VLRC Sex Offenders Registration Act Review

To: Victorian Law Reform Commission

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Queries regarding this submission should be directed to:

Contact person: Brigid Foster
Ph: (03) 9607 9374
Email: bfoster@liv.asn.au
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Executive Summary

1. The current numbers on the Victorian Sex Offenders Register (the Register) are very high. As of 1 June 2011, 3933 registrants had been included on the Register since the scheme began. At the current rates of inclusion, those numbers are expected to rise to 6500 by the end of 2014.

2. Sex offender registration should not be mandatory upon a finding of guilt or conviction for prescribed offences. Inclusion on the register should be a matter of judicial discretion, and should only apply to those offenders who pose an ongoing risk to the sexual safety of members of the community.

3. The current mandatory registration provisions in the Act mean that low risk offenders who are unlikely to reoffend are captured on the Register along with dangerous offenders who are at a high risk of reoffending. The large numbers therefore undermine the purpose of the Sex Offenders Registration Act 2004 (SOR Act), and place an excessive administrative burden onto the police, who must monitor registered offenders.

4. Further, the cost of monitoring large numbers of low risk offenders diverts valuable financial resources away from the investigation of offences, the treatment of high-risk offenders, from victim support services, or from programs which identify at-risk future offenders, and divert them away from future offending.

5. The LIV submits that the current mandatory nature of the registration scheme has lead to unjust outcomes in a number of cases, where the legislation has not kept pace with technological or societal changes. Mandatory registration has captured those who have engaged in “sexting”, or consensual sexual activity between young people.

6. 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.

7. A person who is placed on the Register is, in effect, placed on the Register for life. Even after the reporting period expires, the offender is prevented from undertaking child-related employment.

8. Upon an amendment to the SOR Act removing mandatory inclusion on the Register for a finding of guilt or conviction for a prescribed offence, current low-risk registrable offenders should be able to make an application for removal from the Register. Removal would necessitate the destruction of all information on the Register and all information produced from the Register.

9. In each case where an offender has been charged with a prescribed offence and poses a possible risk to the sexual safety of members of the community, the Prosecution would make an application for inclusion on the Register. The onus should be upon the Prosecution to establish the existence of such a risk, on the balance of probabilities. The Prosecution would be required to call expert evidence in support of that application, and the offender could call expert evidence in rebuttal. The judicial officer would then make a decision as to the offender’s inclusion on the register. The offender would then also have a right of appeal against the decision to a higher court.

10. In relation to certain serious sexual offences against children (for example, where the child is very young), and where a conviction in itself demonstrates the existence of the requisite risk, the LIV accepts the Law Council’s proposal that the SOR Act should be amended to provide that, in those cases:
a) That an application for inclusion on the register is deemed to have been made by
the prosecution upon conviction and must be considered by the sentencing court;
and
b) That the sentencing court must order that the defendant be required to register
unless satisfied that the offender does not pose a risk to the lives or sexual safety of one
or more children, or of children generally (a reverse onus provision)

11. The Register should be one of a range of sources of information available to the DHS in relation
to child protection concerns.

12. The SOR Act should be clarified and amended to enable information sharing between Victoria
Police and DHS.

13. The court should have an absolute discretionary power to decide whether any person found
guilty or convicted of a registrable offence be placed on the Register.

14. A conviction for sexual offending carries with it high social stigmatisation, and inclusion on the
Register has profound long-term consequences. Inclusion on the Register prolongs
stigmatisation, even long after an offence has been committed. Inclusion on the Register should
be taken into account by the sentencing court, as an added aspect to the punishment component
of any sentencing disposition.

15. Section 11(3) SOR Act should continue on the basis that the Prosecution would have to make
the application for inclusion within 30 days of the offender being sentenced, that the onus would
be upon the Prosecution to prove, on the balance of probabilities, that the offender posed a risk
to the sexual safety of another person, that the offender would be able to bring expert evidence
in rebuttal upon the application, and the offender would ultimately have a right of appeal against
their inclusion on the Register.

16. Reporting periods for registered offenders should not be mandatory, but should be a matter of
judicial discretion.

17. The reporting period initially imposed should be shorter (5 years, for example) with a
reassessment of the offender’s level of risk after that period, and regular reassessments thereafter.

18. Upon an amendment to the SOR Act removing mandatory inclusion on the Register for a
finding of guilt or conviction for a prescribed offence, current low-risk registered offenders
should be able to make an application for removal from the Register.

19. Removal from the Register in these circumstances would necessitate the destruction of all
information on the Register and all information produced from the Register.

20. The Chief Commissioner of Police should continue to have the power to apply to the court for
an order extending a registered offender’s reporting obligations, in certain circumstances.

21. The court should have a discretionary power to determine or amend a registered offender’s
reporting obligations, where special circumstances exist which make it appropriate to do so.

22. The LIV does not support additional powers for police to test the veracity of any report
provided by a registered offender. The police currently have the power to enter and search a
property without a warrant, where a member of the police force believes on reasonable grounds
that a person has committed a serious indictable offence.

23. The LIV supports an amendment to the SOR Act giving the Chief Commissioner of Police an
express power to share all information on the Register with CrimTrac. To do otherwise
undermines the purpose of the SOR Act. Other information sharing should be limited.
24. The Chief Commissioner of Police have an express power to report to the DHS that a registered offender has reported that they have had unsupervised contact with a child.

25. The SOR Act should be amended to include a definition of “unsupervised contact”, so that registered offenders reporting obligations are absolutely clear.

26. The sharing of information contained in the Register should be restricted to those bodies expressly prescribed in the Act, and that, unless expressly stated, that information should only be shared with those prescribed bodies, where a registered offender poses a risk to a member of the community. Unlawful disclosure should constitute an offence.

27. The SOR Act should be amended to clarify how often the Director should undertake compliance checks, and how often the Director should provide written reports, and to which Minister.

28. Any person from another government agency who forms a belief based on reasonable grounds that the sexual safety of a child is at risk, must report that information and the basis of that belief to Victoria police, for that information to be included on the Register.

29. Corrections Victoria should only be required to share information about a sex offender that is acquired during any treatment programs undertake by the offender when in custody or on parole, where the Corrections officer forms a view, based on reasonable grounds, that the offender poses a risk to the sexual safety of a child.
Introduction

The Law Institute of Victoria (LIV) welcomes the opportunity to provide the Victoria Law Reform Commission (VLRC) with a submission for the review of the Sex Offender Registration Act 2004 (Vic) (the SOR Act).

Sex offending evokes a powerful emotional reaction in members of the community. Fear, hatred and disgust are common reactions to a type of offending which can have profound and long-term consequences for victims and the community as a whole. Child sex offending in particular is most insidious in that it is perpetrated on society’s most vulnerable members.

For this reason, it is important to approach the subject of sex offender registration from a rational viewpoint, ensuring that any approach avoids an unduly harsh emotional response, but instead takes into account the available empirical evidence.

The LIV supports any evidence based measures that reduce the incidence of sexual offending, reduce the recidivism of sexual offenders, facilitate the prosecution of sexual offences, and prevent registered sex offenders from working in child-related employment. These measures include the registration of sex offenders. However, the LIV makes the following important proviso: sex offender registration should not be mandatory upon a finding of guilt or conviction for prescribed offences. Inclusion on the register should be a matter of judicial discretion, and should only apply to those offenders who pose an ongoing risk to the sexual safety of members of the community.

The current numbers on the Victorian Sex Offenders Register (the Register) are very high. As of 1 June 2011, 3933 registrants had been included on the Register since the scheme began. At the current rates of inclusion, those numbers are expected to rise to 6500 by the end of 2014.

These large numbers alone are not enough to necessitate a reform to the SOR Act. However, the LIV submits that the current mandatory registration provisions in the SOR Act mean that low risk offenders who are unlikely to reoffend are captured on the Register along with dangerous offenders who are at a high risk of reoffending. The large numbers therefore undermine the purpose of the SOR Act, and place an excessive administrative burden onto the police, who must monitor registered offenders.

The LIV supports the concerns of the Director, Police Integrity in relation to a possible unintended consequence of mandatory registration:

“…Yet the circumstances of sex offending, and of sex offenders, vary enormously. Some offenders represent so slight a continuing risk to the community that, in the consideration of law enforcement priorities, the cost of long term monitoring surely cannot be justified. Moreover, if we are to have tens of thousands of registered offenders in the future, the truly dangerous offenders may be overlooked in the vast sea of registrants”

The Director goes on to say:

“…the indiscriminate nature of this scheme, and the absence of judicial discretion, has produced, in far too many cases, outcomes that are absurd, unnecessary, unfair and a waste of the resources of Victoria Police”

The LIV forcefully agrees with the Director’s assessment of the current sex offender’s registration scheme.

1 Information provided to the Victorian Law Reform Commission by the Sex Offenders Registry, Victoria Police, quoted in Sex Offenders Registration Information Paper VLRC June 2011, p 14.
2 Information provided to the Victorian Law Reform Commission by the Sex Offenders Registry, Victoria Police, quoted in Sex Offenders Registration Information Paper VLRC June 2011, p 14.
3 Ombudsman Victoria Investigation into the failure of agencies to manage registered sex offenders February 2011, p 24.
Further, the LIV submits that the cost of monitoring large numbers of low risk offenders diverts valuable financial resources away from the investigation of offences, the treatment of high risk offenders, from victim support services, or from programs which identify at-risk future offenders, and divert them away from future offending.

The LIV submits that the current mandatory nature of the registration scheme leads to unjust outcomes, where the legislation has not kept pace with technological or societal changes. Mandatory registration for the production or possession of child pornography, for example, has captured offenders who have engaged in “sexting” (defined as the act of sending sexually explicit messages or photographs, primarily between mobile phones), or consensual sexual activity between young people. These (often youthful) offenders pose little risk to society, yet the long-term consequences of inclusion on the Register are profound.

Registered offenders are required to initially provide a wide range of information to the Chief Commissioner of Police within seven days of being sentenced for a registrable offence. That information includes the registered offenders name, address, date of birth, telephone number and email address, details of a registered offenders Internet service provider (ISP), all internet user names, chat room user names, instant messenger user names or identities, employment details, the names and ages of any children who reside in the same household with whom the registered offender has regular unsupervised contact, details of any club affiliations, the make, model and colour of any motor vehicles owned or general driven by the registered offender, details of any tattoos or distinguishing marks, findings of guilt of registered offences in foreign jurisdictions, details of any periods of government custody since the registrable offence, details of any intention to leave Victoria, and the passport number and country of issue of each passport held by the registered offender.

Thereafter, the registered offender is required to report to the Chief Commissioner of Police annually, and also at any time when the registered offender’s relevant personal details change. 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.

A person who is placed on the Register is, in effect, placed on the Register for life. Even after the reporting period expires, the offender is prevented from undertaking child-related employment.

While the reporting requirements and limitations on employment set out in the SOR Act are appropriate for sex offenders who pose an ongoing risk to the sexual safety of members of the community, the LIV submits that these onerous conditions constitute a disproportionate and unnecessary response to lower-level offending (for example, “sexting”, or consensual sexual activity amongst young people) and those offenders who are at a low risk of reoffending.

The Sunday Age newspaper recently reported a number of cases where 18-year-olds were convicted of producing or possessing child pornography in circumstances of “sexting”, and were then mandatorily placed on the Register. In one reported case, 18-year-old “Danny” was convicted, on the basis of his own admissions, to a charge of producing child pornography. That charge related to a film and some still photographs he had produced (and later deleted), depicting him having consensual sex with his under 18-year-old girlfriend.

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5 s68(1) Crimes Act 1958
6 s70(1) Crimes Act 1958
8 s 3(3) Sex Offenders Registration Act 2004
9 s14(1) Sex Offenders Registration Act 2004
10 s16 Sex Offenders Registration Act 2004
11 s17 Sex Offenders Registration Act 2004
12 s68(1)(a) Sex Offenders Registration Act 2004
13 s68(1)(b) Sex Offenders Registration Act 2004
14 s67(1) Sex Offenders Registration Act 2004
15 The Sunday Age, 24 July 2011 One stupid moment of rage has life-long consequences
He was mandatorily placed on the Register for eight years, and is therefore unable to pursue his dream of opening his own teaching business. Further, he has become estranged from a younger female relative, with whom he used to have email contact. In another reported case, 18-year-old “Andrew” was placed on the Register after images of 15 to 18-year-old girls in their underwear, were sent to his mobile phone by a female friend. The images were automatically copied to his laptop from his phone when he went to download some other images from his mobile device.

He was placed on the Register for eight years, and has been charged with breaching his reporting obligations under the SOR Act, having failed to inform police of his new telephone number and address. He has suffered from anxiety and depression, now feels nervous around children and teenage girls, and his mother believes that at one time he was at risk of suicide.

The LIV submits that in the above cases, inclusion on the Register makes little sense. Neither Andrew nor Danny would appear to pose an ongoing risk to society, and in both cases a Magistrate deemed the offences worthy of a non-conviction disposition.

The LIV supports the Law Council of Australia (the Law Council) in its view that:

“Inclusion on the Register, and the reporting obligations it entails, has the potential to extend a person’s contact with police and the criminal justice system well beyond the expiry of any sentence they receive. Likewise, it casts the constant spectre of negative exposure and unwarranted discrimination over a person’s future employment opportunities and engagement in the community. The consequences, particularly for first time and one-off offenders, can be unduly punitive.”

The LIV supports the Law Council’s ten principles, set out in the Policy Statement on Registration and Reporting Obligations for Child Sex Offenders, namely that:

- Inclusion on a child sex offender register should not be arbitrary or automatic
- An offender should be required to register only where the sentencing court is satisfied that he or she poses a risk to the lives or sexual safety of one or more children, or children generally (although the LIV supports inclusion on the register of those offenders who pose a risk to the sexual safety of any member of the community)
- There should be a right of appeal against a sentencing court’s order that a person be required to register
- Following a specified period of time, a person should be able to apply to have his or her name removed from the register
- The legislation governing the establishment and administration of child sex offender registers should clearly set out who may have access to information on the register and for what purposes
- Registered persons should be informed if information about them is disclosed to a person or agency, other than a law enforcement agency or officer
- Registered persons should only be registered and requested to provide police with information in accordance with the legislation
- Registered persons must be able to provide information to police, in accordance with their reporting obligations, and police must verify that information, in a manner which does not in and of itself jeopardise the privacy of registered persons
- Unlawful disclosure of information on the child sex offender register should constitute an offence
- Unlawful disclosure offence provisions should be accompanied by a complaint based mechanism administered by an independent body such as the Privacy Commissioner.

16 Ibid, n 15.
17 The Sunday Age, 24 July 2011 “I used to be outgoing now I’m paranoid”
18 Ibid, n 17
19 Law Council of Australia Policy Statement on Registration and Reporting Obligations for Child Sex Offenders p 2
The LIV submits that, upon an amendment to the SOR Act removing mandatory inclusion on the Register for a finding of guilt or conviction for a prescribed offence, current low-risk registered offenders should be able to make an application for removal from the Register. Removal from the Register in these circumstances would necessitate the destruction of all information on the Register and all information produced from the Register. The LIV accepts that while this would result in an increased administrative burden for the courts and police in the short term, in the long term it would facilitate the effectiveness of the Register.

The LIV further submits that the SOR Act should be clarified in relation to information sharing between the Department of Human Services (DHS), Corrections Victoria and the Victorian Police.

The LIV will now address the questions set out in the Information paper, below.

**The recommendations below only apply upon the removal of the mandatory inclusion provisions of the SOR Act**

**Purposes**

1. **To what extent does the Sex Offenders Registration Act fulfil its stated purposes?**

The LIV submits that the large numbers of registered offenders on the Register, and the mandatory inclusion of low risk offenders, diminishes the power of the SOR Act to fulfil its stated purposes.

A clinical forensic psychiatrist with 30 years research experience in the nature and impact of sexual abuse and the assessment and management of offenders told the Ombudsman:

“… vast numbers of people are put on the register for whom the chances of molesting children in the future were not greater than any other man in the community … It means that the system has to deal with a large number of people on the Register who common-sense and experience tells them are no more risk than anyone else. And that means you get bored and you lose all faith in it and it just becomes routine. And when the occasional one pops up who really ought to grab your attention it's lost in the noise of all these other people.”

The LIV submits that the SOR Act should be amended so that inclusion on the register is not mandatory but becomes a matter of judicial discretion. In each case where an offender has been charged with a prescribed offence and poses a possible risk to the sexual safety of members of the community, the Prosecution would make an application for inclusion on the Register. The onus should be upon the Prosecution to establish the existence of such a risk, on the balance of probabilities. The Prosecution would be required to call expert evidence in support of that application, and the offender could call expert evidence in rebuttal. The judicial officer would then make a decision as to the offender’s inclusion on the Register. The offender would then also have a right of appeal against the decision to a higher court. The Prosecution would also have a right to appeal.

In relation to certain serious sexual offences against children (for example, where the child is very young), and where a conviction in itself demonstrates the existence of the requisite risk, the LIV accepts the Law Council’s proposal that the SOR Act should be amended to provide that, in those cases:

- That an application for inclusion on the Register is deemed to have been made by the prosecution upon conviction and must be considered by the sentencing court; and

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20 Ombudsman Victoria Investigation into the failure of agencies to manage registered sex offenders February 2011, p 28
• That the sentencing court must order that the defendant be required to register unless satisfied that the offender does not pose a risk to the lives or sexual safety of one or more children, or of children generally (a reverse onus provision)\textsuperscript{21}

The LIV further submits that the SOR Act lacks clarity in a number of respects, and these failures of clarity undermine the purposes of the SOR Act. For example, the SOR Act is ambiguous as to the information sharing requirements between Victoria Police and the DHS.

It is clear from an examination of Minister Haermeyer’s second reading speech that the overriding purpose of the SOR Act is to “lead the fight against the insidious activities of paedophiles and other serious sex offenders”\textsuperscript{22}. The SOR Act itself sets out its purposes as:

(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) 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;

(b) to prevent registered sex offenders working in child-related employment;

(c) to empower the Police Ombudsman to monitor compliance with Part 4 of this Act.

However, if the SOR Act’s purpose is to ultimately protect children (and the community) by reducing the likelihood of reoffending through the monitoring of sex offenders, then it is a failing of the SOR Act to provide clear information sharing requirements between Victoria Police and the DHS. The findings of the Ombudsman’s report bear out this concern\textsuperscript{23}.

Currently, mandatory reporting requirements are contained in the Children, Youth and Families Act 2005 (the CYF Act), which prescribes that people in certain types of occupations (such as members of the police force\textsuperscript{24}) are mandatory reporters for the purpose of the CYF Act.

Mandatory reporters must report to the Secretary of the DHS as soon as practicable after forming a belief based on reasonable grounds that a child is at risk\textsuperscript{25}. However, these provisions create uncertainty in relation to reporting obligations under the Sex Offenders Registration Act 2004. A member of the police force may make an inaccurate assessment that a child is not at risk, and on that basis, fail to report unsupervised contact to the DHS.

The LIV submits that the SOR Act should be clarified to enable information sharing between Victoria Police and the DHS, compelling police to advise the Secretary of DHS within one day of receiving a report from a registered offender, of that offender’s unsupervised contact with a child.

\textsuperscript{21} Law Council of Australia Policy Statement on Registration and Reporting Obligations for Child Sex Offenders p4

\textsuperscript{22} Victorian Parliamentary Debates (Hansard), Legislative Assembly, 3 June 2004, p 1851

\textsuperscript{23} The Ombudsman found that in relation to 376 offenders who reported they had contact with at least one child, the Victoria Police failed to pass on that information to the Department of Human Services. Corrections Victoria was delayed in providing information relating to risk assessment on to the Department of Human Services, as they sought consent from the registrable offenders prior to releasing that information to the Department of Human Services. See Ombudsman Victoria Investigation into the failure of agencies to manage registered sex offenders February 2011, p 7 - 9.

\textsuperscript{24} s182(1)(e) Children, Youth and Families Act 2003

\textsuperscript{25} s184(1) Children, Youth and Families Act 2003
2. Should the Sex Offenders Register be a primary source of information to the Department of Human Services about child protection concerns?

The LIV submits that the Register should be one of a range of sources of information available to the DHS in relation to child protection concerns.

An examination of the second reading speech and the SOR Act itself shows that the purpose of the SOR Act is quite clear; the sexual safety of children and members of the community is paramount.

However, the current information sharing requirements of the SOR Act are unclear and are in fact governed by the provisions of the CYF Act. This ultimately undermines the purpose of the SOR Act. Members of the police force are mandatorily required, under the CYF Act, to report to the Secretary of the DHS as soon as practicable after forming a belief based on reasonable grounds that a child is at risk.

The lack of clarity around police reporting obligations under the SOR Act, led to the Victorian Ombudsman undertaking an investigation into the failure of agencies to manage registered sex offenders. The results of the investigation were presented to Parliament on 8 February 2011.

One of the findings of that report was that the police and DHS have differing approaches to risk:

“The Department of Human Services concern in such matters is to consider the risk of harm to individual children with whom an offender may be in contact.

However, Victoria Police approached the assessment of risk from a law enforcement perspective in terms of the risk of further offences being committed. While these approaches can be complimentary, the differing approaches hampered the understanding of each other's roles and responsibilities.”

The LIV submits that the SOR Act should be amended to enable information sharing between Victoria Police and DHS, so that the protection of children at risk is paramount.

The LIV submits that these suggested amendments to the SOR Act should only occur once the mandatory inclusion provisions have been removed from the SOR Act, making inclusion on the Register a matter of judicial discretion, only applying to offenders who pose a risk to the sexual safety of children or members of the community.

3. Does the Sex Offenders Registration Act establish an effective scheme for monitoring the activities of convicted child sex offenders who are likely to re-offend?

The LIV submits that the mandatory registration requirements of the SOR Act undermine the effectiveness of the scheme, by overloading the Register with low risk offenders.

The SOR Act should be amended to remove all mandatory registration requirements on a conviction or finding of guilt for a prescribed offence, so that registration is a matter of judicial discretion, and only applies in cases where the offender poses a risk to the sexual safety of a child or other members of the community.

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26 s184(1) Children, Youth and Families Act 2005
27 Ombudsman Victoria Investigation into the failure of agencies to manage registered sex offenders 8 February 2011
Inclusion in the Sex Offenders Register

4. Should inclusion in the Sex Offenders Register be an automatic administrative consequence of a person being convicted of and sentenced for a Class 1 or Class 2 offence?

The LIV is absolutely opposed to mandatory registration upon conviction or finding of guilt for a prescribed offence.

A conviction for an offence can never alone be an accurate predictor of a future risk to the sexual safety of the community.

Furthermore, there are a number of factual scenarios that lessen the culpability of an offender in relation to what are, on the face of it, serious sexual offences. A conviction for sexual penetration of a child under the age of 16, for example, may be the result of consensual sex between a nearly 16-year-old and a 19-year-old who are in a relationship. The production or possession of child pornography may be the result of consensual filming of sexual activity between 17-year-olds, or indeed may arise as a result of “sexting”.

The LIV further submits that mandatory registration undermines the purposes of the scheme, by flooding the Register with low risk offenders, thereby wasting valuable police resources that could be better spent on monitoring high risk offenders, or on the investigation of offences. Further, the registration of low risk offenders reduces faith in the Register; those offenders who are at a high risk of reoffending could be lost in the flood of registered offenders.

5. Should the court have a discretionary power to decide whether to order that a person who is convicted of some or all of the Class 1 or Class 2 offences be placed in the Sex Offenders Register? What criteria should govern the exercise of any discretionary power?

The LIV submits that the court should have an absolute discretionary power to decide whether any person found guilty or convicted of a registrable offence be placed on the Register.

As aforesaid under Question 1, the SOR Act should be amended so that inclusion on the register is not mandatory but becomes a matter of judicial discretion.

In relevant cases, the Prosecution would make an application for the inclusion of an offender on the Register. The onus should be on the Prosecution to establish, on the balance of probabilities, that the offender poses an ongoing risk to the sexual safety of members of the community.

The Prosecution would be required to call expert evidence in support of the application, and the offender could call expert evidence in rebuttal. The judicial officer would then make a decision as to whether the offender should be included on the Register. Only offenders who the judicial officer believed, on the balance of probabilities, constituted a risk to the sexual safety of members of the community should be included on the Register.

The offender would then also have a right of appeal to a superior court against the decision, as would the Prosecution.
In relation to certain very serious sexual offences against children (where the child is very young, for example), where a conviction in itself demonstrates the existence of the requisite risk, the LIV accepts the Law Council’s proposal that the SOR Act should be amended to provide that, in those cases:

- That an application for inclusion on the register is deemed to have been made by the prosecution upon conviction and must be considered by the sentencing court; and
- That the sentencing court must order that the defendant be required to register unless satisfied that the offender does not pose a risk to the lives or sexual safety of one or more children, or of children generally (a reverse onus provision).\(^31\)

6. Should an order placing a person in the Sex Offenders Register be a matter that the court can take into account when sentencing a person for a Class 1 or Class 2 offence?

The court should have ultimate discretion as to whether a convicted offender should be placed on the Register.

The court could take the making of an order into account when sentencing that person.

A conviction for sexual offending carries with it high social stigmatisation, and inclusion on the Register has profound long-term consequences. Sex offenders are the most vilified members of society, and inclusion on the Register prolongs that stigmatisation, even long after an offence has been committed.

A person who is placed on the Register is, in effect, placed on the Register for life. Even after the reporting period expires, the offender is prevented from undertaking child-related employment.

The LIV submits that while inclusion on the Register is absolutely appropriate for offenders who pose a risk to the sexual health of members of the community, their inclusion on the Register should be taken into account by the sentencing court, as an added aspect to the punishment component of any sentencing disposition.

7. Should it continue to be possible for a court to order that a person convicted of any offence be placed in the Sex Offenders Register if the court is satisfied that the offender poses a risk to the sexual safety of any other person?

The LIV submits that a person convicted of any offence should be able to be placed on the Register, where the court is satisfied beyond reasonable doubt that the offender poses a risk to the sexual safety of any person.

It is conceivable that an offender convicted of any offence other than a sexual offence, displays or reveals high-risk attributes, thought processes or behaviours, which might reveal that they pose a risk to the sexual safety of another person.

In these circumstances, the LIV supports the continuation of s11(3) SOR Act on the basis that the Prosecution would have to make the application within 30 days of the offender being sentenced, that the onus would be upon the Prosecution to prove, on the balance of probabilities, that the offender pose a risk to the sexual safety of another person.

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\(^31\) Law Council of Australia Policy Statement on Registration and Reporting Obligations for Child Sex Offenders p4
poses a risk to the sexual safety of another person, that the offender would be able to bring expert evidence in rebuttal, and the offender would ultimately have a right of appeal against their inclusion on the Register.

**Duration of reporting obligations**

8. **Should the duration of a registered sex offender’s reporting obligations continue to be automatically determined by a legislative classification of offences?**

Mandatory reporting periods fail to take account of the myriad of circumstances that may increase or decrease an offender’s level of risk of reoffending. Neither do mandatory periods take account of the many factual circumstances that lower an offender’s culpability or lessen the seriousness of an offence (“sexting” for example).

The LIV submits that the reporting periods for registered offenders should not be mandatory, but should be a matter of judicial discretion.

It is the view of the LIV that the reporting period initially imposed should be shorter (5 years, for example) with a reassessment of the offender’s level of risk after that period, and regular reassessments thereafter.

It would be a matter for the judicial officer, based on expert evidence in relation to an assessment of risk, whether an order including an offender on the Register should be extended for longer periods, or even life.

9. **Should the court have a discretionary power to determine the length of the reporting period? What criteria should govern the exercise of any discretionary power?**

The LIV submits that the court should have the discretion to determine the length of any reporting period, based on a risk assessment undertaken by experts who are then called to provide evidence for the Prosecution and offender during the application for inclusion on the Register.

There may be cases, for example, where an offender is currently at a higher risk of offending due to recent changes to lifestyle or circumstance - drug or alcohol use, loss of employment, or recent bereavement for example. These risk factors may be alleviated through counselling or treatment, rendering the registered offender a low risk of reoffending, and in a shorter reporting period than currently prescribed under the SOR Act.

In these circumstances it may be appropriate to order a shorter reporting period (5 years, for example).

In these cases, the SOR Act should be amended to allow for a re-evaluation of risk at the end of the reporting period, whereby the registered offender is obliged to attend the sentencing court, where their risk of reoffending is re-evaluated.

If the judicial officer is convinced, on the balance of probabilities, that the offender still poses a risk to the sexual safety of members of the community, the reporting period could be extended for a longer period.

Offenders deemed at high risk of reoffending could be ordered to report for long periods, or even life in very serious cases. This would ultimately be a matter for the judicial officer.
10. Are the current provisions in the Sex Offenders Registration Act for suspending the reporting obligations of sex offenders adequate?

Currently, a registered offender who is required to report for life, can make an application to the Supreme Court for an order suspending his or her reporting obligations if:

(a) a period of 15 years has passed (ignoring any period during which the registrable offender was in government custody) since he or she was last sentenced or released from government custody in respect of a registrable offence or a corresponding registrable offence, whichever is later; and

(b) he or she did not become the subject of a life-long reporting period under a corresponding Act whilst in a foreign jurisdiction before becoming the subject of such a period in Victoria; and

(c) he or she is not on parole in respect of a registrable offence.

Under this provision, it is expected that the Supreme Court will be inundated with such applications after 2019, being 15 years since the introduction of the SOR Act.

The LIV submits that the period of time before such an application is allowable should be reduced to 10 years, bearing in mind that s43 SOR Act restricts an offender’s entitlement to make a further application for suspension, until five years have elapsed from the date of the refusal.

In all other respects, the LIV submits that this provision is acceptable, but only on the condition that only those offender’s who pose a risk to the sexual health of children or members of the community, are included on the Register. We reiterate that inclusion on the Register should not be mandatory but should be a matter of judicial discretion.

The LIV is supportive of the continuation of s39A SOR Act, which allows the Chief Commissioner to apply to the Supreme Court, at any time, for an order suspending the reporting obligations of a registered offender.

Furthermore, the LIV submits that, upon an amendment to the SOR Act removing mandatory inclusion on the Register for a finding of guilt or conviction for a prescribed offence, current low-risk registered offenders should be able to make an application for removal from the Register.

Removal from the Register in these circumstances would necessitate the destruction of all information on the Register and all information produced from the Register. The LIV accepts that while this would result in an increased administrative burden for the courts and police in the short term, in the long term it would facilitate the effectiveness of the Register.

11. Should the Chief Commissioner of Police or some other statutory official have the power to apply to a court for an order extending a registered sex offender’s reporting obligations?

The Chief Commissioner of Police should have the power to apply to the court for an order extending a registered offender’s reporting obligations, if the Chief Commissioner has formed a belief based on reasonable grounds that the registered offender poses a risk to the sexual health of any member of the community.

32 s39(2) Sex Offender Registration Act 2004
The onus of proving that risk should be upon the Chief Commissioner, who would be required to call expert evidence in support of the application.

The offender would have an opportunity to produce expert evidence in rebuttal, and a judicial officer would make a decision if he or she formed a view, on the balance of probabilities, that such an order was necessary in light of the risk the offender posed to the sexual health of members of the community.

The Chief Commissioner would not be required to prove that the offender posed a risk to any specific member of the community.

The offender would then have a right to appeal against that decision.

**Content of reports**

**12. Should all registered sex offenders continue to have the same reporting obligations that are automatically determined by the legislation?**

The LIV has no objection to a legislative presumption that all registered sex offenders have the same reporting obligations that are automatically determined by the legislation, on the condition that registration is not mandatory upon conviction or a finding of guilty for a prescribed offence, but rather only applies to those offenders who pose an ongoing risk to the sexual safety of members of the community.

However, if special circumstances exist which make it appropriate to do so, the court should have the power to amend a registered offender’s reporting conditions.

The LIV does not object to the time frames in relation to reporting obligations, set out in the SOR Act.

**13. Should the court have a discretionary power to determine the content of a registered sex offender’s reporting obligations? What criteria should govern the exercise of any discretionary power?**

The LIV submits that there should be a legislative presumption that all registered sex offenders have the same reporting obligations, as set out in the SOR Act, but only on the condition that registration is not mandatory upon a conviction or finding of guilt for a prescribed offence, but rather only applies to those offenders who pose an ongoing risk to the sexual safety of members of the community.

However, if special circumstances exist which make it appropriate to do so, the court should have the power to amend a registered offender’s reporting conditions.

**14. Should the Chief Commissioner of Police have additional powers which would permit police officers to test the truth of any report provided by a registered sex offender? If yes, what should those powers be and in what circumstances should they be available?**
The SOR Act requires a registered offender to report to the Chief Commissioner of Police any changes to personal details within 14 days after that change occurs, or within one day if that change is in relation to residence or regular unsupervised contact with a child.

The SOR Act does not currently provide Victoria Police with additional powers to ascertain the veracity of that information.

The LIV does not support additional powers for police to test the veracity of any report provided by a registered offender. The police currently have the power to enter and search a property without a warrant, where a member of the police force believes on reasonable grounds that a person has committed a serious indictable offence. “Serious indictable offence” is defined as an indictable offence which is punishable for life or for a term of five years or more.

Thus, a member of the police force currently has sufficient powers, conferred by the Crimes Act 1958, to search a property if that police member believes that child pornography is being produced or possessed, or any offence under Part 1, Division 1, Subdivision (8C) is being committed.

Management, use and disclosure of information in the Register

15. Should the Chief Commissioner of Police have an express power to give some or all information in the Sex Offenders Register to CrimTrac for national law enforcement purposes?

The LIV supports an amendment to the SOR Act giving the Chief Commissioner of Police an express power to share all information on the Register with CrimTrac. To do otherwise undermines the purpose of the SOR Act.

However, the LIV supports that information sharing only on the following basis:

a) That only those offenders who pose an ongoing risk to the sexual safety of members of the community are included on the Register;
b) That CrimTrac only uses that information for national law enforcement purposes, and only discloses that information to law enforcement bodies that would be prescribed in the SOR Act and would include the Australia Federal Police, and the police forces in each Australian State and Territory.
c) That any disclosure of that information beyond the scope of the SOR Act would constitute an offence.

16. Should the Chief Commissioner of Police have an express power to give some or all information in the Sex Offenders Register to the Secretary of the Department of Human Services for child protection purposes?

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33 s17(a) Sex Offenders Registration Act 2004
34 s14(2)(b) Sex Offenders Registration Act 2004
35 s14(2)(c) Sex Offenders Registration Act 2004
36 s459A Crimes Act 1958
37 s325(b) Crimes Act 1958
38 s68 Crimes Act 1958
39 s70 Crimes Act 1958
Members of the Police Force are currently required, under the CYF Act, to report to the Secretary of DHS where they have, during the course of their employment, formed a belief on reasonable grounds, that a child is in need of protection. However, this has led to significant issues, where a police member has failed to report unsupervised contact to the DHS because they have not formed a belief that a child is at risk, where in fact that child may be.

The LIV submits that the Chief Commissioner of Police should have an express power, to report to the DHS as soon as practicable, whenever a registered offender reports that they have had unsupervised contact with a child.

This amendment should only apply if the SOR Act is specifically amended to restrict inclusion on the Register to the most high risk offenders, as determined by judicial discretion.

The DHS could then undertake an investigation as to whether a child is, indeed, at risk.

The LIV has concerns in relation to the “unsupervised contact with a child” provisions of the SOR Act.

First, the provisions are silent as to what constitutes “unsupervised contact”, although “contact” is defined for the purposes of Part 5 of the SOR Act as:

\[
\text{contact} \text{ means any form of contact between a person and a child and includes—}
\]

(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;

Secondly, a registered offender currently has no obligation to report “unsupervised contact” with a child, unless he or she has unsupervised contact with the child for at least 3 days (whether consecutive or not) in any period of 12 months.

This provision means that, in order to ensure that a registered offender is fulfilling his or her reporting obligations under the SOR Act, the registered offender must keep a record of any “unsupervised contact” with a child, then report that contact when it occurs for at last 3 days over a 12-month period. This provision, the LIV submits, is unworkable and undermines the purpose of the SOR Act.

It is also conceivable that a registered offender poses a risk to a child on the inconsecutive days of unsupervised contact that occur prior to the requirement of a report.

The LIV submits that the Act should be amended to include a definition of “unsupervised contact”, so that registered offenders reporting obligations are absolutely clear.

The LIV also supports an amendment to the SOR Act to provide that “unsupervised contact” constitutes one day, rather than three consecutive or non-consecutive days, of contact with a child.

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40 s184 Sex Offenders Registration Act 2004
41 Ombudsman Victoria Investigation into the failure of agencies to manage registered sex offenders February 2011, p7
42 Part 5 – Registered Sex Offenders Prohibited from Child-related Employment Sex Offenders Registration Act 2004
43 s14(2)(c) Sex Offenders Registration Act 2004
17. Should the Chief Commissioner of Police have an express power to give some or all information in the Sex Offenders Register to any other public body or official for any other purpose?

The LIV submits that the sharing of information contained in the Register should be restricted to those bodies expressly prescribed in the SOR Act, and that, unless expressly stated, that information should only be shared with those prescribed bodies, where a registered offender poses a risk to a member of the community.

18. Should registered offenders continue to be required to report ‘unsupervised contact’ with a child? If so, should the legislation contain guidance about what is meant by this term? Should registered sex offenders be required to report ‘unsupervised contact’ with a child before it occurs rather than after it has occurred? If reporting were required in advance of contact, should it be before the first contact, a subsequent contact, or at any other point in time?

The LIV submits that SOR Act should be amended to include a definition of “unsupervised contact” which incorporates the definition of “contact” from Part 5 of the SOR Act44, namely:

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;

This amendment is necessary to make the reporting obligations of a registered offender, absolutely clear.

The LIV also submits that the time frame of unsupervised contact, which would initiate the necessity of a report to the Chief Commissioner, should be one day, rather than three days as is currently contained in the SOR Act.

This time frame would have the benefit of making the reporting obligations clearer, and would better serve the purposes of the Act; a high risk offender is perhaps as likely to pose a risk to a child on one day of unsupervised contact, as on three.

The LIV is opposed to an obligation for a registered offender to report unsupervised contact with a child before it occurs. In many cases it would be impossible to predict unsupervised contact with a child. Such a provision would set registered offenders up for a breach of their reporting obligations, where unsupervised contact was unplanned and unexpected.

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44 Part 5 – Registered Sex Offenders Prohibited from Child-related Employment Sex Offenders Registration Act 2004
Protections for registered sex offenders

19. Are there adequate protections for registered sex offenders in the Act?

The LIV supports the current protections for registered offenders in the SOR Act, on the condition that inclusion on the Register is not mandatory upon a conviction or finding of guilt for a prescribed offence, but is a matter of judicial discretion, and only applies to those offenders who pose an ongoing risk to the sexual health of a child, or member of the community.

In those circumstances, the LIV submits that the SOR Act limits the rights of registered offenders in a reasonable and proportionate way.

Accountability and review

20. Are the current accountability and review mechanisms in the Act adequate?

The LIV submits that the SOR Act should be amended to extend and clarify the Director of the Office of Police Integrity’s monitoring requirements.

Currently the SOR Act is silent as to how often the Director should monitor compliance with the SOR Act by the Chief Commissioner of Police and others who have access to the Register.

The SOR Act should be amended to clarify how often the Director should undertake compliance checks, and how often the Director should provide written reports, and to which Minister.

The LIV submits that compliance checks should take place on a regular basis.

Furthermore, the LIV supports Recommendation 8 in the Ombudsman’s report that:

“The Office of Police Integrity:

Extend its auditing of the registry to encompass the obligation of Victoria Police to report to the Department of Human Services when an offender has disclosed contact with a child and that each report of contact with a child has been documented and provided to the Department of Human Services in accordance with legislative requirements.”

45 Ombudsman Victoria Investigation into the failure of agencies to manage registered sex offenders February 2011, p 37
Management of other information about registered offenders

21. Should other government agencies be required or permitted by legislation to give the Chief Commissioner of Police information about a registered sex offender for inclusion in the Sex Offenders Register? If so, what type of information?

The LIV submits that, any person from another government agency who forms a belief based on reasonable grounds that the sexual safety of a child is at risk, must report that information and the basis of that belief to Victoria police, for that information to be included on the Register.

In this way, the sexual safety of children is always of a paramount concern.

22. Should Corrections Victoria be required or permitted by legislation to give the Secretary of the Department of Human Services information about a sex offender that is acquired during any treatment programs undertaken by the offender when in custody or on parole?

The LIV accepts that information sharing between Corrections Victoria and DHS is a complex issue. The LIV agrees that fostering a relationship of trust and confidence between a Corrections Office and a registered offender facilitates rehabilitation which is in the community’s best interest.

However, the LIV submits that the right of a child to be protected outweighs the right to privacy of an offender in this regard.

Corrections Victoria should only be required to share information about a sex offender that is acquired during any treatment programs undertaken by the offender when in custody or on parole, where the Corrections officer forms a view, based on reasonable grounds, that the offender poses a risk to the sexual safety of a child.
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 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 offences, 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 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 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 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, the Children, Youth and Families Act 2005 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 are not within the scope of the review.