

DOCUMENT TITLE:

SEX OFFENDER INFORMATION REGISTRATION ACT

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NOTE:

THIS POLICY DOCUMENT IS TO BE READ IN THE CONTEXT PROVIDED BY THE **PREFACE** TO THIS PART OF THE MANUAL.

CERTAIN WORDS AND PHRASES HAVE THE MEANINGS ESTABLISHED IN THE “**WORDS & PHRASES**” SECTION OF THIS PART OF THE MANUAL.

OVERVIEW

The Sex Offender Registration Act (SOIRA, “the Act”), in force as of December 15, 2004, establishes a database designed to assist peace officers in the investigation of sexual offences. The database is to contain addresses, descriptions, and other vital information relating to convicted sex offenders, and is accessible to investigators as soon as they become aware of the commission of a sexual offence. Investigators are able to search the database by location, within a radius of any specific address or geographical area. Crown Attorneys, except in very narrow circumstances, do not have access to the database information.

When a sex offender is convicted, the Crown, as outlined in this policy document, is to apply to the court for an order under SOIRA, and the court, as soon as possible after sentencing, shall issue an order directing the offender to report to a designated registration centre. There, the offender is to provide the personal information specified in the Act. The information is to be updated regularly by the offender, and this obligation continues for 10 years, 20 years, or life, depending on the maximum penalty for the offence upon which the conviction is registered. Failure to comply with the terms of a SOIRA order is a new offence under the *Criminal Code*.

The court may exempt an offender from SOIRA obligations only if the court is satisfied that the impact of the obligations would be “grossly disproportionate to the public interest in protecting society through the effective investigation of crimes of a sexual nature” to be achieved through SOIRA.

The Act also has retrospective application. Convicted sex offenders serving sentences when the Act is proclaimed in force will be served with notices requiring them to attend registration centres and provide the specified information. These offenders may apply to any court for an exemption, but must meet the same test for exemption as applies to other offenders. Retrospective application of the Act will be managed by a specialized working group of Crown Attorneys, trained and instructed in regard to the relevant provisions of the Act.

KEY ASPECTS OF SOIRA, and POLICY CONSIDERATIONS

Applications for SOIRA Orders

The process of issuing an order requiring an offender to provide information to the

database established under SOIRA begins with the prosecutor making an application to the court when an offender is convicted of a “designated offence”. Offenders who are granted absolute discharges under s. 730 of the *Criminal Code* are not subject to SOIRA orders. The Act also does not apply to “young persons”, unless they are tried in ordinary court (YOA), or are given an adult sentence (YCJA).

“**Designated offences**” are listed in s. 490.011 of the *Criminal Code*. The list includes all sexual offences, and any attempts or conspiracies to commit sexual offences. The list also includes offences such as breaking & entering, abduction, trespassing at night, manslaughter and murder if the Crown establishes beyond a reasonable doubt that the offender committed the offence with the intent to commit a sexual offence [CC s. 490.012(2)].

Once the prosecutor applies for a SOIRA order, the court shall issue the order unless the offender can place himself within the exemption provision, noted below.

Cases in which the prosecutor should apply for a SOIRA Order

The intent of Parliament in developing the SOIRA registry was to facilitate the investigation of sexual offences by giving the police a database which would provide early leads in an investigation. The effectiveness of this important new tool will be affected by the completeness of the information in the database. The legislation anticipates that very few convicted offenders will be exempted from the database. Accordingly, **prosecutors are to apply for SOIRA orders for all eligible offenders, except in truly exceptional circumstances**. Truly exceptional circumstances will exist when it is clear that a properly instructed court would find that the offender fits within the statutory exemption i.e. the impact of the order would be **grossly disproportionate** to the public interest in protecting society through the effective investigation of sex crimes, to be achieved by the registration of information under SOIRA [CC s. 490.012 (4)].

When faced with a fact situation which apparently includes a relatively low level of violence, or an offender with no known criminal background, prosecutors should bear in mind that sex offenders often act in a pattern of escalating violence over time. It is also possible that a particular investigation may have uncovered only “the tip of the iceberg” in regard to dangerous sexual conduct. Failure to seek an order in such circumstances could expose the public to danger by delaying the apprehension of offenders.

Resolution discussions and agreements

To help ensure the integrity and completeness of the SOIRA database, the decision to apply or not apply for a SOIRA order must not become a bargaining chip in the plea or charge resolution process. Possible avoidance of a SOIRA order must not be a factor in

charge selection or in the position taken on sentence. Prosecutors should also be careful not to agree to a statement of fact drafted in support of a guilty plea if the facts, when presented in court, will not prove the intent of the accused to commit an offence of a sexual nature.

Identifying eligible cases

It is anticipated that when the police deliver a Crown Sheet relating to a sexual offence to the Crown Attorneys' Office, it will have a notation indicating SOIRA eligibility (in most cases, an appropriate box will be ticked). When a Crown file is opened for an eligible case, the cover of the file should be stamped "SOIRA", or otherwise be clearly noted for eligibility.

SOIRA orders are to be made in Form 52, samples of which have been made available to Crown Attorneys' Offices. A draft order in Form 52 should be prepared and placed in the file when it is opened. The duration of the order depends upon the maximum penalty for the predicate offence, as follows [CC s. 490.013(2)]:

- for summary offences, or indictable offences punishable by 5 years imprisonment or less, the order ends 10 years after it was made;
- for offences punishable by 10 or 14 years imprisonment, the order ends 20 years after it was made;
- for offences punishable by life imprisonment, the order lasts for life.

The first prosecutor to review the file should confirm eligibility and ensure that the draft order has been prepared and that the duration of the order matches the offence.

Note: Nova Scotia has 8 SOIRA registration centres. The offender is required to report to the registration centre that serves the area in which his/her main residence is located. A list of centres will be given to the offender when the order is made. The location of the centre does not appear in the draft order.

[The offender may appeal the making of an order based on a question of law or mixed fact and law. The offender may apply for a termination of obligations after 5 years for a "10-year" order, after 10 years for a "20-year" order, and after 20 years for a lifelong order (CC s. 490.015).]

Making the application

The application for a SOIRA order may be made orally, and, generally, it would be appropriate to make the application at the same time that an application is made for a DNA sample order, if such an order is being sought. The court is to make the SOIRA order "as soon possible after it imposes a sentence" [CC s. 490.012].

It is anticipated that some offenders will endeavor to avoid the registry by arguing that they fit within the “grossly disproportionate” exemption described in s. 490.012(4) of the *Criminal Code*. Until jurisprudence is developed relating to SOIRA, prosecutors should be familiar with the cases which arose in regard to a similarly worded exemption in the DNA data bank legislation—see s. 487.051(2) of the *Criminal Code*, and related cases. [Under the heading “Anticipated Legal Issues”, near the end of this document, there is a discussion of this issue.]

Restrictions on use of SOIRA information

There are safeguards in SOIRA to protect the privacy interests of sex offenders and to facilitate the rehabilitation and reintegration of offenders into the community as law-abiding citizens. As far as is possible, the only use of the database is to be by police investigators who reasonably believe that a sexual offence has been committed. Disclosure of database information (or the fact that the information is in the database) to others, including Crown Attorneys, is strictly controlled by the Commissioner of the RCMP.

Prosecutors cannot obtain SOIRA information, except as is permitted under s.490.03 of the *Criminal Code*. The exceptions are as follows:

- If the Commissioner is satisfied that it is necessary, information may be disclosed to a prosecutor applying for a Form 52 order.
- If the Commissioner is satisfied that it is necessary, information may be disclosed to the Attorney General in proceedings to terminate SOIRA orders, or in proceedings relating to an exemption from a retrospective SOIRA order.
- If, in a proceeding, a person who is subject to a SOIRA order discloses the registered information (or the fact that such information is registered), the Attorney General may request and receive all of the registered information.

Once the prosecutor or the Attorney General receive the SOIRA information in the circumstances stated above, the information may be disclosed to the court in the proceedings for which it was requested, and to appeal courts [CC s.490.03(3)].

Information from the database may also be disclosed to a judge or justice in an application for a search warrant in a sexual offence investigation [CC s.490.04(4)]. The prosecutor, if aware of the application for a search warrant, should advise the applicant to seek a sealing order in regard to the disclosed information.

It is an offence under SOIRA to consult any SOIRA information without authorization, or to disclose information in the database except as permitted by SOIRA [see SOIRA, s. 15(3)]

and s. 15 (4)].

Criminal Code offences created

Failure to comply with a SOIRA order, without reasonable excuse, is an offence under s. 490.031 of the *Criminal Code*. In the case of a first offence, it is punishable on summary conviction by a fine of \$10,000 or 6 months imprisonment, or both. For second and subsequent offences, the charge is hybrid. By indictment, the punishment is a fine of up to \$10,000, and imprisonment for up to 2 years, or both.

Anticipated legal issues

As noted previously, when an application for a Form 52 Order is made it can be expected that some offenders will oppose the making of the order by seeking exemption under section 490.012(4). The offender must establish that the granting of the order would have an impact on him which 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 the registration of his/her personal information under SOIRA..

Some arguments which may be expected to be advanced by defendants are these:

1. The offence is a minor, insignificant act compared to other obviously dangerous offences/ persons.
2. The reporting requirement is a punishment that is cruel and unusual and tends to brand the defendant as a sex offender.
3. The requirement to provide detailed and private information violates Section 7 of the *Charter of Rights and Freedoms*.
4. Registration requirement is an unwarranted response to a distorted picture of sex offenders/offences.
5. There has actually been a decrease in sexual crimes since 1993.
6. It is a myth that all sex offenders re-offend.
7. The serious crimes are a small percentage of sexual offences.
8. The Registry system would be an expensive duplication of existing systems.
9. Registration would promote a false sense of security in the public mind.

10. Registration would be a needless involvement of many individuals in the justice system and thus undermine treatment programs by diverting monetary and person resources away from treatment.
11. The public and certain interest groups will increasingly demand greater access to the registry database

The jurisprudence relating to sex offender registries is very limited at this point in that the only Canadian sex offender registry scheme to be in operation before 2004 is in Ontario. The Ontario scheme is under judicial scrutiny at this time via the case of **R. v. Dyck**, [2004] O.J. No. 2842 (Quicklaw cite), a decision of Hearn, J. Of the Ontario Court of Justice issued June 30, 2004, presently under appeal. Referred to in that decision are the cases of **R. v Murrins**, 162 CCC (3d) 412 (N.S.C.A.), and **R. v Beare**, 45 CCC (3d) 57 (S.C.C.) which are helpful on specific issues.

The extensive *viva voce* evidence of experts and the written material considered by Hearn, J. demonstrate the sort of presentation that the prosecutor might make when confronted with the arguments listed above. The trial judge was able to conclude that:

1. Sex offences are prevalent, particularly among women and children and they have a substantial impact upon the victims.
2. Sex offenders, as a group, are prolific in offending.
3. Sex offenders commit crimes within close proximity to their own homes.
4. Time is usually of the essence, particularly in cases involving child abduction.
5. Sex Offender Registry data provides an invaluable investigative tool.
6. Registration itself can be a deterrent, particularly for offenders who are no longer subject to parole or probationary supervision.
7. No other system currently provides current and updated address information of offenders of the prescribed sexual offences.
8. Registry information would provide a useful tool to ensure police investigation is quick and efficient and thus promote public and community safety.

In the case of **Murrins**, the issue was whether a DNA Order ought to be made. This case is useful for the argument that the order is not a further sanction but a furtherance of the state's legitimate interest in solving crimes; that the taking of the sample was a gathering

of information, albeit a form of seizure ; that the order was not automatic in that the Court had to be satisfied that it was in the best interests of justice and therefore there was not a Section 7 Charter violation.

In **Beare**, the issue was the requirement to submit to fingerprinting prior to conviction. The useful finding in this case is that such a scheme is an invaluable tool of criminal investigation and of great assistance in the judicial process.

While in the **Dyck** case the Ontario legislation was found to be unconstitutional based on a Charter Section 7 argument, it is easily distinguished because of the major differences between the Ontario act and the *Sex Offender Information Registration Act*. Hearn, J. found the Section 7 violation because the act was “unnecessarily broad and going beyond what is needed to accomplish the government objective” [para 118] and “more importantly, the legislation fails to accord with the principles of fundamental justice....by neglecting to provide for procedural fairness in the process requiring registration.” [para 124]. Herne, J. conducted an analysis of the “not yet in force” *Sex Offender Information Registration Act* and concluded that it indeed clearly addresses to a great extent the issues and arguments made by the defendant in **Dyck** [paras. 101-111].

**SEX OFFENDER INFORMATION REGISTRATION ACT
DESIGNATED OFFENCES**

DESIGNATED OFFENCES s. 490.011(1)(a)			
Offence	10 yr. Requirement	20 yr. Requirement	Life Requirement
151 - sexual interference	Summary conviction	Indictable 10 yr. max	
152 - invitation to sexual touching	Summary conviction	indictable 10 yr. max	
153 - sexual exploitation	Summary conviction/indictable 5 yr. max		
153.1 - sexual exploitation of a disabled person	Summary conviction/indictable 5 yr. max		
155 - incest		Indictable 14 yr. max	
160(3) - bestiality presence of child	Summary conviction	Indictable 10 yr. max	
163.1 - child pornography	Summary conviction	Indictable 10 yr. max	
170 - parent or guardian procuring sex act	Indictable 5 yr. max		
172.1 - luring child use of computer	Summary conviction/indictable 5 yr. max		
173(2) - exposure	Summary conviction		
212(1)(l) - stupefying for purpose of sex		Indictable 10 yr. max	
212(2) - living on avails prostitution		Indictable 14 yr. max	
212(2.1) - aggravated offence		Indictable 14 yr. max	
212(4) - obtaining prostitution of person under 18	Indictable 5 yr. max		
271 - sex assault	Summary conviction	Indictable 10 yr. max	
272 - sex assault with weapon/cause BH		Indictable 14 yr. max	
273(2)(a) - aggravated sex assault (use firearm)			Indictable max life imprisonment
273(2)(b) - aggravated sex assault			Indictable max life imprisonment
273.3(2) - removal of child from Canada	Summary conviction/indictable 5 yr. max		

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DESIGNATED OFFENCES**

DESIGNATED OFFENCES s. 490.011(1)(b)			
Offence	10 yr. Requirement	20 yr. Requirement	Life Requirement
173(1) - indecent acts	Summary conviction		
177 - trespassing at night	Summary conviction		
230 - murder in commission of offence			Indictable max life imprisonment
234 - manslaughter			Indictable max life imprisonment
246(b) - overcoming resistance			Indictable max life imprisonment
264 - criminal harassment	Summary conviction	Indictable 10 yr. max	
279 - kidnapping			Indictable max life imprisonment
280 - abduction person under 16	Indictable 5 yr. max		
281 - abduction person under 14		Indictable 10 yr. max	
348(1)(d) - B & E dwelling			Indictable max life imprisonment
348(1)(e) - B & E other	Summary conviction	Indictable 10 yr. max	

<u>Place</u>	<u>Designated Area</u>
1. Baddeck RCMP Detachment 16 Hillcrest Drive - PO Box 400 Baddeck, NS B0E 1B0 Telephone (902) 295-2350	Inverness, Richmond, Victoria Counties, and Membertou and Eskasoni Reserves
2. Bible Hill RCMP Detachment 283 Pictou Road - Bible Hill PO Box 1585 Truro, NS B2N 5V3 Telephone (902) 893-6820	Colchester, Cumberland Counties, and Hants County East of Highway 101
3. Bridgewater RCMP Detachment 14 Pinegrove Road - Cookville PO Box 4000 Bridgewater, NS B4V 3V3 Telephone (902) 527-5555	Lunenburg and Queens Counties
4. Cape Breton Regional Police Service Central Division 865 Grand Lake Road Sydney, NS B1P 6W2 Telephone (902) 563-5095	Cape Breton Regional Municipality, other than Membertou and Eskasoni Reserves
5. Halifax Regional Police 1975 Gottingen Street Halifax, NS B3J 2H1 Telephone (902) 490-6500	Halifax Regional Municipality
6. New Glasgow Police Service 225 Park Street New Glasgow, NS B2H 5B7 Telephone (902) 1941	Antigonish, Guysborough and Pictou Counties
7. New Minas RCMP Detachment 18 Jones Road New Minas, NS B4N 3N1 Telephone (902) 679-5555	Annapolis and Kings Counties, and Hants County East of Highway 101
8. Yarmouth Rural RCMP Detachment 156 Starrs Road - PO Box 5050 Yarmouth, NS B5A 4K6 Telephone (902) 742-9106	Digby, Shelburne and Yarmouth Counties