

Inquiry into the Management of Child Sex Offender Information

Submission to the Victorian Legislative Council Legal
and Social Issues Committee

29 April 2021

Contents

Who we are.....	4
Introduction	5
The harsh impacts of mandatory registration	5
The importance of judicial discretion	6
Unintended consequences of mandatory registration.....	7
The Tasmanian approach.....	8
Conclusion.....	9

Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.¹

The ALA office is located on the land of the Gadigal of the Eora Nation.

¹ www.lawyersalliance.com.au.

Introduction

1. The ALA welcomes the opportunity to have input into the inquiry by the Legislative Council Legal and Social Issues Committee ('the Committee') into the Management of Child Sex Offender Information.
2. The focus of this submission is on the need for judicial discretion in relation to decisions to place an offender on the Sex Offenders Register (SOR).
3. While the ALA supports the existence of the SOR, it considers that the mandatory registration of offenders undermines the purposes of the register and in some cases results in unfair outcomes. The ALA submits that sex offender registration decisions should be discretionary and based on whether an offender poses a real risk of further sexual offending.

The harsh impacts of mandatory registration

4. The ALA is concerned that the current approach to sex offender registration is too rigid and does not enable a court to consider the individual circumstances of each person and the specific nature of their offending. The ALA submits that this rigidity can result in unfair outcomes for particular individuals, particularly those for whom the offending was historical in nature and the offending was one-off or situational with no further subsequent offending; for young people; and for people with cognitive impairment.
5. The ALA notes that the consequences of being placed on the SOR can be quite serious and detrimental to the prospects of rehabilitation and reintegration into the community post-sentence. The significant long-term impacts for persons placed on the SOR can include difficulties obtaining employment and housing, social isolation, deterioration of mental health and substance abuse. These can often result in recidivism and re-entry into the criminal justice system.
6. Any person on the SOR is also prohibited from applying for or engaging in 'child-related employment', which covers a broad range of employment including educational institutions, community services, and any clubs, associations or movements that provide services or conduct activities for children. This is regardless of whether the registrable offence was related to child sexual offending.

7. The *Sex Offenders Registration Act 2004* (Vic) ('SORA') also requires certain people who commit sexual offences to keep police informed of their whereabouts and other personal details for a period of time: eight years (minimum reporting period), 15 years or life, depending on the offence that has been committed.² The stated objective of this scheme is to reduce the likelihood that people will re-offend and to facilitate the investigation and prosecution of any offences that they may commit.
8. The ALA is concerned that for some individuals this reporting scheme will unnecessarily extend their contact with police and the criminal justice system, creating potential for adverse or confrontational contact with law enforcement officers, resulting in further arrest and prosecution. In addition, it may result in charges for breaching SORA reporting obligations. This is particularly concerning for those people who are already subject to excessive policing attention, including Aboriginal or Torres Strait Islander people, homeless people, people with mental illness or cognitive impairment, or people from particular culturally and linguistically diverse communities.
9. The ALA agrees with the Law Council of Australia that –

Inclusion on the Register, and the reporting obligations it entails, has the potential to extend a persons' 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 persons' future employment opportunities and engagement in the community. The consequences, particularly for first time and one-off offenders, can be unduly punitive.³

The importance of judicial discretion

10. The ALA strongly submits that there is a need for judicial discretion in relation to decisions to place a person on the SOR. A judicial discretion will permit key issues – such as those

² *Sex Offenders Registration Act 2004* (Vic) ss 34-36.

³ Law Council of Australia, *Policy Statement on Registration and Reporting Obligations for Child Sex Offenders* (Policy Statement, 2011) 2 <<https://www.lawcouncil.asn.au/resources/policies-and-guidelines/registration-and-reporting-obligations-for-child-sex-offenders>>.

referred to in paragraph 4 above – to be taken into consideration, given that in such circumstances there may be unfair outcomes should the offender be placed on the SOR.

11. The ALA notes that the Victorian County Court has previously submitted that several judges consider that there should be a discretion when it comes to placing a person on the sex offenders register, rather than requiring the person to make an application for a registration exemption order.⁴
12. The ALA agrees with the County Court that inclusion on the SOR should be a matter for judicial discretion, and ought only to apply to those offenders whom, upon expert assessment, are deemed to pose an ongoing real risk to the sexual safety of members of the community. The ALA also agrees with the County Court that the SOR should also be reviewed to remove those registrants who pose little risk.

Unintended consequences of mandatory registration

13. The ALA is concerned that the scheme of mandatory registration has several unintended consequences that cause significant delays and wastage in the operation of the criminal justice system. These include a:
 - further disincentive to enter a plea of guilty for a sexual offence charge, out of concern for the serious long-term implications of being placed on the SOR;
 - greater likelihood of contested hearings resulting in delays in matters coming to trial in the courts; and
 - drain on policing resources due to monitoring and enforcement of SOR reporting obligations.
14. The ALA submits that the purpose and integrity of the register is undermined as a result of these unintended consequences, which could be mitigated with the introduction of judicial discretion in relation to decisions to place a person on the SOR.

⁴ County Court of Victoria, *Response to the VLRC Issues Paper – Improving the Response of the Justice System to Sexual Offences*, (Submission, 2021) 24-25
<https://www.lawreform.vic.gov.au/sites/default/files/Sub_60_County_Court_of_Victoria_final.pdf>.

The Tasmanian approach

15. The equivalent provisions in the Tasmanian *Community Protection (Offender Reporting) Act 2005* (Tas), allow for some discretion on the part of the court. Section 6 states:

(1) The court is to make an order directing that –

(a) the Registrar cause the name of a person whom the court sentences for a reportable offence to be placed on the Register; and

(b) the person comply with the reporting obligations under this Act –

unless the court is satisfied that the person does not pose a risk of committing a reportable offence in the future.

(2) The court is to make the order at the time the person is sentenced for the reportable offence.

(3) For the purposes of subsection (1), it is not necessary that the court be able to identify a risk of offending against a particular person or particular persons or a particular class of persons.

16. The practice in Tasmania is that an offender is placed on the register unless the risk of reoffending is far-fetched or fanciful.⁵ There is consistent evidence that psychologists and psychiatrists are prepared to offer opinions that the risk of reoffending is far-fetched or fanciful in cases where the offending is historic and there are no further sex offences, or with very young offenders.

17. In the 15 years that the Tasmanian discretion has existed, the ALA is unaware of any person who is not on the register subsequently offending.

18. The ALA submits that the Tasmanian provision does not provide sufficient discretion, given the interpretation of the provision by Tasmanian courts. The ALA submits that discretion to place an offender on the register should only be exercised where the court is satisfied beyond reasonable doubt that the offender poses risk to the sexual safety of one or more persons or

⁵ See *Hickman v PWJ* [2015] TASSC 55.

of the community. The legislation should reflect the test applied in the case of *Bowden*,⁶ which construed the concept of 'risk' as a 'real risk', and not fanciful.

Conclusion

19. The Australian Lawyers Alliance (ALA) welcomes the opportunity to provide this submission to the Legal and Social Issues Committee inquiry into the Management of Child Sex Offender Information. The ALA is available to provide further information in relation to any of the matters raised by this submission.



Jeremy King

Victorian President

Australian Lawyers Alliance

⁶ [2013] VSCA 382, [33].