Legislative Summary **LS-470E**

BILL C-16: SEX OFFENDER INFORMATION REGISTRATION ACT

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LEGISLATIVE HISTORY OF BILL C-16

HOUSE OF COMMONS		SENATE	
Bill Stage	**Date**	**Bill Stage**	**Date**
First Reading:	12 February 2004	First Reading:	12 February 2004
Second Reading:	12 February 2004	Second Reading:	19 February 2004
Committee Report:	12 February 2004	Committee Report:	25 March 2004
Report Stage:	12 February 2004	Report Stage:	
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Royal Assent: 1 April 2004

Statutes of Canada 2004, c.10

N.B. Any substantive changes in this Legislative Summary which have been made since the preceding issue are indicated in **bold print.**

Legislative history by Peter Niemczak

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TABLE OF CONTENTS

CANADA

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BILL C-16: SEX OFFENDER INFORMATION REGISTRATION ACT*

Bill C-16, An Act respecting the registration of information relating to sex offenders, to amend the Criminal Code and to make consequential amendments to other Acts (the Sex Offender Information Registration Act), was introduced in the House of Commons on 12 February 2004 and deemed to have passed all stages on the same date.(1) The Bill's purpose is to help police services investigate crimes of a sexual nature by requiring the registration of certain information relating to sex offenders. This is mainly done through the addition of a number of sections to the *Criminal Code*.(2) The Bill also makes consequential amendments to the *Access to Information Act*(3) and the *Criminal Records Act*,(4) along with coordinating amendments to the *Criminal Code* to make it consistent with the provisions of Bill C-12, An Act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act.

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* Notice: For clarity of exposition, the legislative proposals set out in the Bill described in this Legislative Summary are stated as if they had already been adopted or were in force. It is important to note, however, that bills may be amended during their consideration by the House of Commons and Senate, and have no force or effect unless and until they are passed by both Houses of Parliament, receive royal assent, and come into force.

(1) By a motion adopted on 10 February 2004, the House of Commons provided for the reintroduction in the 3rd session of government bills that had not received royal assent during the previous session and that died on the *Order Paper* when Parliament was prorogued on 12 November 2003. The bills could be reinstated at the same legislative stage that they had reached when the 2nd session was prorogued.

(2) R.S.C. 1985, c. C-46.

(3) R.S.C. 1985, c. A-1.

(4) R.S.C. 1985, c. C-47.

BACKGROUND

A. Existing Sex Offender Registries

1. The United States

Registries of sex offenders have been in place in certain states of the United States for some time. The first state to require sex offenders to register with a local law enforcement agency was California, which adopted this requirement in 1947.(5) There was, however, no national requirement for sex offender registration until the enactment in 1994 of the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act.(6) This law is named for an 11-year-old boy who was abducted from his home in Saint Joseph, Minnesota, in 1989. Neither he nor his abductor has ever been found. His mother became an advocate for missing children. The Wetterling Act instructs the Attorney General to establish guidelines for states that require: (1) a person who is convicted of any crime against a minor, or who is convicted of a sexually violent offence against anyone, to register a current address with a designated state law enforcement agency for at least 10 years; and (2) a person who is judged to be a sexually violent predator to register with a state law enforcement agency for the person's entire lifetime. The Act provides an exception to the latter requirement when the sentencing court, after receiving a report by a state board of experts in the field of behaviour and treatment of sexual offenders, determines that the person no longer suffers from a mental abnormality or a personality disorder that would make the person likely to engage in a predatory, sexually violent offence. The states can decide when to evaluate the offender, either at the time of sentencing or when the offender has finished a term of imprisonment and is ready for release.

The Act requires central data collection by the states and transmission of the data to the Federal Bureau of Investigation (FBI) and local authorities. It permits disclosure of such information to law enforcement agencies, government agencies conducting confidential background checks, and local communities. States that failed to comply with the provisions of the Act faced the prospect of losing some federal funding for their criminal justice systems. By June 2000, all states had achieved compliance.

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(5) California Department of Justice, *California's Megan's Law*, July 2000, p. 5.

(6) The Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act is Title XVII, Sec. 170101 of the Violent Crime Control and Law Enforcement Act of 1994 (P.L. 103-322 Sec. 170101; 108 Stat. 2038; 42 U.S.C. 14071).

Although the Wetterling Act did not require community notification, some states had enacted laws that required the public to be notified when a sex offender moved into the area. In October 1994, for example, New Jersey passed "Megan's Law," putting into place a state-wide sex offender notification system. The genesis of this law was the rape and murder of seven-year-old Megan Kanka in New Jersey in 1994. She was killed by a child molester with two previous convictions for sexual offences, who had moved across the street from her family without their knowledge. Megan's mother campaigned for a change in the law to give parents access to information on pedophiles in their area. On 17 May 1996, President Clinton signed a federal Megan's Law requiring that communities receive notification of sex offenders in their neighbourhoods.(7) The federal Megan's Law amended the Wetterling Act in two ways: (1) it eliminated a general requirement that information collected under state registration programs be treated as private data; and (2) it stated that the designated state law enforcement agency shall release relevant information that is necessary to protect the public concerning a specific person required to register on a sex offender registry. The identity of the victim of a sex offence, however, is not to be released. On 3 October 1996, President Clinton also signed into law the Pam Lychner Sexual Offender Tracking and Identification Act.(8) The Act provides for an interstate tracking system, so that sex offenders who move about the country are always required to be registered.

As a result of this federal legislation, and the laws that have modified it, all 50 states, the District of Columbia, and the federal government impose some form of registration requirement on sex offenders. Many issues of sex offender registration, however, remain at the discretion of state lawmakers, including: (1) which offenders should be registered; (2) what information is gathered; (3) how much information is disclosed; and (4) what standards and procedures are used to determine the information gathered and the extent of disclosure. State notification options range from the passive (where the public seeks out the information) to the active (where the police or the offender are required to notify residents). The typical information contained in the registration system includes an offender's name, address, date of birth, Social Security Number, photo, fingerprints, criminal history, place of employment, and vehicle registration. Eight states require blood samples for DNA registration, while Michigan requires a DNA profile.

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(7) P.L. 104-145; 110 Stat. 1345; 42 U.S.C. 14071(e).

(8) P.L. 104-236; 110 Stat. 4093; 42 U.S.C. 14072(b).

A state registration program established under the Wetterling Act requires a responsible official to inform the offender of the duty to register, obtain the information required for registration, and inform the offender that if the offender changes residence address, the offender shall report the change of address. The official also needs to obtain fingerprints and a photograph of the offender. The released offender is then required to read and sign a form stating that the duty to register under this section has been explained.

The state in which the sex offender resides determines the amount of time that the offender must be registered, and the sex offender has the option of challenging the determination. When a sex offender moves to a new state, the offender has between 48 hours and 70 days (depending on the state) to notify the authorities of the new address. Failure to register can result in fines and imprisonment. The Wetterling Act more generally requires that the states impose criminal penalties on any person who knowingly fails to register under a state sex offender program and to keep such registration current.

The states normally follow one of four models with respect to notification:

- An agency identified by the state (e.g., law enforcement, parole) determines the level of risk that the offender poses to the community and then implements a notification plan that reflects that level of risk;

- The state statute stipulates which types of offenders are subject to notification and what notification methods to use. A designated agency, such as a law enforcement agency, the probation and parole department, or the local prosecutor's office carries out the notification;

- The offenders themselves are required to carry out the community notification, although they may be supervised by a criminal justice agency; or

- Community groups and individuals must request information about whether a sex offender is living in their community or ask for information about a specific person.

Typically, states distinguish among three groups that must or may be notified: organizations, residents, and the media. In all states, schools are notified when a sex offender moves into the area. Some states also notify their public housing departments, public libraries, block watches, churches, and any other organizations that oversee women or children. In most states, local agencies have discretion over which media to contact. Megan's Law permits citizens of the United States to conduct two types of searches: (1) a community search in which a specific geographic area is queried to identify registered sex offenders; and (2) a name search,

in which names of people can be checked to see whether they are registered sex offenders. The state determines the type of search allowed and whether the search is done by computer (e.g., California), or by a paper request at local law enforcement offices (e.g., Pennsylvania).(9)

Statutes providing for sex offender registration and community notification have been challenged in the state and federal courts on a number of legal grounds, including privacy and the Eighth Amendment prohibition of cruel and unusual punishment. The most serious challenges have been under the Ex Post Facto Clause. The United States Constitution prohibits the passage of *ex post facto* laws, i.e., laws that punish individuals retroactively for misdeeds occurring before passage of a law.(10) Thus, challenges have arisen when the registration requirements and community notification are imposed upon individuals who have been convicted of sex offences before the enactment of the statute in question. On 5 March 2003, the United States Supreme Court released its decisions in two cases in which it considered the constitutionality of "Megan's Laws."

In *Connecticut Department of Public Safety et al.* v. *Doe*(11) the "Megan's Law" in Connecticut, which provided for public notification of sex offenders, was challenged as a violation of the Fourteenth Amendment's Due Process Clause. The Supreme Court held that mere injury to reputation does not constitute the deprivation of a liberty interest. Even if a sex offender was deprived of his or her liberty, the public notification in Connecticut did not state that the offender was currently dangerous, only that he or she had been convicted of a sex offence in the past. This conviction was something the convicted offender had already had a procedurally safeguarded opportunity to contest. In the case of *Smith et al.* v. *Doe et al.*(12) the Supreme Court examined the Alaska Sex Offender Registration Act, whose registration and notification requirements are both retroactive. The Supreme Court held that, since the Alaska statute was not punitive in nature, its retroactive application did not violate the Ex Post Facto Clause. The Alaska statute was intended as a civil regulatory scheme only and did not act as a punishment of sex offenders convicted before the statute came into force. The outcome of future constitutional challenges to sex offender registration and notification laws will depend in each case upon the intent and wording of the statute in question.

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(9) Alison M. Siskin and David Teasley, *Sex Offender Registration: Issues and Legislation*, Congressional Research Service report for Congress, 19 April 2001, p. CRS-11.

(10) U.S. Const. Art I, sec. 9, cl. 3 (prohibition of federal *ex post facto* laws); U.S. Const. Art. I, Sec. 10, cl. 1 (prohibition of state *ex post facto* laws).

(11) No. 01-1231.

(12) No. 01-729.

2. The United Kingdom

On 1 September 1997, the United Kingdom implemented the *Sex Offenders Act 1997*.[13] This statute requires all persons convicted of a sexual offence (as listed in Schedule 1 to the statute), found not guilty of such an offence by reason of insanity, found to be under a disability and to have done the act charged against him or her in respect of such an offence, and anyone cautioned by a constable in respect of a sexual offence that the offender has admitted, to notify the police of his or her name(s), date of birth, and home address. Such notification must initially be done within three days and in person. At this notification, the police are empowered to take fingerprints and photographs of offenders. A sex offender must also notify police, within 14 days, of any change of name, home address, or any stay of more than 14 days in a year at an address about which the police have not been notified. An offender must also notify the police of his or her intention to leave the United Kingdom for eight days or longer and of his or her return, along with details of the trip.[14] The notification requirement applies retroactively to those persons still in contact with the criminal justice system, whether serving a sentence of imprisonment, awaiting sentencing, serving a community sentence, or subject to supervision in the community.

The minimum period during which an offender must report to the police is five years. If sentenced to imprisonment for six months or less, the reporting period is seven years, while a sentence of imprisonment of six to thirty months leads to a reporting period of ten years. A sentence of imprisonment of thirty months or more, or an admission to a hospital subject to a restriction order, leads to an indefinite reporting period. For young offenders (under 18), the notification periods of ten, seven, and five years are halved. Notification periods start from the date of conviction or caution. Failure to comply with the reporting requirements is an offence, making the offender liable on summary conviction to a fine or to imprisonment for a term not exceeding six months, or to both. Upon conviction on indictment, the maximum penalty is a fine or five years' imprisonment, or both. Offenders under 18 years of age cannot be imprisoned for failure to notify the police. As of December 2001, 97% of offenders required to register had done so.[15]

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(13) 1997, c. 51, as amended by the *Criminal Justice and Courts Services Act 2000*, 2000, c. 43.

(14) Home Office Circular 20/2001.

(15) BBC News World Edition, 12 December 2001.

If an act is committed outside the United Kingdom which constitutes an offence under the law in force in that country and would constitute a sexual offence to which the statute applies if it had been done in the United Kingdom, that act shall constitute that sexual offence under the law of that part of the United Kingdom. Proceedings under the *Sex Offenders Act 1997*, however, shall not be brought unless the person who committed the act is a British citizen or resident in the United Kingdom.

There is currently no public access to the sex abuse registry in the United Kingdom. Disclosure to third parties of personal information about individual offenders is an exception to a general policy of confidentiality.(16) Disclosure by police is permissible, however, where it is part of an overall plan for managing the risk posed by a potential offender and there is a need to protect an individual child, a group of children, or other vulnerable persons. The U.K. government is currently of the opinion that allowing parents direct access to the sexual offenders register could encourage vigilante attacks, such as took place in 2000 after the tabloid newspaper *News of the World* published the names of sex offenders.(17) There is also concern that such publicity might drive offenders underground and away from support services, perhaps putting children at greater risk.

On 20 November 2003, royal assent was given to the *Sexual Offences Act 2003*.(18) Part 2 of the Act re-enacts Part 1 of the *Sexual Offenders Act 1997* but with a number of changes. The Act provides for a notification order to be applied to offenders with convictions for sex offences abroad. This is designed to catch "sex tourists" who would otherwise escape the registration requirements, if they did not have a conviction in the United Kingdom, and foreign citizens who the police know have been convicted for a sex offence in their own countries. The Act also provides that sex offenders must notify the police within three, instead of 14, days of any change of address or name and also inform police if they spend seven days or more in a calendar year away from home. Another change requires that an offender register annually with the police, whether or not the information concerning them had changed. Finally, the Act introduces a two-year notification period for someone who has been cautioned for a sex offence.

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(16) Home Office Circular 39/1997.

(17) *Guardian Unlimited*, 4 August 2000.

(18) *Sexual Offences Act 2003*, 2003, Chapter 42.

3. Ontario

The first Canadian province to establish a registry of convicted sex offenders was Ontario. *Christopher's Law (Sex Offender Registry 2000)*[19] was proclaimed on 23 April 2001. It was named after 11-year-old Christopher Stephenson, who was murdered in 1988 by a convicted pedophile on federal statutory release. At the 1993 inquest into Christopher's death, the coroner's jury recommended creating a national registry for convicted sex offenders, requiring them to register with their local police service.

The Sex Offender Registry is a provincial registration system for sex offenders who have been released into the community, obligating them to report annually to police. Police enter information about these individuals into a database, including their name, date of birth, current address, current photograph, and the sex offence(s) for which the offender is responsible. The public does not have access to the Sex Offender Registry. The purpose of maintaining the database is to provide police services with important information that improves their ability to investigate sex-related crimes, as well as monitor and locate sex offenders in the community.

Mandatory registration applies to residents of Ontario who have been convicted of a criteria sex offence in Canada and were serving a sentence on the day Christopher's Law was proclaimed, or who were convicted of a sex offence on or after the day the legislation came into force. In this way, the legislation acts retroactively. The criteria sex offences are: sexual interference; invitation to sexual touching; sexual exploitation; incest; bestiality; child pornography (making, possession, distribution); parent or guardian procuring sexual activity; exposure; sexual assault; sexual assault with a weapon, threats to a third party or causing bodily harm; and aggravated sexual assault. Mandatory registration also applies to residents of Ontario who have been found not criminally responsible for a criteria sex offence by reason of a mental disorder on or after the day the legislation came into force, or who are young offenders convicted of a criteria sex offence in adult court.

Every criteria sex offender must report in person to police in the jurisdiction where he or she resides, and at the place and during the times determined by the police service. An offender must report within 15 days after release from custody, after conviction if not given a custodial sentence, after having been found not criminally responsible and given an absolute or conditional discharge, after a change of address, after becoming a resident of Ontario, and

(19) S.O. 2000, c. 1.

15 days prior to ceasing to be a resident of Ontario. An offender must also report annually between the 11th and 12th month after last reporting. Individuals who are convicted of a sex offence, or found not criminally responsible for a sex offence on account of a mental disorder, for which the maximum sentence is not more than ten years, are required to comply with the registration requirements for a ten-year period. Any offender convicted of more than one criteria offence or convicted of an offence for which the maximum sentence is more than ten years is subject to registration requirements for life.

Failure to abide by the reporting requirements is an offence. For a first offence, the punishment is a fine of not more than $25,000, or imprisonment for not more than one year, or both. For a subsequent offence, the punishment is a fine of not more than $25,000, or imprisonment for a term of not more than two years less a day, or both.

The Sex Offender Registry is operated and maintained by the Ontario Provincial Police on behalf of the Ministry of the Solicitor General. Local police services are responsible for establishing a registration site to which offenders can report. Police services must also conduct the registration of those offenders who report by entering the appropriate information into the database, including a photograph of each offender. Besides registering offenders, local police services are responsible for enforcing the legislation. The *Police Services Act*(20) empowers local police chiefs to publicly disclose information about offenders considered to be a significant risk to the community.(21) The public, however, does not have access to the Sex Offender Registry database, and unauthorized disclosure of information in the registry is an offence.

If an offender receives a pardon for all criteria sex offences, he or she will be able to have his or her name and personal information removed from the Registry. The offender will first have to provide proof of a pardon to a local police service. Only Central Sex Offender Registry staff can remove an offender from the Registry.

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(20) R.S.O. 1990, c. P.15, s. 41(1.1).

(21) See O. Reg. 265/98, which authorizes a chief of police to disclose personal information if he or she believes that an individual poses a significant risk of harm to other persons and that disclosing the information would reduce that risk.

4. Other Provincial Measures

In February 1995, the Province of Manitoba created the Community Notification Advisory Committee (CNAC) to review cases of convicted sex offenders thought to be at high risk to re-offend.(22) This provided a more formal structure to the informal protocols concerning public notification that existed previously. The Committee advises police whether the public should be warned about such offenders living in the community. CNAC is made up of people from the criminal justice and mental health systems who have the expertise to determine whether an offender is likely to commit further crimes. There is also a private citizen to represent the interests of the public. If the police believe an offender about to be released poses a threat to commit another sexual offence, they refer the case to CNAC for a recommendation as to whether the public should be warned. If possible, offenders are told that their case has been referred to the committee and that a public notification may be made. They are given an opportunity to make a written submission to the committee or arrange for someone to do so on their behalf.

CNAC has a range of options open to it. The strongest action it can take is full public notification. This is a province-wide warning to all Manitobans, and includes a news release to major media outlets, which may include a photograph of the offender, a physical description, and the nature of his or her past offences. CNAC may also issue warnings targeted to a specific community or group, may decide that no notification is necessary, or it may recommend that the police take other steps to ensure community safety, such as surveillance or applying for a court order to keep the offender from contacting children. It is the police agency, however, that is ultimately responsible for what action is or is not taken. CNAC is a joint initiative of the Province of Manitoba, RCMP, Winnipeg Police Service, Brandon Police Service, and Correctional Service Canada. Similar initiatives have now been instituted in a number of other provinces to notify the public about dangerous offenders in the community.

In May 2002, the Alberta Solicitor General made accessible on the Internet information about "high-risk offenders."(23) A person is considered "high-risk" when a Chief of Police or the Assistant Commissioner of the RCMP in Alberta makes a determination that a person presents a "risk of significant harm." This determination is made under section 32 of the

(22) See: http://www.gov.mb.ca/justice/safe/pubnote.html.

(23) See: http://www4.gov.ab.ca/just/crimeprev/hro.cfm.

Alberta *Freedom of Information and Protection of Privacy Act*.[24] The stated purpose of the Web pages is to provide information on high-risk offenders to enable members of the public to take suitable precautionary measures. The information provided includes the offender's name, the offence he or she committed, a photograph, and the area in which the offender was released or lives. The Web site is supposed to contain only the most serious offenders who are deemed to present a risk of significant harm to the safety of the public. Not all dangerous or serious offenders are included. The Web site contains a warning that under no circumstances is the information to be used to injure, harass, or commit a criminal act against any person named.

B. Interdepartmental and Federal/Provincial/Territorial Working Groups on High-Risk Offenders

In 1993, the federal departments of the Solicitor General, Health, and Justice established an interdepartmental working group to study the option of establishing a registry of convicted sex offenders. From a process of consultation, the working group came to a number of conclusions:

- A separate registry would, at best, duplicate a part of what is already available through the Canadian Police Information Centre (CPIC).
- Access to the full criminal history of convicted offenders would be more useful than the narrow criteria of sex offending.
- A separate system would be expensive and difficult to administer, particularly with regard to verification of identity.
- Public access to any form of registry raises serious privacy issues.
- Information contained on a registry (including CPIC) is of limited value unless supported by a more comprehensive screening process that should be adopted by those concerned with protecting and assisting children and other vulnerable groups.[25]

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(24) R.S.A. 2000, c. F-25.

(25) Solicitor General, Health, and Justice Canada, *Report of the Federal ad hoc Interdepartmental Working Group on Information Systems on Child Sex Offenders: Screening of Volunteers and Employees in Child-Sensitive Positions*, 1994. The conclusions are summarized at: http://www.johnhoward.ab.ca/PUB/offender.htm.

As a result of this report, the federal government announced in November 1994 that there would be a National Screening System for volunteers and employees in positions of trust with children and other vulnerable groups (see below).

A Federal/Provincial/Territorial Working Group on High Risk Offenders was also established to review the effectiveness of existing information systems, including the National Screening System, and to examine additional ways to strengthen the ability to protect children and other vulnerable groups, including a national registry. The Working Group generally concluded that a new, national pedophile or sex offender registry would not significantly improve upon the status quo in protecting children and other vulnerable groups from sexual predators. The Working Group noted the limitations of a national sex offender registry, which include: fear that a registry will have the effect of driving sex offenders underground; misidentification of sex offenders if no unique information such as fingerprints is submitted with an inquiry; the lack of comprehensiveness of a registry, since it would contain no information on the unconvicted; and possible social consequences such as vigilante actions, the spreading of fear or, alternatively, a false sense of security when an inquiry results in a negative response.

The Working Group concluded that there was currently (in 1998) a substantial basis for achieving public protection goals provided by:

- the national data system of criminal history information (CPIC);
- active screening of volunteers and others in positions of trust based in part on criminal record checks; and
- public notification schemes that exist in almost all jurisdictions.(26)

The Working Group recognized that improvements could be made in all these areas. In particular, it recommended that any additional resources made available for improving information systems for the protection of children and other vulnerable groups should be spent on enhancing CPIC, modernizing it, and improving its ability to carry confidential police intelligence information to aid law enforcement with high-risk individuals.

(26) Federal/Provincial/Territorial Working Group on High Risk Offenders, *Report to Federal, Provincial and Territorial Ministers on Information Systems on Sex Offenders Against Children and Other Vulnerable Groups*, 1998.

C. Recent Federal Initiatives Concerning Sex Offenders

In 1994, a national screening system was put in place as part of CPIC. The system allows an agency dealing with children to request a local police criminal background check through CPIC on anyone wanting to be involved with that agency, either as an employee or as a volunteer. Information is provided to the organization in accordance with the provincial Access to Information and Privacy laws. The CPIC data that may be available to an agency include: data on all convicted sex offenders, plus information on restraining orders for family violence incidents, peace bonds, and prohibition orders relating to sex offenders; information about the age and gender of the victim in cases of child sexual offences; and fingerprint information on those convicted of all "hybrid" child sexual offences (either summary or indictable offences). In 2000, the *Criminal Records Act* was amended so that criminal records of pardoned sex offenders who apply for positions of trust with children can be revealed. This is done when the applicant for the position has given approval for the verification to be made and the Solicitor General of Canada has approved of the disclosure.(27)

Bill C-55, an Act to Amend the Criminal Code (high risk offenders), the Corrections and Conditional Release Act, the Criminal Records Act, the Prisons and Reformatories Act and the Department of the Solicitor General Act, came into force on 1 August 1997. The Act created a "long-term offender" designation that targets sex offenders and allows for a period of community supervision of up to ten years following the release of the long-term offender from custody.(28) If, while on community supervision, a long-term offender breaches an order of his supervision, he will be subject to a term of imprisonment of up to ten years. In addition, there is a dangerous offender designation, which requires judges to impose indeterminate sentences on all dangerous offenders.(29) A new judicial restraint was also introduced by the Act, which is aimed at persons who are considered likely to commit a personal injury offence. Judicial restraint is set out in section 810.2 of the *Criminal Code* and allows judges to order a peace bond that includes special conditions, such as electronic monitoring requirements or avoiding contact with children.

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(27) *Criminal Records Act*, R.S.C. 1985, c. C-47, s. 6.3.

(28) *Criminal Code*, s. 753.1.

(29) *Criminal Code*, s. 753.

The *Corrections and Conditional Release Act* requires Correctional Service Canada to provide information regarding the identity and criminal record of offenders to the National Parole Board, provincial governments or parole boards, or any other agency authorized to supervise offenders. The Act also provides for the notification of police forces prior to the release of a federal inmate, whether on temporary absence or statutory release. These provisions apply to all federal inmates, not only those classified as dangerous or long-term offenders. Where Correctional Service Canada has reasonable grounds to believe that an inmate who is about to be released will pose a threat to any person, it is required to take steps prior to release to give the police all information under its control that is relevant to the perceived threat.(30) The Act also allows for sexual and other violent offenders to be detained until the end of their sentence.(31)

DESCRIPTION AND ANALYSIS

Bill C-16 consists of 25 clauses. The following description highlights selected aspects of the bill and does not review every clause.

A. Purpose of the Act

Clause 2 of the Bill describes its purpose as being to help police services investigate crimes of a sexual nature by requiring the registration of certain information relating to sex offenders. Clause 2 also states that this objective is to be achieved in accordance with a number of principles. One principle is that the police should have rapid access to certain information relating to sex offenders in order to assist them in the investigation of crimes of a sexual nature. Another principle is that the privacy interests of sex offenders and the public interest in their rehabilitation and reintegration into the community as law-abiding citizens are to be respected. In order to do this, the information is to be collected only to enable police services to investigate crimes that they have reasonable grounds to suspect are of a sexual nature. Access to the information, and use and disclosure of it, are to be restricted.

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(30) *Corrections and Conditional Release Act*, S.C. 1992, c. 20, s. 25.

(31) SS. 129-132.

B. Clauses 20 and 21: Amendments to the *Criminal Code*

A number of sections are to be added to the *Criminal Code* as part of the creation of a national sex offender database. New section 490.011 defines a "designated offence" by listing the offences for which an order that a sexual offender register with the database may be imposed.

Proposed section 490.012 of the *Criminal Code* is the key provision of Bill C-16. This subsection provides that a court shall, on application of the prosecutor, make an order requiring a person to comply with the *Sex Offender Information Registration Act.* Such an order is to be made after sentence is imposed for a "designated offence," or after the court renders a verdict of not criminally responsible for such an offence on account of a mental disorder. For certain designated offences, the court shall make such an order when the Crown has proved beyond a reasonable doubt that the act was committed with the intent to commit one of the designated "sexual" offences. The court is not required to make an order under this section if the offender establishes that, if the order were made, the impact on him or her, including on his or her privacy or liberty, would be grossly disproportionate to the public interest in protecting society through the effective investigation of crimes of a sexual nature, by means of the sex offender registry. Thus, section 490.012 makes explicit the balancing that must be done by judges between the interests of sex offenders and the interest of society to be protected from them. This section requires the court to give reasons for making or refusing an order to register.

Section 490.013 sets out the duration of any order to register as a sex offender. If the designated offence is prosecuted summarily or is an offence for which the maximum term of imprisonment is 2 or 5 years, then the order to register ends after 10 years. If the maximum term of imprisonment for the designated offence is 10 or 14 years, the order lasts 20 years. Finally, an order to register lasts for life if the designated offence has a maximum penalty of imprisonment for life. If a second or subsequent order is made, it applies to the sex offender for life.

Section 490.014 allows for either the prosecutor or the sex offender to appeal from a judge's decision on whether or not to compel the offender to enrol in the sex offender registry. Section 490.015 will allow a sex offender to apply to have an order to register terminated earlier than originally ordered. Section 490.016 states that the court is obliged to terminate an order if it is satisfied that the sex offender has established that the impact on him or her of continuing the order, including on his or her privacy or liberty, would be grossly

disproportionate to the public interest in the protection of society through the effective investigation of crimes of a sexual nature, by means of the sex offender registry. Section 490.017 will allow for appeals of decisions on early termination of orders to register.

Section 490.019 provides for an offender to be served with a notice in Form 53 to comply with the S*ex Offender Information Registration Act*. Section 490.02 makes it clear that the persons served with Form 53 are not those covered by an order in Form 52 made pursuant to section 490.012. Rather, a Form 53 notice can be served on anyone convicted of, or found not criminally responsible on account of mental disorder for, a designated offence and who is still subject to a sentence for that offence on the day on which the *Sex Offender Information Registration Act* comes into force. Thus, there will be a retroactive effect to the sex offender registry. Section 490.02 also provides for the registration in the national database of those offenders who are registered in the Ontario sex offender database, unless they have been finally acquitted of, or received a pardon for, every relevant offence.

Section 490.022 states that the obligation to register set out in section 490.019 begins one year after the day on which the offender is served with a Form 53 notice. The obligation ends on the earliest of the day on which an exemption order is made, the day on which the obligation to register under the Ontario Act ends, or the day on which the offender obliged to register under the Ontario Act provides satisfactory proof of a pardon. If none of these situations applies, the obligation ends in either 10 years, 20 years, or extends for life, depending upon the maximum term of imprisonment that was possible for the offence in question. The obligation to register for life applies if the offender was convicted of, or found not criminally responsible on account of mental disorder for, more than one designated offence.

Section 490.023 of the *Criminal Code* will allow a person subject to a section 490.019 order to apply to a court for an exemption. In order to do this, the offender must not be subject to an order under section 490.012. The court is obliged to make an exemption order if the offender has established that the impact of the obligation on him or her, including on his or her privacy or liberty, would be grossly disproportionate to the public interest in protecting society through the effective investigation of crimes of a sexual nature, to be achieved by means of a sex offender registry. This test is the same as that for a termination order under section 490.016 from an order to register under section 490.012. Section 490.024 provides for an appeal by either the Attorney General or the offender from a court's decision on an application for a termination order.

Section 490.026 will allow a person subject to an obligation under section 490.019 and not subject to an order under section 490.012 to apply to a court for a termination order. The same time periods apply as for a termination order from a section 490.012 obligation, as does the "grossly disproportionate" impact test, as set out in section 490.027. Section 490.029 provides for an appeal from a court's decision on a termination order.

Section 490.031 of the *Criminal Code* will make it an offence to fail to comply, without reasonable excuse, with an order made under section 490.012 or with an obligation under section 490.019. For a first offence, on summary conviction, the offender is liable to a fine of not more than $10,000, or to imprisonment for a term of not more than six months, or to both. In the case of a second or subsequent offence, for a conviction on indictment the offender is liable to a fine of not more than $10,000, or to imprisonment for a term of not more than two years, or to both. If convicted summarily, the offender is liable to a fine of not more than $10,000, or to imprisonment for a term of not more than six months, or to both.

Clause 21.1 of Bill C-16 would require that a committee of Parliament review the administration of the sex offender registry two years after the coming into force of the Act. The committee is to submit a report to Parliament within six months of undertaking its review, which is to include a statement of any changes to the Act or its administration that the committee would recommend.

C. Clauses 4 to 7: Obligations of Sex Offenders

Clause 4 of the Bill requires a sex offender to report for the first time under an order, in person, to the registration centre that serves the area in which his or her main residence is located. This is to be done within 15 days after the order is made, if the person is convicted of the offence in connection with which the order is made, but is not given a custodial sentence. A sex offender must also report if he or she receives a discharge for the offence in connection with which the order is made if he or she is found not criminally responsible for the offence on account of a mental disorder, if he or she is released from custody pending the determination of an appeal relating to the offence, or if he or she is released from custody after serving the custodial portion of a sentence for the offence in connection with which the order is made. A sex offender must subsequently report to the closest registration centre within 15 days after changing

his or her main residence or any secondary residence, within 15 days after changing his or her given name or surname, and at any time between 11 months and one year after he or she last reported to a registration centre.

Clause 5 of the Bill sets out the information that must be provided by a sex offender. This information includes the offender's given name, surname, and every alias that he or she uses, his or her date of birth and gender, the address or location of his or her main residence and every secondary residence, the address or location of any place at which he or she is employed or volunteers, the address or location of every educational institution at which he or she is enrolled, telephone numbers, and his or her height and weight and a description of every physical distinguishing mark that the offender has. Clause 5 also provides for the taking of a photograph of an offender, at the discretion of the person collecting the information.

Clause 6 requires a sex offender to notify the registration centre that serves the area in which his or her main residence is located if he or she will be absent from the main residence or any secondary residence for at least 15 consecutive days. The offender must provide information about the address or location at which the offender stays or intends to stay, and of the actual or estimated dates of departure from, and return to, the main residence or secondary residence. Notification of the actual or estimated date of departure must be given if the sex offender leaves Canada. The sex offender must also report his or her actual return to a main residence or a secondary residence, not later than 15 days after the return. A sex offender may not be required to provide this notification in person.

D. Clauses 8 to 12: Responsibilities of Persons who Collect and Register Information

Clause 8 refers to the obligation of the court that convicts a sex offender to send a copy of an order requiring the offender to provide information to the sex offender registry to the police service whose member charged the sex offender with the offence in connection with which the order was made. When the police service receives such an order, the person who registers information at the police service shall register in the database only certain information contained in the order. This information consists of the name of the sex offender, the reference to any fingerprint record, every offence to which the order relates and when and where the offence(s) was (were) committed, when and where the person was convicted of the offence(s) or found not criminally responsible on account of a mental disorder, the age and gender of every victim of the offence(s) and the victim's relationship to the offender, the date and duration of the

order, and the court that made the order. The registration of this information must be done in such a way as to ensure its confidentiality. The same information is to be registered by the Attorney General of a province or minister of justice of a territory in which the sex offender was served with a Form 53 notice.

Clause 9 obliges the person collecting information at a registration centre to inform the sex offender immediately of the nature of the offender's obligations under sections 4 to 6 and the nature of the information he or she is required to provide, along with the purpose for which the information is being collected. If the person collecting information has reasonable grounds to suspect that a person reporting to a registration centre as a sex offender is not the sex offender and no other proof of identity is satisfactory in the circumstances, the person may take fingerprints from the purported offender in order to confirm his or her identity. If the fingerprints confirm identity, they are to be destroyed without delay. This clause again emphasizes that the person collecting the information is to ensure that the sex offender's privacy is respected and that the information received is kept confidential. Clause 10 states that the only information to be registered in the database is that provided in accordance with section 5 or section 6.

Clause 11 obliges the person collecting information at the registration centre to provide a copy of the information to the sex offender. Clause 12 provides the sex offender with the right to request a correction in the database of any information relating to him or her, if the offender believes it is erroneous.

E. Clauses 14 and 15: Retention of Information in Database

Clause 14 makes it clear that the database of information on sex offenders is part of the automated criminal conviction records retrieval system that is maintained by the RCMP. This system is known as the Canadian Police Information Centre. Clause 15 states that the information in the database is to be kept indefinitely, subject to three exceptions. One is any regulation made by the Governor in Council respecting the removal of information. The second exception is when an offender is granted an exemption order by the court. The third exception is when a sex offender is finally acquitted of the offence in connection with which the order to be put in the database was made, or receives a free pardon granted under Her Majesty's royal prerogative of mercy or the *Criminal Code* for the offence. After an acquittal or a pardon, the offender's record is to be permanently removed from the database.

F. Clauses 16 and 17: Prohibitions and Offences

Clause 16 prohibits anyone from consulting the sex offender registry unless he or she is a member or employee of a police service investigating a specific offence, a person who collects or registers information in the database, a person authorized under section 13 to consult information in the database for research or statistical purposes, or a member or employee of the RCMP who is authorized to consult the database in order to maintain it and who does so for those purposes. There is also a prohibition against matching any information contained in the database with any other data, unless for the purpose of investigating a specific offence that a police service has reasonable grounds to believe is of a sexual nature. Finally, clause 16 prohibits disclosure of any information contained in the database, except to: the sex offender to whom the information relates; anyone authorized under section 13 to consult the database for research or statistical purposes; or law enforcement personnel to whom the disclosure is necessary in order to perform their duties.

Clause 17 states that every person who knowingly provides false or misleading information under subsection 5(1) or 6(1) [the requirements for sex offenders to provide information about themselves, their address, and any changes of location] is guilty of an offence and liable, in the case of a first offence, to a fine of not more than $10,000, or to imprisonment for a term of not more than six months, or to both. In the case of a second or subsequent offence, on summary conviction, the penalties are the same. On conviction on indictment, the offender is subject to a fine of not more than $10,000, or to imprisonment for a term of not more than two years, or to both. In addition, every person who knowingly contravenes the prohibitions on unauthorized consulting, disclosure, or use of the sex offender database is guilty of an offence and liable on summary conviction to a fine of not more than $10,000, or to imprisonment for a term of not more than six months, or to both.

G. Clauses 22 and 23: Consequential Amendments

Section 24 of the *Access to Information Act* states that the head of a government institution shall refuse to disclose any record that contains information the disclosure of which is restricted by any provision set out in Schedule II. Schedule II of the Act lists the prohibitions in various statutes against releasing information. Clause 22 of Bill C-16 adds the proposed Sex Offender Information Registration Act to the list of statutes in Schedule II. The reference in

Schedule II is to subsections 9(3) and 16(4) of the proposed Sex Offender Information Registration Act. Subsection 9(3) deals with the destruction of fingerprints used to confirm the identity of an offender, while subsection 16(4) forbids the disclosure of any information in the sex offender database, except to the sex offender, a researcher, or to various law enforcement officials who need the information in order to carry out their duties.

A second consequential amendment in Bill C-16 is to the *Criminal Records Act*. Section 5(b) of this statute describes the effect of an offender receiving a pardon under the *Criminal Records Act*, which includes keeping the judicial record of a conviction separate from other criminal records and removing any disqualification to which the convicted person is, by reason of the conviction, subject. Certain legal restrictions can remain, however, even after a pardon is granted. These currently include a mandatory order prohibiting the possession of weapons (s. 109 of the *Criminal Code*), a discretionary order prohibiting the possession of weapons (s. 110 of the *Criminal Code*), an order to stay away from places where young persons are present (s. 161 of the *Criminal Code*), an order prohibiting the operation of a motor vehicle, vessel, aircraft, or railway equipment (s. 259 of the *Criminal Code*), and an order prohibiting the possession of weapons following a court martial (s. 147.1(1) of the *National Defence Act*). The amendment to the *Criminal Records Act* adds new sections 490.012 and 490.019 of the *Criminal Code* to the list of legal restrictions that can continue, even after a pardon has been granted. Thus, the requirement that a sex offender register in the sex offender database can continue.

H. Clause 25: Coming Into Force

The provisions of the Bill will come into force on a day to be fixed by order of the Governor in Council.

COMMENTARY

One of the federal government's concerns regarding a retroactive sex offender registry was that it might violate the "double jeopardy" principle and thereby contravene the *Charter of Rights and Freedoms*. Following a meeting with provincial and territorial ministers of justice, however, the government changed its position: Bill C-16 will cover all sex offenders who are "on sentence" at the time the law comes into force. That means it will include the

names of offenders convicted of sex crimes who are in jail, on parole, or on probation on the day the law takes effect. It will not cover those who have completed their sentence by the time the law comes into force. Some provinces, however, want the registry to be completely retroactive – that is, to include all sex offenders who are still alive, regardless of when they finished serving their sentences. Alberta, for example, has identified 27 sex offenders who are at risk of re-offending but who will not be included in the registry because they have already served their sentence.(32)

Another concern that has been raised about the proposed sex offender registry is that information it contains will not generally be available to the public. A number of editorials have called for the registry to be made publicly available, as is the case in the United States. Such public access would deny sexual predators the cloak of anonymity and, therefore, make it harder to find unknowing victims.(33) A contrary opinion has also been put forward. This holds that publishing the names of every sex offender in any given area will only result in him or her being driven from place to place, or even underground. That would make it harder for authorities to keep track of their movements.(34) OPP Staff Sergeant Charles Young, the manager of Ontario's sex offender registry, has attributed the high compliance rate (93%) in Ontario partly to the fact that there is no public notification, as exists in many American states, where citizens can see who is on the registry. The compliance rate in the United States is much lower.(35)

The John Howard Society has questioned the effectiveness of sex offender registries, their costs, and even the accuracy of their information. The Society has said that no recent studies have addressed such concerns.(36) Questions have been raised about whether the keeping of a list of past offenders living in the area of an abduction would actually help the police to intervene quickly enough to save lives. A call has been made for a review of the legislation after three years to see whether it is effective in preventing crimes, solving crimes, and even alleviating public fears.(37)

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(32) *The Kingston Whig-Standard*, 20 October 2003, p. 11.

(33) *The New Brunswick Telegraph Journal*, 16 December 2002, p. A6.

(34) *The Chronicle-Herald* [Halifax], 3 January 2003, p. D1.

(35) *The Record* [Waterloo Region], 16 September 2003, p. A1.

(36) *The Star Phoenix* [Saskatoon], 4 June 2003, p. A11.

(37) *Edmonton Journal*, 7 October 2003, p. A14.