



Law Council  
OF AUSTRALIA

# Consultation Paper: National Public Register of Child Sex Offenders

Department of Home Affairs

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## About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2019 Executive as at 1 January 2019 are:

- Mr Arthur Moses SC, President
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- Mr Tony Rossi, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

## Acknowledgement

The Law Council is grateful for the assistance of its National Criminal Law Committee in the preparation of this submission.

## Executive Summary

1. The Law Council welcomes the opportunity to provide a submission to the Department of Home Affairs in response to the Australian Government's Consultation Paper in relation to establishing a National Public Register of Child Sex Offenders (the **Consultation Paper**).
2. The Law Council acknowledges that child sexual abuse and exploitation are particularly serious crimes committed against some of the most vulnerable members of the Australian community.
3. The importance of this issue has been the subject of significant investigation and analysis by the *Royal Commission into Institutional Responses to Child Sexual Abuse* in 2016 which made several recommendations to improve the protection of children in an institutional setting. However, the establishment of a public register of child sex offenders was not one of the recommendations made.<sup>1</sup> The vast majority of sexual assaults are not committed by strangers but rather a person known to the victim, and a large proportion of offences are committed by a family member.<sup>2</sup> Further, these registers contain many low-risk offenders, and young offenders where the age difference between them and the victim is small and the conduct was consensual. There is a strong public interest in the rehabilitation of people in these categories which may well be adversely impacted by publicly naming and shaming them indefinitely and beyond the period of their court-ordered punishment.
4. While the proposed National Public Register of Child Sex Offenders (the **Register**) would capture persons listed on existing state and territory non-public Registers, it is also intended to have some impact in deterring people not on the register from committing a child sex offence.<sup>3</sup> However, the Law Council notes there are already significant penalties in place for these types of offences and that both general and specific deterrence have great weight as a purpose of sentencing offenders convicted of child sexual assault or related offences such as possessing child pornography.<sup>4</sup>
5. A recent study of empirical data in relation to the effectiveness of public sex offender registries both overseas and in Australia was conducted by the Australian Institute of Criminology. It concluded that while public registries may have a small deterrent effect on first time offenders, they do not reduce rates of recidivism of offenders already on the Register.<sup>5</sup> However, based on a small number of studies in the United States, there was some evidence that non-public sex offender registries do reduce re-offending by assisting law enforcement.<sup>6</sup> This serves to illustrate that the existing non-public system of sex offender registration, as currently used by the states and

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<sup>1</sup> Commonwealth, *Royal Commission institutional Responses to Child Sexual Abuse* (2016) vol 8, 22. Recommendations made in relation to *Record keeping and information recommendations*.

<sup>2</sup> In 2015 approximately three quarters of sexual assault victims knew the offender and one third of the offenders was a family member which increased to 83 percent of victims aged less than fourteen years. Australian Bureau of Statistics 2017. *Crime Victimization, Australia, 2015-2016*. ABS cat. No.4530.0 Canberra: ABS. <http://www.abs.gov.au/ausstats/abs@nsf/mf/4530.0>

<sup>3</sup> Department of Home Affairs, *National Public Register of Child Sex Offenders* (2019) 1 ('A National Public Register').

<sup>4</sup> See for example *R v Booth* [2009] NSWCCA 89 at [40] – [44] Simpson J, *R v ABS* [2005] NSWCCA 255 at [26] Buddin J, *R v Cook* [2004] QCA 469.

<sup>5</sup> Australian Institute of Criminology "What impact do public sex offender registries have on community safety" No 550 May 2018 6.

<sup>6</sup> Ibid.

territories in Australia, is a more effective system than the proposed public registration model in reducing the incidence of child sexual assault.

6. It is very important to note that none of the states and territories – which administer the existing registries - has a public-facing scheme. The Law Council has concerns in relation to the impact the proposed Register will have on the existing state and territory legislation enacted to establish a cogent system of non-public registration of child sex offenders.
7. The Law Council also has concerns in relation to both the constitutional validity of any Commonwealth legislation which is enacted to establish the Register and the significant impact the publication of information will have in relation to the privacy of both offenders and victims of child sexual assault offences. In this submission, there is discussion in relation to these issues as well as each of the thirteen questions listed in the Consultation Paper<sup>7</sup> including for example the:
  - types of offenders to be included on the Register;
  - information to be made available on the Register and for what purpose;
  - existing legislation and what amendments would be required; and
  - method by which information is entered on the Register.
8. Key recommendations of this submission include:
  - There be careful consideration of the privacy concerns of both the victims of the offences and the offenders.
  - There be careful consultation with state and territory Governments so that the existing systems in place for non-public registration are not undermined;
  - There be a careful consideration of the constitutional validity of any proposed legislation enacted to establish the Register;
  - If there is to be a public Register any inclusion on the Register should only be made by a court order and not be an arbitrary or automatic process based on information extracted from existing registration schemes; and
  - The preferred model for the Register, if it is to be established at all, is that it should not allow for a public facing database, but require the public to make an application for the information in certain circumstances from the Australian Federal Police or the Commissioner for Police in each state and territory.

## Questions for Consultation

### **Does your organisation support public registration of registered child sex offenders?**

9. The Law Council does not support a model that would allow an open, central public website. The Law Council considers that there is adequate state and territory legislation in place to protect the public from recidivist child sex offenders which achieves an appropriate balance between protecting the community and the privacy concerns of victim, offenders and their families.

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<sup>7</sup> Department of Home Affairs, *National Public Register of Child Sex Offenders* (2019) 5 ('A National Public Register').

10. The Law Council's Policy Statement on *Registration and Reporting Obligations for Child Sex Offenders (2010)* outlines the principles which the Law Council consider should underpin any potential national public child sex offender registration system, 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;
- 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.

## **What Legislative, systems and resourcing implications would a National Public Register have on responsible agencies?**

### **The existing legislation**

11. At present each state and territory has legislation in place in relation to the non-public registration of persons convicted of prescribed sexual and other offences committed against children.<sup>8</sup> The primary purpose of this legislation is to both reduce the likelihood that a person on the Register will re-offend and to assist law enforcement authorities to facilitate the investigation and prosecution of any further alleged or suspected offences committed by a person listed on the Register. It achieves this by allowing law enforcement to know of the location of a person on the Register, as well as a significant quantity of other information.

12. The present state and territory legislation prescribes who and when a person is to be placed on the Register and then sets out what legislative reporting and other obligations apply to a person who is listed on the Register. If the registered person

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<sup>8</sup> *Crimes (Child Sex Offenders) Act 2005* (ACT), *Child Protection (Offenders Registration) Act 2000* (NSW), *Child Protection (Offender Reporting and Registration) Act 2004* (NT), *Child Protection (Offender Reporting) Act 2004* (QLD), *Child Sex Offenders Registration Act 2006* (SA), *Community Protection (Offender Reporting) Act 2005* (Tas), *Sex Offenders Registration Act 2004* (Vic), *Community Protection (Reporting Reporting) Act 2004* (WA).

fails to comply with these reporting and other obligations the legislation creates various offences around failing to comply with their reporting obligations or providing misleading information to police when reporting.<sup>9</sup>

13. The various non-public Registers in each state and territory (with the exception of Western Australia, discussed below) provide the police with information in relation to registered persons as to residence, identity, general location where they can be found, employment details, club membership, distinguishing features such as tattoos, details of the motor vehicle used by the person, details of any carriage service used by the person, details of any computers, internet providers and email addresses used by the person, and details of any children with whom the person is residing. The person is required to report any changes in any of these circumstances immediately during their specified "reporting period". If there are no changes they must still report to the police once a year to confirm the accuracy of the information contained on the register during their "reporting period". The length of time the person is required to report is determined by the nature of their offending and risk to the community and the type of offences they have committed.<sup>10</sup>
14. The information on the registers can generally only be accessed in limited circumstances. For example in NSW, section 19BA of the *Child Protection (Offender Registration) Act 2000* sets out the circumstances when certain "scheduled agencies" may collect and use personal information about a registrable person. That section operates by authorising and exempting the agency from the operation of the *Privacy and Personal Information Protection Act 1988* (NSW) that restricts access to information held by the government.
15. There are similar privacy restrictions put in place in all the state and territory registration Acts restricting who can access information that is on the Register with access being generally restricted to persons authorised by the Commissioner of Police to do so.<sup>11</sup>
16. The legislation in each state and territory forms the basis of the offenders who are then listed on the Australian Child Protection Offender Reporting Scheme. In support of this scheme the Australian Criminal Intelligence Commission maintains the National Child Offender System, which is a web based application that allows Australian police to record and share child sex offender information and exchange information between each state and territory police force. It is not presently possible for the public at large to be permitted access to information relating to persons listed on the various state and territory registers by virtue of the privacy restrictions imposed by each state and territory Act relating to the non-public registration of child sex-offenders.
17. In South Australia, Western Australia, Victoria and Tasmania there is some provision for the Commissioner of Police to authorise publishing details of a registered offender, including their name and a photograph, where the person has failed to comply with

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<sup>9</sup> See for example *Child Protection (Offender Registration) Act 2000* (NSW) ss 17, 18 that provide offences of failing to comply with reporting obligations, or providing misleading information, punishable by up to five years imprisonment.

<sup>10</sup> For example, *Child Protection (Offender Registration) Act 2000* (NSW) s 14A which say the reporting period can range from eight years to "the remainder of the person's life".

<sup>11</sup> *Community Protection (Offender Reporting) Act 2004* (WA) s 81, *Sex Offender Registration Act 2004* (VIC) s 63, *Crimes (Child Sex Offenders) Act 2005* (ACT) s 118, *Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004* (QLD) ss 69,70, *Child Sex Offenders Registration Act 2006* (SA) s 61, *Community Protection (Offender Reporting) Act 2005* (Tas) s 44.

their reporting requirements and their current whereabouts is unknown.<sup>12</sup> However, in Western Australia, publication of details relating to “Missing Sex Offenders, Non-Compliant Reportable Offenders” is the first tier in a three tier system of publication of details of reportable offenders. For missing offenders in South Australia, Western Australia and Victoria, the details of publication, including the photograph must be removed from the website on which they are published as soon as the offender reports their whereabouts to the Commissioner.<sup>13</sup>

18. In Western Australia there is also the “Community Protection Disclosure Scheme”. This allows a parent or guardian of a child to apply to the Commissioner of Police to be provided with information on whether a “person of interest”, that is a person who has regular unsupervised contact with their child, is a “reportable offender”.<sup>14</sup> It is a criminal offence for a person to seek this information where they are not a parent or guardian and do not have a lawful right to access that information.<sup>15</sup> There is a restriction on publishing information on an offender who is a child and this cannot be done in any circumstances.<sup>16</sup>
19. In Western Australia the Commissioner of Police can publish the “photograph and locality” of a person if the person is subject to a “Dangerous Sex Offenders Supervision Order” (and that order does not specifically preclude publication of information pertaining to the offender), and the person commits one of the offences listed in subsection 85G(2) of the *Community Protection (Offender Reporting) Act 2004* (WA). In these limited circumstances the Commissioner can make an application to the Minister to allow publication of the identity and location of the offender having been satisfied that “the person poses a risk to the lives or sexual safety of one or more persons, or persons generally”.<sup>17</sup>
20. In Western Australia where the Commissioner intends to publish the photograph and locality of the person, written notice must be given to the person of the decision to publish, the reasons for the decision and information about their right to make submissions or be heard in relation to the proposal within twenty one days from when they receive notice. Before that actual publication, the Minister must consider any submissions made on behalf of the person<sup>18</sup> and *may* (italics added) take into account the following:
  - (a) any medical, psychiatric, psychological or other assessment relating to the person;
  - (b) any information indicating whether or not the person is likely to commit a prescribed offence in the future;
  - (c) whether or not there is any pattern of offending behaviour on the part of the person;

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<sup>12</sup> *Community Protection (Offender Registration) Act 2004* (WA) s 85F, *Child Sex Offenders Registration Act 2006* (SA) s 66F, *Community Protection (Offender Reporting) Act 2005* (Tas) s 47A, *Sex Offenders Registration Act 2004* (Vic) s 61A.

<sup>13</sup> *Community Protection (Offender Registration) Act 2004* (WA) s 85F, *Child Sex Offenders Registration Act 2006* (SA) s 66F, *Sex Offenders Registration Act 2004* (Vic) s 61E.

<sup>14</sup> *Community Protection (Offender Reporting) Act 2004* s 85J.

<sup>15</sup> *Ibid* s 82.

<sup>16</sup> *Ibid* s 85G(2).

<sup>17</sup> *Ibid* s (2)(c)(ii).

<sup>18</sup> *Ibid* s 85G(4)(a).

- (d) the person's antecedents and the seriousness of his or her total criminal record;
- (e) the person's age and the age of any victim at the time those offences were committed;
- (f) the difference in age between the person and any victims of those offences; and
- (g) any other matter the Minister considers relevant.<sup>19</sup>

21. Further factors the Minister may consider when making the decision to publish details of either a missing reportable offender or "identifying information" (photograph and general location) about a person pursuant to subsection 85G(2) of the Act, include the following:

- whether the publication of identifying information would interfere with an investigation by the police in relation to the person;
- the person's compliance with reporting obligations under the Act;
- the operation of a community order under the *Sentencing Act 1995 (WA)*; a Dangerous Sex Offender supervision order or any other court order the person is subject to;
- whether the publication of the identifying information about the person might identify a victim of an offence or the school attended by a victim of an offence, committed by the person;
- the effect that the publication of the identifying information about the person might have on a victim of an offence committed by the person;
- the views of the victim of the offence as expressed to the Commissioner;
- whether publication of identifying information about the person would increase the risk of the person committing offences;
- the Commissioner's assessment of the benefit to the community of the publication of the identifying information about the person;
- if the identifying information is about a person awaiting trial for an offence, whether publication of identifying information would prejudice the fair trial of the person; and
- any other matter the Commissioner considers relevant.<sup>20</sup>

22. The criteria listed above serve to illustrate the complex range of issues that need to be carefully considered when a determination is to be made in deciding whether to publish information about people who have committed child sex offences.<sup>21</sup>

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<sup>19</sup> Ibid s 85(6).

<sup>20</sup> See the *Community Protection (Offender Reporting) Act 2004 (WA)* s 85I.

<sup>21</sup> A similar list of criteria can be found in the *Sex Offenders Registration Act 2004 (Vic)* s 61D, to be considered before publication can occur in Victoria where a reportable offender's location is unknown.

23. An interesting feature of the Western Australian scheme is the creation of an offence of “Conduct intended to incite animosity towards or harassment of identified offenders” and conduct that is likely to increase animosity or harassment of a person where that conduct takes place in public.<sup>22</sup> This has been enacted to address the concern about acts of public vigilantism that can foreseeably occur following the publication of information about registrable offenders.
24. The proposed “National Public Register of Child Sex Offenders” will, to varying degrees, be significantly different to and inconsistent with all the existing state and territory provisions relating to non-public registration, depending on what form the Register takes.
25. The Law Council considers there should be extensive consultation with the state and territory Governments about the impact the proposed national Register will have on their existing child protection, offender registration schemes and changes that may be required to be made to their legislation to accommodate the public Register model proposed by the Federal Government which represents a significant departure from the way the current state and territory registration schemes operate.

### **Issues of constitutional validity**

26. An important consideration is whether the Commonwealth government has the power to make legislation in relation to the Register, if the state and territory Governments do not confer that power to the Commonwealth. Since the form of that legislation is currently unknown, it is difficult to say anything of substance about the potential constitutional issues at this stage. However, the Law Council notes there is no obvious head of power to support, for example, Commonwealth legislation requiring provision of information about convicted persons by State agencies or the overriding of suppression orders.
27. It should also be borne in mind that the proposed federal legislation is inconsistent with existing state and territory sex offender registration legislation that essentially provide for a non-public registration system. This may render the operation of the state and territory laws vulnerable to constitutional challenge. This is a significant concern. The state and territory systems are well established, effective and have been operating for a long time to provide coordinated, systematic assistance to law enforcement authorities in this area.
28. A further constitutional issue is that the decision to place a person on a public Register could arguably be seen as a judicial function within the meaning of Chapter III of the Australian Constitution, rather than an act of executive government. It could be argued that naming a person on a public Register has a punitive aspect and as such should not be done as an act of executive government but, in accordance with the separation of powers, by a Court.

### **Recommendations**

- **The Commonwealth should consider whether it has the Constitutional Power to legislate for a national Register; and**
- **Consideration should be given to the Constitutional implications of that Register on the existing state and territory legislation.**

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<sup>22</sup> *Community Protection (Offender Reporting) Act 2004* s 85L.

## Privacy considerations

29. The Law Council has significant concerns in relation to the privacy implications of the proposed Register both for offenders and for victims. A right to privacy is explicitly stated under Article 12 of the 1948 Universal Declaration of Human Rights which states:

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Australia is also a signatory to the *International Covenant on Civil and Political Rights* and Article 17 provides for a general right to privacy stating that:

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.

30. In Australia there is legislation both at a federal level and in each state and territory providing for the protection of privacy information. At a federal level there is the *Privacy Act 1988* (Cth) which sets out the “Australian Privacy Principles”.<sup>23</sup> In the states and territories there is separate legislation dealing with the protection of privacy and personal information.<sup>24</sup>

31. However, there is provision for the disclosure of information relating to an individual where it is for a legitimate law enforcement purpose. For example, in NSW there is a specific exemption in relation to the disclosure of information by a government agency if that disclosure is “reasonably necessary for law enforcement purposes”.<sup>25</sup> The disclosure of what would be considered private information on the Register may not be considered to be a genuine “law enforcement purpose”. In this case, for example, the *Privacy and Personal Information Act 1998* (NSW), would need to be amended to authorise the publication of the information on the Register.

32. In principle, where the divulging of information on the Register is disproportionate to the purpose it is intended for, that is community protection, by, for example, listing a person on the Register for longer than is necessary, then this could breach the general right to privacy and amount to “interference with the privacy of an individual” within the meaning of section 13 of the *Privacy Act 1988* (Cth).

33. It is also vital that any proposed legislation provide for consultation with victims, seeking their views about the publication of details of the perpetrator and the offences committed against them (where the victim is a young child this consultation could occur with the parent or legal guardian of the child). In Victoria, the Commissioner of Police can take into account both the “views of the victim” and the “the effect publication might have on a victim” before making a decision to publish information about a registrable offender.<sup>26</sup> It is clearly undesirable if the publication of information

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<sup>23</sup> *Privacy Act 1988* (Cth) s 14 and Schedule 1.

<sup>24</sup> The main legislation being the *Privacy and Personal Information Act 1998* (NSW), *Privacy and Data Protection Act 2014* (Vic) and *The Charter of Human Rights and Responsibilities Act 2006* (Vic), *Information Privacy Act 2009* (Qld), *State Records Act 1997* (SA), *State Records Act 2000* (WA), *Personal Information Protection Act 2004* (Tas), *Information Act 2002* (NT), *Human Rights Act 2004* (ACT).

<sup>25</sup> *Privacy and Personal Information Act 1998* (NSW) s 23.

<sup>26</sup> *Sex Offenders Registration Act 2004* (Vic) s 61D. There is a similar provisions in Western Australia see *Community Protection (Offender Reporting) Act 2004* s 85I(2)(d).

would impact on the victim and their family's right to privacy and this could potentially compound the already significant trauma, embarrassment and distress suffered by the victim.

34. A major privacy complication is that the proposed public model is in stark contrast with the non-public registration systems in place in the states and territories. The information in these Registries has been compiled on the basis of criteria which assume a non-public register. Providing all this information for a public Register would require fundamental re-consideration.
35. The legislation governing the establishment and administration the Register should clearly set out who may have access to the Register and for what purpose. It should follow on from this that if there is unlawful disclosure of information on the Register this should constitute a criminal offence. For example in Tasmania it is an offence for a person with access to information on the Register to "to cause the disclosure" of that information.<sup>27</sup>
36. Unlawful disclosure offence provisions should also be accompanied by a mechanism for complaints to be made by the effected person to an independent body such as the Privacy Commissioner.<sup>28</sup>

#### **Recommendations**

- **There be consideration to creating a criminal offence for unauthorised disclosure and distribution of information on the Register;**
- **There be provision for some oversight and complaint mechanism to be made to the Privacy Commissioner included in the legislation establishing any proposed Register; and**
- **Consideration must be given to the privacy concerns of the victim of any offence and the impact publication will have on their right to privacy.**

#### **The process of being listed on the Register**

37. The Law Council considers that the legislation should be framed so that a Court is responsible for deciding whether an offender is placed on any public Register. This would ensure the process of naming a person on the public Register is not automatic or arbitrary and that only offenders that are a considered by the Court to be genuine threat to community safety are placed on the Register.
38. As each state and territory already has its own legislative scheme for registration of child sex offenders, it would be more consistent if an application for an offender to be placed on the national public Register were to be made to a Court in the state or territory where the person is subject to non-public registration.
39. The Law Council considers that the legislative criteria listed in paragraphs (20) and (21) above, be used as a model of what criteria must be considered by a Court in determining whether or not an order should be made to publish information relating to an offender. The person should be served with an application setting out the orders

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<sup>27</sup> *Community Protection (Offender Reporting) Act 2005* (Tas) s 45.

<sup>28</sup> As provided by the *Privacy Act 1988* (Cth).

sought for publication and the reasons and thereby giving the person the opportunity to present a case in reply before the court makes any decision.

40. If the decision is made by a Court the rule of law principles relating to procedural fairness can have greater application. This would enable the person to be given the opportunity to obtain legal representation and to make submissions as to whether information about them should be published. It would also require the Court to set out its reasons for its decision having considered the evidence and arguments of both sides. There can also be provision for a right of appeal against the decision of the Court.
41. It is important to emphasise that the nature and extent of the information recorded on the existing state and territory registers is compiled on the premise that these are non-public registration systems. If this information is going to be relied on for a public Register, it is important that the decision to now allow publication of this information is made through a judicial process and that publication is neither automatic nor arbitrary.

#### **Recommendations**

- **The decision to allow or remove the publication of information on a public website should be made by a Court having consideration of specified, legislative criteria, and having considered the evidence and arguments of both sides, in accordance with principles relating to the rule of law and procedural fairness; and**
- **There should then be a right of appeal against that decision.**

#### **The definition of a registerable “child sex offender”.**

42. The Law Council has significant concern as to the legal definition of who should be considered to be a registerable person for the purpose of being listed on a national Register. If the definition is that any child sex offender who is currently on a state or territory Child Sex Offender Register is to be listed on the public Register, this would mean that a large number of people would be required to be placed on the national public Register, including people that have been convicted of less serious offences or have only committed one such offence. The Law Council considers that such an approach is too general and invasive of the right to privacy.
43. The state and territory child sex offender registration schemes attempt to classify offenders based on seriousness of the offence they have committed. This is determinative of the period they are subject to reporting obligations. However, one of the difficulties in imposing a national Register is there are some differences in the jurisdictions of classifying offences as either, for example class 1 or class 2 offences as is done in NSW.<sup>29</sup>
44. The focus of the criteria to be placed on the Register should be for offenders who pose a significant danger to the community and not just people who are already on state and territory child protection registers who do not pose a risk to the community because they are in the process of or have taken significant steps towards rehabilitation. For people who have achieved significant rehabilitation, to be then placed on a public register, could actually be detrimental to them and result in them

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<sup>29</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) s 3, definition of class 1 and class 2 offences.

losing employment, housing and other factors which would mitigate against re-offending.<sup>30</sup>

#### Recommendation

- **A careful, limited definition should apply to who is an eligible registrable person for the purpose of any national public Register, so that only particularly high risk and potentially dangerous offenders are subject to orders being made in relation to publication of identifiable information.**

#### Systems and Resourcing Implications

45. The model proposed in the Consultation Paper is that the Government would fund the development of a national public Register “ICT solution”, hosted by the Australian Criminal Intelligence Commission. Information would be “extracted” from the National Child Offender System to the public facing website. The proposal is that all information would be quality assured and vetted by Australian law enforcement agencies prior to publication.<sup>31</sup>
46. The model seems to assume that all the information that is proposed to be available on the public Register, that is the name, aliases, date of birth, photo, physical description, general locality, general nature of offending and period of registration, will be accurately recorded by the police in each state and territory. This information is then transferred to the National Child Offender System and subsequently “extracted” to the public facing website.<sup>32</sup>
47. The Law Council strongly opposes any system of automatic extraction from an existing database used by law enforcement authorities to a “public facing website”. There needs to be provision for the person to be able to check the accuracy of the information entered on the Register. In NSW for example, the registrable person has the right to be provided with all the “reportable information” contained in the Register by law enforcement who are then required to amend the Register if information is incorrect upon the request being made by the person.<sup>33</sup>
48. Care needs to be taken to ensure that any appeal processes are allowed to be concluded before details are automatically extracted to a public Register. For example a person may be convicted a registerable offence in a state court. The person may then appeal that decision and subsequently be successful on appeal. In these circumstances, any premature disclosure of the person’s details on a public Register is profoundly damaging to the person’s reputation and clearly inappropriate while the appeal process is pending. There should also be a legislative provision to enable an application to be made by a person to the Court to have their name removed from the public Register at any time.
49. In relation to resourcing issues, it is unclear from the Consultation Paper whether the AFP will also be the most likely body that will be responsible for establishing,

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<sup>30</sup> Australian Institute of Criminology “*What impact do public sex offender registries have on community safety?*” No 550 May 2018 7.

<sup>31</sup> *National Public Register of Child Sex Offenders* 4.

<sup>32</sup> *Ibid.*

<sup>33</sup> *Child Protection (Offenders Registration) Act 2000* s 19B.

monitoring and maintaining the Register, as well as investigating and prosecuting any offences that are committed in relation to misuse of information on the Register.

50. There will also be the resources required for the judiciary to determine issues that arise from the creation of the Register and legal aid for people who wish to contest an application. This includes judicial determination of who should go on the register and for how long, appeals against decisions for a person to be included on the Register, dealing with breaches of legislation and the new offences that will be created relating to misuse of information or improper disclosure of information on the Register. There are likely to be significant costs associated with the creation of the Register for both law enforcement and the judiciary.

#### **Recommendations**

- **There not be any automatic extraction of information from state and territory based registration systems to a national public database;**
- **That a preferred model is for information to be manually entered on the system if there is to be a public website;**
- **The offender should have the right to inspect the information prior to publication; and**
- **There be a right of appeal against any decision allowing publication of any information on a public Register.**

### **What are the timeframes associated with any required legislative and systems changes?**

51. Given that there will need to be extensive consultation with the state and territory Governments, perhaps this issue could be raised at the next Council of Australian Governments (COAG) meeting.
52. There needs to be appropriate consultations and discussion with various stakeholders, including victim support groups.

### **What are the legal implications associated with a National Public Register?**

53. As discussed above there are a number of legal implications associated with the Register.
54. A further potential legal implication is that where false information is included on the Register that falsely names a person a child sex offender, it is potentially an extremely defamatory act and the Government would be liable for a potentially large amount of damages.

### **What are the privacy implications associated with a National Public Register?**

55. See the above discussion in paragraphs (29) to (36) page of the submission under the heading "privacy considerations".

## What is required to ensure data quality and accuracy of information on a National Public Register?

56. There should be system in place to ensure that information is vetted and not automatically extracted from state based data as an error in the original data entry will be replicated on the national Register. Rather information should be compiled and checked, before then being manually entered on the Register.

## Are the types of offenders proposed to appear on a National Public Register (i.e. registered child sex offenders) appropriate?

57. The Law Council considers that there should be a number of people who are excluded from being named on a public Register of sex offenders as discussed below.

### Juveniles

58. In relation to juvenile offenders it should be the case that the default position is that a juvenile sex offender is not placed on a public Register. The existing systems of non-public registration can provide the court sentencing the offender with a discretion as to whether a juvenile offender is listed on the non-public register or not.<sup>34</sup>
59. The reason for this is that crimes committed by juvenile offenders are committed by people with much less maturity. It is for this reason that the court places greater weight on rehabilitation as a purpose of sentencing when sentencing young and juvenile offenders.<sup>35</sup> However, when a juvenile commits a very serious offence, less weight may be placed on rehabilitation and greater weight on the protection of the community.<sup>36</sup>
60. The Law council considers that a juvenile child sex offender should not be included on the public Register including after they attain the age of eighteen years. There is provision for them to be registered pursuant to existing state and territory non-public registration legislation where it is deemed appropriate by the court to do so.

### Non-Contact sexual offenders

61. Consideration needs to be given as to whether people convicted of non-contact sexual offences, such as possessing child pornography should be named on the Register. This offence can apply to a range of offending behaviour, including “sexting” (the taking and sending of sending of nude photograph’s to themselves and other people). This is a common occurrence and offence committed by young people throughout the world.
62. In the United States there were so many young people and adolescents being placed on the public Register due to “sexting” type offences, the legislation had to be

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<sup>34</sup> An example is *Child Protection (Offenders Registration) Act 2000* (NSW) s 3C gives the sentencing court a discretion to make an order the child offender is not to be treated as a registrable person for the purposes of that Act.

<sup>35</sup> *KT v R* (2008) 182 A Crim R 571 [22] (McClellan CJ), *R v GDP* (1991) 53 A Crim R 112 [115-116].

<sup>36</sup> *R v Adamson* (2002) 132 A Crim R 511 [31], *IE v R* (2008) 183 A Crim R 150 [16].

specifically changed in a number of states to address this issue and prevent them being named on the public Register.<sup>37</sup>

### **People with Mental Illness and Cognitive Impairment**

63. In sentencing offenders who suffer from significant mental illness or cognitive impairment the court is required to have regard to this when assessing the moral culpability of the offender. A serious mental condition can reduce the weight placed by the court on general deterrence as a purpose of sentencing.<sup>38</sup>
64. The Law Council considers that it is in the interests of justice for people who suffer from a significant mental health condition to be given the full weight of the principle they are not an appropriate vehicle for general deterrence and should not be listed on a national public Register.

### **People who have achieved genuine rehabilitation**

65. There should be some provision for people who have not re-offended for a lengthy period of time to be excluded from being named on a public Register. There should also be provision that where a person has not offended for a period of time, the person can apply to the court for their name to be removed from the Register. There is provision in the current state and territory registration schemes for a person to apply to have their reporting requirements suspended after a period of time. A similar provision should be included in the model for the proposed national Register.

### **Offenders in proceedings where the court has made a non-publication order**

66. There are cases where the Court can make a suppression or “non-publication order”. For example in NSW pursuant to the *Court Suppression and Non-Publication Orders Act 2010* the court can make an order prohibiting the publication or disclosure of information tending to reveal the identity of or otherwise concerning any party to or witness in proceedings before the court.<sup>39</sup> One of the grounds for the Court to make the order is that the order is necessary to avoid causing undue distress or embarrassment to a party or witness in criminal proceedings involving an offence of a sexual nature.<sup>40</sup> Where such an order is made it would not be appropriate for the offender to be listed on a national Register accessible to the public at large.

### **Offenders where the victim of the offence does not want the offender named on the public Register**

67. As raised above, there should also be some consultation with a victim or the guardian or parent of a victim of child sexual assault as to whether they agree to the offender being listed on a public Register. If they do not wish this to occur because it may cause the child victim or their family undue distress or embarrassment then the offender should not be named on the public Register.

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<sup>37</sup> Harripersad KW 2014, From Sexting to sex offender: Adult punishment for teenage hijinks. *Florida A & M University Law Review* cited in the Australian Institute of Criminology “*What impact do public sex offender registries have on community safety*” No 550 May 2018.

<sup>38</sup> *Muldock v The Queen* (2011) 244 CLR 120 at [10-460].

<sup>39</sup> *Court Suppression and Non-Publication Orders Act 2010* (NSW) s 7.

<sup>40</sup> *Ibid*, s 8(1)(d).

## What categories of information about registered child sex offenders should be published on a National Public Register?

68. In the Consultation Paper the suggested information to be available on the website included the convicted offender's name, aliases, date of birth, a photo, physical description, general locality, a description of the general nature of offending and the period of registration.<sup>41</sup>
69. The Law Council considers that the less information that is included, the better the model will balance the need to protect the privacy of the offender, and their family members, with the provision of information to the public to provide community protection. A great deal of information is given to law enforcement for the purposes of non-public registration. This should not be disclosed. If information is to be published it should be limited to a photograph and the general locality (that is the region and state or territory in which they reside only). In the Western Australian model, the information which is published for certain, "dangerous and high risk" offenders is limited to the photograph and locality of the person.<sup>42</sup>

## How should the effectiveness of a National Public Register be assessed?

70. The Law Council considers that there is a need for the assessment as to whether the legislation is successful in achieving its purported goals. It is recommended that any assessment should be undertaken by a reputable organisation that can provide a methodical, objective and credible analysis such as the Australian Institute of Criminology.<sup>43</sup>

## Are there other options that should be pursued for publication of child sex offender information?

71. The Law Council considers that there are other models for allowing there to be some publication of child sex offender information such as that operating in the United Kingdom and partly the system which operates in Western Australia, as well as Tasmania.
72. The United Kingdom did not adopt a United States style system where there is automatic disclosure of child sex offender details to the general public, partly because of concerns the government had that such a model may have the effect of encouraging offender's to go missing to avoid the distress caused by their openly publicised notoriety and therefore puts children at greater risk of harm by making it more difficult for the police to monitor persons on the register.<sup>44</sup>
73. In the United Kingdom (and in Western Australia in accordance with the "Community Protection Disclosure Scheme") a member of the public who has a legitimate concern in relation to the safety of their children, can apply to the Commissioner of Police for access to information about person of interest", that is a person who has regular unsupervised contact with their child, is a "reportable offender".<sup>45</sup> In this model, there

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<sup>41</sup> *National Public Register of Child Sex Offenders*, 1.

<sup>42</sup> "locality" is defined as "a description of the general locality, such as the town or suburb in which the person resides" *Child Protection (Offender Reporting) Act 2004 (WA)* s 85A.

<sup>43</sup> A helpful evaluation is set out in the report by the Australian Institute of Criminology "*What impact do public sex offender registries have on community safety*" No 550 May 2018.

<sup>44</sup> The Child Sex Offender (CSO) Disclosure Scheme Guidance Document, para 2.1, p 2.

<sup>45</sup> *Community Protection (Offender Reporting) Act 2004* s 85J.

is not a public Register as such, but certain information of persons listed on the Register can be accessed by the public. This is different to the model which operates in the United States and South Korea, and the model proposed in the Consultation Paper, where information is to be made available to the community at large via the internet.

74. In the United Kingdom there is the “Violent and Sex Offender Register” which is a database of records of people who are required to register with the police pursuant to the *Sexual Offences Act 2003* (UK). The United Kingdom has a *Child Sex Offender Disclosure Scheme* in operation which allows anybody to make an application for information about a person who has some form of contact with a child. The application is made to law enforcement who may decide to then provide the information to a person who is appropriate to receive the information, such as a parent or guardian. Where the person in question (the subject) does have a conviction for a child sex offence, poses a risk of causing harm to the child, and the disclosure is necessary to protect the child, there is a statutory presumption in favour of releasing the information to the person making the inquiry.<sup>46</sup> Section 327A of the *Criminal Justice Act 2003* (UK) provides that the decision to release information to the public about a particular convicted child sex offender is done as part of a legal obligation on the part of the law enforcement agencies responsibility to manage and assess risks posed by any relevant sexual and violent offenders within their local area command.<sup>47</sup> The information that can be provided to the member of the public making the inquiry is limited to information about the “relevant previous convictions of the offender as it considers appropriate to disclose to the member of the public concerned” and further, the police can “impose conditions for preventing the member of the of the public concerned from disclosing the information concerned to any other person”.<sup>48</sup> The “responsible authority”, being law enforcement, must maintain a record setting out the reasons for making or not making the disclosure.<sup>49</sup> The disclosure should only be made to the person who is able to use the information to safeguard children, such the parent or guardian of the child.

75. The Law Council considers that if there is to be publication of information about people on various state and territory sex offender registers, the United Kingdom model is to be preferred to the model proposed in the Consultation Paper.

#### **Recommendation**

- **If there is a to be a National Public Register, consideration be given to implementing a scheme of limited access by the public to information contained on that Register based on the model adopted in the United Kingdom or in Western Australia with the “Community Protection Disclosure Scheme”.**

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<sup>46</sup> *Criminal Justice Act 2003* (UK) s 327A(2).

<sup>47</sup> *Ibid* s 325.

<sup>48</sup> *Ibid* s 327A(5).

<sup>49</sup> *Ibid* s 327(8).