



Law Council
OF AUSTRALIA

Office of the President

11 January 2019

Mr Hamish Hansford
Assistant Secretary
Department of Home Affairs
Level 1, 3-5 National Cct
BARTON ACT 2600

By email: childexploitation@homeaffairs.gov.au

Dear Mr Hansford

National Public Register of Child Sex Offenders

Thank you for the opportunity to provide initial high-level views on the proposed National Public Register of Child Sex Offenders (**the Register**).

The Law Council of Australia holds significant concerns about the very limited timeframe the Federal Government has allowed for stakeholder consultation into its proposed Register, given no detailed proposal has been received. In the timeframe available for response, the Law Council has not had the opportunity to properly consider and answer the questions provided in the Consultation Paper: National Public Register of Child Sex Offenders (**Consultation Paper**). It respectfully requests a three-week extension in which to provide informed views on these questions to Government.

Preliminary consultation period inadequate and model proposed is unlikely to achieve consistency

I note that the Law Council has only been given until close of business Friday (11 January 2019), to provide 'initial high-level views' on the Register after being advised by the Department of Home Affairs (**the Department**) at 11.15am on 10 January 2019. That is, the Law Council has been granted only approximately 30 hours to provide these initial views. Further, the Department only provided the Consultation Paper to the Law Council at 5.47pm on 10 January 2019, requesting views by close of business on 11 January 2019, allowing less than 24 hours consultation. This comes after the proposed Register was announced only on 9 January 2019 by Home Affairs Minister, the Hon Peter Dutton MP.

While the Department has noted that it 'would then of course welcome a more detailed response when you have had time to consider the proposal more fully', the difficulty from the Law Council's perspective is that it has not been presented with a detailed proposal regarding the Register upon which to meaningfully provide comment. The Consultation Paper is five pages in length and only includes one page on the preliminary model provided for comment.

The Law Council considers that such a process is inappropriate and inadequate.

A proper proposal needs to be developed before adequate consultation can occur. Otherwise there is a real risk of the Register failing in its stated aim of protecting the community and it may have myriad unintended consequences.

A comprehensive consultation process based on a detailed proposal should occur before any legislation is introduced.

A detailed proposal should, for example, outline what is intended to be captured by the Register. A careful consideration is required of the criteria to be applied to firstly determine the definition of a 'child sex offender'. The Consultation Paper notes that registered child sex offenders (i.e. convicted of serious, multiple or repeat child sex offences and subsequently registered under the Australian Child Protection Offender Reporting Scheme) would appear on a National Public Register post-sentence. It also notes that a national approach is needed for consistency purposes. However, the Australian Child Protection Offender Reporting Scheme is currently based on a system where child sex offenders are registered under state and territory offender registration legislation which may differ across jurisdictions. The creation of the Register based on this information is therefore unlikely to achieve the national consistency intended.

Further, as noted below, the Law Council does not support automatic inclusion on a child offender register which appears to be contemplated by the proposed model.

Clarification is needed as to whether the following circumstances are proposed to be captured:

- where an offence has been proven and no conviction recorded;
- people who may suffer from an intellectual disability or serious mental illness that substantially reduces the moral culpability of their offending behaviour; and
- juveniles who commit child sexual assault offences.

In relation to juvenile child sex offenders it is noted that the proposal is that information about juvenile child sex offenders 'would not be made public while the offender remains under the age of 18'. The Law Council submits that children who commit child sexual assault offences should not at any stage have their information made available on a public register, even after they attain the age of eighteen years. There are very good reasons why the approach of our criminal courts to sentencing juveniles is different to sentencing adults and for an offence committed by a juvenile to be on public register designed primarily for adult offenders does not reflect the distinction in criminal responsibility between adult and juvenile offenders. However, there could be provision in relation to particularly serious cases of offending by a juvenile for the prosecution to make an application to the court, once the offender has acquired the age of eighteen, for that person to be listed on the public register if the court, having considered various psychiatric and other evidence, is of the view it is appropriate to do so in the interests of community protection.

Great care needs to be taken in determining who should be placed on the Register.

The Law Council has long been of the view that any determination of whether a person should be included on a child sex offenders register should not be arbitrary and should be based on an evidence-based assessment and determination that the person poses a real continuing risk of danger to a child or children generally. This determination should be made

either at the time of sentencing by the sentencing court or in the form of post detention orders by a court to ensure that it is based on the evidence of any such risk.

Law Council Policy Statement on Registration and Reporting Obligations for Child Sex Offenders

In the absence of a detailed proposal upon which to comment, I attach the Law Council's Policy Statement on Registration and Reporting Obligations for Child Sex Offenders (2010) for your consideration. The Policy Statement outlines principles which the Law Council says should underpin child sex offender registration systems, including:

- Inclusion on a child 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 of children generally;
- 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 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 required 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 offenders register should constitute an offence; and
- Unlawful disclosure offence provisions should be accompanied by a complaints based mechanism administered by an independent body such as the Privacy Commissioner.

Broad disclosure of offender information

The Law Council would need to know how and by whom information on the Register may be publicly disclosed. In particular, the Law Council would be concerned by any policy proposals which would effectively mean that the decision to disclose information contained on the register would be left to the discretion of a prescribed police officer or officers, without judicial supervision.

The Law Council would also be concerned if, under a new national approach, information on registered sex offenders could be disclosed to a potentially very broad category of people. This would, in the Law Council's view, give rise to unintended consequences across Australia.

In the Law Council's view, the provision of information on registered offenders without court supervision should be restricted to law enforcement agencies only.

We believe an approach which allows information to be disclosed quite broadly, in accordance only with police protocols and without court supervision, has many potential dangers.

First, many child sex offences cases are the subject of court imposed non-publication orders which are not imposed in order to protect the identity of the offender, but to protect the identity of the victim, who are often young children and can be identified through the publication of the name of the offender. The Consultation Paper notes that:

All information would be quality assured and vetted by Australian law enforcement agencies prior to publication, to ensure it is accurate, does not identify victims of child sexual abuse and is consistent with any existing non-publication court orders.

The Law Council submits that it is difficult for law enforcement authorities to determine whether the identity of the victim can be inferred through the publication of the offender's name. It should be remembered that it is not uncommon for an offender to be a member of the family of the victim, so that identification of the offender may lead to identification of the child. This is a decision which would be more appropriately made by a court. This needs to be carefully considered and there should be some provision for the input of a victim (or their parent or guardian) of a child sexual offence to be consulted before the offender is listed on a public register as it may exacerbate the already profound psychological damage occasioned to the victim.

It is important that people, especially children, are not deterred from reporting these offences, because of fear of the adverse and widespread publicity that may follow to them and their family if the perpetrator is named on a public register. The prosecution of offenders is of critical importance to the Australian community.

Secondly, under such an approach it is conceivable in appropriate cases that relevant persons might include community members who reside in close proximity to those who qualify as a registered offender, if that community member (or their children) is considered to be at risk. Such a system would not involve any front-end court supervision of the process of disseminating information on an applicable registered sex offender to relevant persons. Moreover, there would exist no mechanism to allow judicial review of a decision to provide an offender's details (if the power is not directly legislatively based). Hence there will be no back-end monitoring of the use of the power either.

Thirdly, the Law Council would be concerned by any legislative mechanisms which would make it impossible for offenders to be removed from a register following a lengthy period of non-offending. In effect, their placement on such a register acts as another means of punishment, beyond their original sentence and irrespective of whatever efforts they have made to complete rehabilitation.

Broad disclosure systems will also place law enforcement officers in a potentially very difficult position. While protocols or guidelines might set out a structured process to be applied in each case, it is arguable – and quite understandable – that police may be reluctant to exercise discretion in favour of the registered offender when making determinations to release information. Faced with the prospect of criticism that may flow in circumstances where information was suppressed and a registered person were to re-offend, a police officer (either the field officer making the recommendation or the ultimate decision maker) is likely to err on the side of disclosing the offender's details to a potentially inappropriately broad category of people.

The absence of a process to review decisions to disclose information and the likelihood of community pressure being exerted in high profile cases, would raise concerns about whether police are the appropriate agency to make recommendations and/or decisions in respect of this matter. A better model, for cases where the assessing and determining authority is not the sentencing court, would enable police to make an application to the court for an order that an offender be placed on the public register.

Broad disclosure of applicable offender information may also serve to encourage community members to engage in premeditated acts of violence against applicable registered offenders. Increased vigilante action will inevitably place further pressure on the resources of law enforcement agencies. Vigilante action must not be underestimated. It can amount to serious criminal activity including violent assault and even murder.

It is essential an effective and appropriate balance is struck between protecting the community and protecting the basic rights and liberties of released offenders who have been already been sentenced by the courts.

Given the intrusive nature of the powers and the problems discussed above, a more appropriate balance might be struck if the courts were charged with supervision over the exercise of these powers (other than for law enforcement agencies). It is argued that courts are better suited to this function because:

- they have greater capacity to investigate these matters in accordance with the principles of justice and statutory law;
- the separation of powers makes them less susceptible to political pressure;
- it would ensure decisions are more transparent and that appropriate avenues of review exist; and
- it would ensure that principles of procedural fairness apply and that the court would be required to give reasons for its decision for a person to be named on a public register.

In the Law Council's view and given the restriction of liberties proposed by broad sex offender information disclosure systems, courts must play a role in supervising the exercise of these powers. There should be a judicial determination of who is to be placed on the public register taking into account appropriate criteria for the protection of the community, directed towards determining the actual risk an individual poses to the community, such as likelihood of re-offending and prospects of rehabilitation. The court should also be afforded the opportunity to consider the evidence and arguments or both sides before making a decision that naming the person on the public register is in the best interests of protecting the community.

Finally, all states and Territories have systems in place for the monitoring and registration of child sex offenders by their police forces. They have extensive powers to monitor and check child sex offenders. These are firmly in place to protect the public. Furthermore, there is provision for 'Extended Supervision Orders' to be made (e.g. in NSW), to further regulate, monitor and intensively supervise particularly serious child sex offenders in order to protect the community. It cannot therefore be said that there are not measures currently in place to address the legitimate need to protect the community from recidivist child sexual offenders. Therefore, any proposal for a Register must proceed carefully to achieve the right balance with laws that accord with the rule of law.

I would appreciate if you could draw the above views to the attention of Ministers when developing the proposed Register.

The Law Council would welcome the opportunity to comment on a detailed proposal or to discuss any of the above.

I trust the Department will give this matter every consideration.

Please contact Dr Natasha Molt, Director of Policy at natasha.molt@lawcouncil.asn.au or on 02 6246 3754, if you would like any further information.

Yours sincerely

A handwritten signature in black ink, appearing to read 'A. Moses'.

Arthur Moses SC
President