders, which replaced sex offender orders.<sup>112</sup> A chief officer of police can apply to a magistrates' court for a sexual offences prevention order in respect of a person who has been convicted of a registrable sexual offence,<sup>113</sup> if an order is necessary to protect the public<sup>114</sup> from serious sexual harm.<sup>115</sup>
- 1.55 Sexual offences prevention orders operate for a minimum of five years and can prohibit the offender from doing anything described in the order.<sup>116</sup> Breach of a sexual offences prevention order is punishable by imprisonment.<sup>117</sup> These orders are similar to child protection prohibition orders, discussed in Chapter 8.

### Risk of sexual harm orders: Restricting the conduct of people who have not been convicted of sexual offences

- 1.56 As well as sexual offences prevention orders, the Sexual Offences Act permits a chief officer of police to apply to a magistrates' court for a risk of sexual harm order if it appears that a person

104 Ibid s 327A(5).

105 United Kingdom Home Office, *National Rollout of Scheme to Protect Children* (2 August 2010) <<http://www.homeoffice.gov.uk/media-centre/press-releases/national-rollout-scheme-protect>>.

106 Or finding of guilt or caution: *Sexual Offences Act 2003* (UK) c 42, ss 114, 115(5) (definition of 'appropriate date').

107 *Sexual Offences Act 2003* (UK) c 42, s 114.

108 Ibid s 116(2).

109 Ibid s 117(2).

110 Ibid s 117(1).

111 Ibid s 122.

112 Ibid ss 104–113. Sex offender orders had existed since 1998: *Crime and Disorder Act 1998* (UK) c 37, s 2.

113 Or certain violent offences, including murder, culpable homicide, assault, abduction and others: *Sexual Offences Act 2003* (UK) c 42, ss 104(2), 106(6), sch 5.

114 Or any particular members of the public: *Sexual Offences Act 2003* (UK) c 42, s 104(1)(b).

115 *Sexual Offences Act 2003* (UK) c 42, s 104(1)–(2).

116 Ibid s 107.

117 Ibid s 113.

has engaged in particular acts but has not been convicted.<sup>118</sup> The chief officer of police can apply for an order if it appears that the person has, on at least two occasions:

- engaged in sexual activity involving a child or in the presence of a child
- caused a child to watch a person engaging in sexual activity or to look at a moving or still image that is sexual
- given a child anything that relates to sexual activity or contains a reference to such activity
- communicated with a child, where any part of the communication is sexual.<sup>119</sup>

1.57 There is no requirement for an offence to have been committed or for the person to have been convicted. The order operates for a minimum of two years and can prevent the person from doing anything described in the order.<sup>120</sup>

## Conclusions

1.58 The number of restrictive civil orders and other measures which may be applied to registered sex offenders in the United Kingdom may be explained, in part, by the fact that the United Kingdom does not have a post-sentence detention and supervision order regime. In Scotland, orders for lifelong restriction can be made in respect of certain sexual and violent offenders,<sup>121</sup> but elsewhere in the United Kingdom, there is no equivalent to the *Serious Sex Offenders (Detention and Supervision) Act* (Vic). Therefore, it seems that MAPPAs, the police power of entry and the civil orders that registered sex offenders may be subject to are an attempt to create a higher tier of sex offender management than that provided by passive registration.

## Civil commitment of sex offenders in the United States

### State law

1.59 Twenty states of the United States have enacted civil commitment legislation,<sup>122</sup> allowing for people convicted of sexual offences to be detained after they have served their sentence. Although states are not mandated by federal law to enact civil commitment schemes in the same way as registration and community notification schemes, federal funding is offered to states that implement such laws.<sup>123</sup>

1.60 For a state to be eligible for federal funding, the state law must:

- apply to ‘sexually dangerous offenders’—offenders who suffer from a serious mental illness, abnormality or disorder that would make it difficult for them to refrain from sexually violent conduct or child molestation
- provide for secure civil confinement of the person, including appropriate control, care and treatment during the confinement
- provide for appropriate supervision, care and treatment for the person once released from confinement.<sup>124</sup>

Ten million dollars funding was allocated for each financial year from 2007 to 2010 for this purpose.<sup>125</sup>

118 Ibid s 123.

119 Ibid.

120 Ibid s 124.

121 *Criminal Justice (Scotland) Act 2003* (UK).

122 Minnesota, California, Florida, New Jersey, Illinois, Wisconsin, Massachusetts, Washington, Virginia, New York, Kansas, Texas, Missouri, Nebraska, South Carolina, Arizona, Iowa, North Dakota, Pennsylvania and New Hampshire: Office of the Legislative Auditor Minnesota, *Civil Commitment of Sex Offenders: Evaluation Report* (March 2011) 16.

123 42 USC § 16971 (2010). The federal provisions are named the ‘Jimmy Ryce’ civil commitment provisions, named after Florida provisions of the same name, that were enacted in response to a 9-year-old Miami boy who was abducted, sexually abused and murdered: Jill Levenson, ‘Sexual Predator Civil Commitment: A Comparison of Selected and Released Offenders’ (2004) 48(6) *International Journal of Offender Therapy and Comparative Criminology* 638, 639.

124 42 USC § 16971 (2010).

125 Ibid § 16971(f).

- 1.61 In 2010, there were approximately 5300 offenders subject to civil commitment in the United States.<sup>126</sup> Of the twenty states that have enacted civil commitment laws, all states except Texas provide for confinement of civilly committed offenders to a secure facility.<sup>127</sup> In Texas, offenders who are civilly committed live in ‘halfway houses’ under global positioning satellite surveillance.<sup>128</sup> New York is unique, providing for both commitment to a secure facility and living in the community under intensive supervision.<sup>129</sup>
- 1.62 In California, sex offenders are civilly committed to the Coalinga State Hospital—described as a psychiatric hospital that ‘provides in patient treatment services for Californians with serious mental illnesses’.<sup>130</sup> The hospital has capacity to house 1500 patients and employ 1600 staff.<sup>131</sup> The hospital does not publish data about how many patients it houses, but a 2009 documentary indicated that there were more than 500 sex offenders in Coalinga State Hospital, only 12 of whom have ever been approved for release.<sup>132</sup> Of these, none have been able to find accommodation that complies with Californian residence restrictions.<sup>133</sup>
- 1.63 Following a United States Supreme Court decision,<sup>134</sup> most states apply the ‘sexual dangerousness’ criteria for determining which offenders are subject to civil commitment laws.<sup>135</sup>

## Federal law

- 1.64 Federal offenders who are in the custody of the Bureau of Prisons<sup>136</sup> or who have been committed to the custody of the Attorney-General because they are unfit to stand trial<sup>137</sup> can be civilly committed if a court determines that they are sexually dangerous.<sup>138</sup> The Attorney-General has responsibility for these people and, if the state in which the person lives or was tried<sup>139</sup> will not take responsibility for the person’s civil commitment, the Attorney-General must ‘place the person for treatment in a suitable facility’, until such time as a state assumes responsibility for the person or the person is no longer sexually dangerous to others, whichever is earlier.<sup>140</sup>
- 1.65 This type of civil commitment has been permitted under federal law since 1949.<sup>141</sup> In 2010, the United States Supreme Court held that these provisions were constitutionally valid.<sup>142</sup>

126 Office of the Legislative Auditor Minnesota, *Civil Commitment of Sex Offenders: Evaluation Report* (March 2011) 17. Minnesota has four times the United States’ national average of civilly committed offenders per one million residents: at 18. This is compared to Victoria’s zero detention orders and 13 supervision orders per one million residents: Victoria’s population in March 2011 was 5,605,600: Australian Bureau of Statistics, *Australian Demographic Statistics: March Key Figures* (29 September 2011) <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/3101.0>>, Table 4; at 5 December 2011, there were 75 current supervision orders in Victoria: information provided by the Department of Justice.

127 Office of the Legislative Auditor Minnesota, *Civil Commitment of Sex Offenders: Evaluation Report* (March 2011) 16.

128 Ibid.

129 Ibid 17.

130 California Department of Mental Health, *Seclusion and Restraint Data: State Hospitals and Psychiatric Programs* (2011) <[http://www.dmh.ca.gov/Services\\_and\\_Programs/State\\_Hospitals/S\\_and\\_R/default.asp](http://www.dmh.ca.gov/Services_and_Programs/State_Hospitals/S_and_R/default.asp)>.

131 California Department of Mental Health, *Coalinga State Hospital* (2011) <[http://www.dmh.ca.gov/Services\\_and\\_Programs/State\\_Hospitals/Coalinga/default.asp](http://www.dmh.ca.gov/Services_and_Programs/State_Hospitals/Coalinga/default.asp)>.

132 *Louis Theroux: A Place for Paedophiles* (directed by Louis Theroux, BBC, 2009).

133 Ibid.

134 *Kansas v Hendricks*, 521 US 346 (1997).

135 Jill Levenson, ‘Sexual Predator Civil Commitment: A Comparison of Selected and Released Offenders’ (2004) 48(6) *International Journal of Offender Therapy and Comparative Criminology* 638, 639.

136 Federal Bureau of Prisons, *About the Bureau of Prisons* <<http://www.bop.gov/about/index.jsp>>.

137 18 USC § 4241 (2010).

138 Ibid § 4248.

139 If they were tried.

140 18 USC § 4248 (2010).

141 *United States v Comstock*, 130 S Ct 1949 (2010).

142 Ibid.

# Appendix G: Annual report by the Northern Territory Police Commissioner under section 93 of the *Child Protection (Reporting and Registration) Act 2004 (NT)*

Northern Territory Police



## ANNUAL REPORTING

### ***CHILD PROTECTION (OFFENDER REPORTING AND REGISTRATION) ACT 2004*** ***Period 1 July 2010 to 30 June 2011***

The *Child Protection (Reporting and Registration) Act* (the Act) commenced operation in the Northern Territory on 12 January 2005.

The Act provides for the registration and reporting of persons who commit sexual offences and certain other serious crimes against children. These offences are divided into two classes which determine the level of reporting for the offender. Class one offences require the offender to report for 15 years to life (depending on the number of convictions). Class two offences require the offender to report for 8 years to life (depending on the number of convictions).

The NT Child Protection Registry is maintained by the Sex Crimes Division. The NT Registrar is Superintendent Joanne Foley.

Section 93 of the Act requires the Commissioner of Police to provide an annual report at the end of each financial year on specified issues including any other matter relating to reportable offenders, the Register of the administration of this Act as directed by the Minister.

Accordingly, the attached information is provided pursuant to Section 93 of the Act.

**CHILD PROTECTION (OFFENDER REPORTING  
 AND REGISTRATION) ACT  
 REPORTABLE MATTERS IN THE NORTHERN TERRITORY  
 2010 – 2011**

a)	Number of reportable offenders registered in the Territory.	<b>235</b>
b)	Number of reportable offenders in the Territory who have life-time reporting obligations.	<b>17</b>
c)	Number of child reportable offenders in the Territory.	<b>2</b>
d)	Number of persons in the Territory who are reportable offenders because they are the subject of an offender reporting order without committing a Class 1 or Class 2 Offence.	<b>1</b>
e)	Number of persons in the Territory who are reportable offenders and have been sentenced for a subsequent Class 1 or Class 2 Offence during the year.	<b>2</b>
f)	Number of Suspension Orders under Part 3, Division 6 that were made or revoked during the year.	<b>Nil</b>
g)	Number of prohibition Orders made during the year.	<b>Nil</b>
h)	Number of prosecutions during the year for offences under the Act.	<b>16</b>

**Additional information**

Number of persons served with notices informing them of their requirement to register and are yet to register.	<b>3</b>
Number of persons served with a notice informing them of their requirement to register within seven days of being notified.	<b>1</b>
Number of persons served with a notice informing them of their requirement to register and are in custody, and are required to register upon release.	<b>62</b>
Number of persons who are currently before the court for reportable offences.	<b>84</b>
Number of persons in the Territory with an outstanding warrant who are still required to go before the court for reportable offences.	<b>3</b>

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