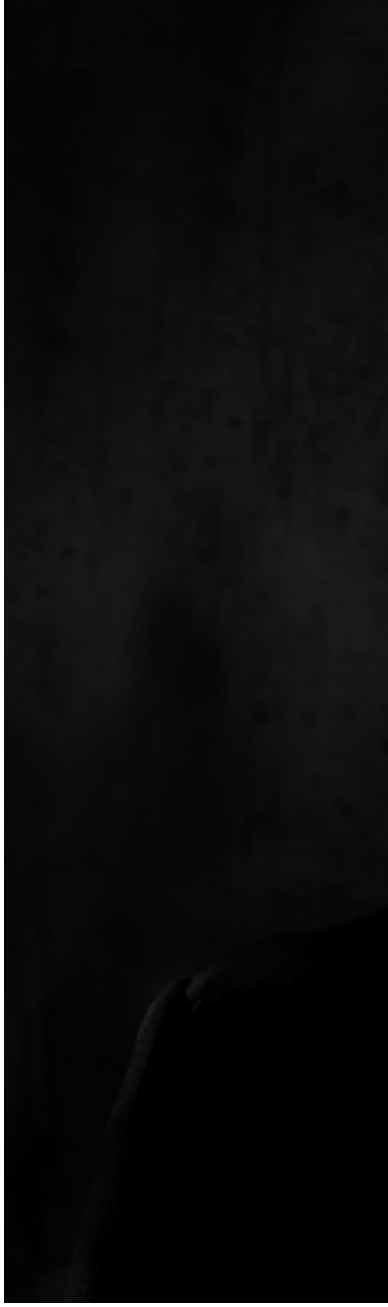

A doctrine of parsimony needed

SOME OF THOSE FOUND GUILTY OF SEXUAL OFFENCES ARE ALMOST AUTOMATICALLY ADDED TO THE SEXUAL OFFENCES REGISTER. BUT PERHAPS THEY DO NOT BELONG THERE. BY DAVID JOSEPH

In the recent decision in *Blyss v The Magistrates' Court of Victoria (Blyss)*[1] the Supreme Court had the opportunity to consider the scope and applicability of the *Sex Offenders Registration Act 2004* (Vic) ("SORA"). The case essentially examined the question of whether a person found masturbating in his car, by the roadside, could, beyond reasonable doubt, pose a risk to the sexual safety of any person or to the community. The case necessarily needed to explore the meaning of the term "sexual safety" and whether "obscenity", being an affront to public morals and decency, as distinct from a sexual offence in the ordinary sense, can pose the relevant threat.

The case sought to review a decision of the Magistrates' Court sitting at Shepparton in July 2011 in which the plaintiff, who was a repeat offender of similar acts over the years, submitted a plea of guilty. It appeared from the records maintained by the Magistrates' Court, the solicitor acting on the day and the informants that no meaningful consideration of whether the plaintiff's offending was a relevant offence for the purposes of SORA nor whether the plaintiff, in conducting himself in that manner, posed the relevant risk. Unfortunately, the magistrate's decision was made in July 2011 so the tape recordings and other court information were no longer available, to say nothing of the difficulties posed in making the application so long out of time. The plaintiff's position was that to be sentenced as a registrable offender for the particular offending was unjust and that justice needs to be seen to be done, better late than never.

In the experience of the plaintiff's solicitor, the process in the Magistrates' Court is perfunctory: the prosecutor simply requests the defendant be sentenced as a registrable offender and, where there is no objection from counsel, the order is made. There was a recent case not dissimilar to Mr Blyss' case whereby the defendant exposed himself to two women on the train. Although allegedly "disgusted", one of the women maintained the presence of mind to photograph the incident on her phone and report the matter to the authorities. At the hearing of the matter – an admission to the facts and a plea being submitted to the Court – the process appeared to be devoid of any examination as to the relevance of the offence and whether the offending posed the relevant risk "beyond reasonable doubt". In this case it was submitted that the offence was not a relevant offence for the purposes of SORA and the Court agreed, releasing the defendant with a heavy fine instead.

Notwithstanding the relatively brisk nature of summary proceedings in the Magistrates' Court, the solicitor who appeared at Shepparton in 2011 had maintained a detailed hand-written record of the proceeding which indicated that no argument or other submissions were made in relation to registrability. That there are very clear intentions of SORA, on its own face, it appeared that its purposes and scope had not been dealt with or considered in the Magistrates' Court.

ADOBE STOCK

SNAPSHOT

- The process of sentencing an offender as registrable appears perfunctory.
- There may be many offenders suffering under the reporting obligations whose conduct did not or should not come within the scope and purposes of SORA.
- To employ its instruments too widely may run the risk of the register not being taken seriously enough if it be known that any offence might be registrable.

Scope of the Act

It might appear, therefore, that there may be many offenders suffering under the reporting obligations whose conduct did not or should not come within the scope and purposes of SORA.

The plaintiff's case included a variety of submissions:

- that obscenity, whether obscene exposure or publication, is a victimless crime and that as a legal concept simply involves the description of "things which are offensive to current standards of decency" – cf. Fullagar J in *R v Close* [1948] VLR 445 (FC) at 463
- that SORA, being an oppressive statute of a penal nature, should be interpreted closely and in relation to its own defined terms
- that SORA requires a "victim"
- that by s1(1)(a), the stated purpose of SORA is to require "certain offenders who commit sexual offences" to report their personal details to police and, by sub-s(2)(c), to enable a sentencing court to order ". . . offenders who commit certain sexual offences against adult victims . . ." to comply with reporting obligations
- that by employing the words "certain offenders who commit sexual offences" and "offenders who commit certain sexual offences", as distinct from "any" sexual offenders or "all" sexual offenders, the Parliament has intended to limit the classes of sexual offenders and sexual offences and that SORA is not, thereby, intended to apply to all or any such offenders or offences
- that the types of offences and the types of offenders are to be understood with certainty and that such understanding should or would be obtainable from the words of SORA itself.

It is submitted that the intentions of SORA were, in fact, to provide for the reportability for certain serious sex offenders. In introducing the Bill to parliament, Mr Haermeyer said that the Act provided for ". . . the mandatory registration of child sex offenders [ie, Class 1 and 2 offences] but also empowering the courts with a discretion to order the registration of serious sexual offenders who commit sex offences against adult victims".[2]

The additional issue for the plaintiff was whether his

conduct could mean he was a serious sexual offender, committing offences against anyone. On its face, the plaintiff's conduct appeared to be passive, there being no threat or assault, let alone a victim of a sexual offence. Indeed, the term "sexual offence" needs to be clarified for the purposes of SORA, but it would appear from the context of the Act that a sexual offence is one where there is an actual victim or a real threat of probable victimhood.

The defendants sought to have the applicability of SORA expanded, seemingly as far as possible, but it was conceded that drink driving offences would not be registrable. In my opinion, such a position is extraordinary because it would therefore, seemingly, be possible to countenance any offence as a relevant offence.

Section 11(1) of SORA provides: "If a court finds a person guilty of an offence committed as an adult that is not a Class 1 or Class 2 offence (including an offence that is a Class [3] or Class 4 offence), it may order that the person comply with the reporting obligations of this Act". Class 1 and Class 2 offences are those committed against children and Classes 3 and 4 refer to adult victims. As such, the Court has the discretion described by Mr Haermeyer above. It was submitted on behalf of the plaintiff that by referring to Class 3 and Class 4 offences in SORA itself, the Court should be guided by those definitions, ie, by applying a doctrine of noscitur a sociis where the meaning of "an offence" is to be gathered by the context, such context being provided by reference to the descriptions of Class 3 or 4 offences.

As such, the plaintiff's case was that "an offence" needed to be:

- a serious sexual offence, if not specifically a Class 3 or Class 4 offence
- committed by a serious sexual offender.

Indeed, case law was submitted from other Australian jurisdictions in support of a construction that a threat to "sexual safety" needed to be ". . . a risk of a person or persons being the victim of a sexual offence"3 or ". . . a risk of a person being the victim of a sexual assault".[4]

Wider interpretation

The Court was persuaded by the defence to employ a wider interpretation so that the relevant risk could be psychological harm, but it was not demonstrated that such a risk existed "beyond reasonable doubt" in the plaintiff's case, as required by s11(3) of SORA, the psychological harm being sustained from the shock, one presumes, of having been exposed to a pornographic act such as that occasioned by the plaintiff. The Court chose to construe "an offence" by reference to s60B of the *Crimes Act 1958* – loitering near schools etc, (now s49N). Loitering near schools or places where children are likely to gather is not of itself an offence unless the person loitering has been found guilty of a variety of possible offences including by sub-s(2)(a)(iii) (now sub-s3(c)(iv)) – an offence against s19 of the *Summary Offences Act 1966*, ie, obscene exposure. Accordingly, the Court was satisfied that obscene exposure was "an offence" for the purposes of s11(1) of SORA.

In relation to this, the Court said:

"Section 11 is not expressed to be limited to contact offending or offending that poses a risk to physical safety or bodily integrity. It is true that the purposes of the Act and s11(3) influence the interpretation of 'an offence' in s11(1), as submitted by the plaintiff. However, neither the Act's purposes nor s11(3) refers to contact offending, physical safety, or bodily integrity. On its ordinary meaning, the expression 'sexual safety' in s11(3) is not limited to physical safety. Looking at the purposes of the Act and the range of offences listed in Schedules 1 to 4 of the Act, there is no reason to limit the words 'sexual safety' to physical safety or bodily integrity. Those schedules include offences such as transmitting indecent communications to minors, possessing child pornography, administering a child pornography website, assisting a person to avoid apprehension (in respect of child pornography offences), and loitering near schools.

"Of particular interest is the loitering near schools offence, which is included in Schedule 2 as a Class 2 offence. Under s60B of the *Crimes Act 1958*, it is not an offence for just anybody to loiter near a school. Rather, the person must have been found guilty of a predicate offence listed in s60b(2)(a), and must be found loitering without reasonable excuse in or near a school. One of the predicate offences is wilful and obscene exposure (s60B(2)(a)(iii)). Several of the other predicate offences listed in s60B(2)(a) are included in the schedules to the Act. In my view, the fact that wilful and obscene exposure can trigger the offence of loitering near schools supports the conclusion that wilful and obscene exposure qualifies as 'an offence' under s11(1) of the Act.

"As the offence of wilful and obscene exposure comes within the meaning of 'an offence' in s11(1), the plaintiff's first ground of review would fail."[5]

However, it was not established beyond reasonable doubt or otherwise that the plaintiff was near children or likely to be so. There was certainly no evidence that the plaintiff had ever been interested in children or anyone else other than adult women. It is to be emphasised that the offence of loitering near schools is a Class 2 offence, but obscene exposure, per se, is not, this being an element of the offence of loitering near schools. While the plaintiff's conduct might conceivably have been capable of observation by children it remains unclear how this possibility can demonstrate that the plaintiff posed that risk beyond reasonable doubt. He was sitting in his car at the time of his various offences.

The Court also noted that there is a Class 2 offence of transmitting indecent communication to persons under 16 years of age (Item 28A(vii) to Schedule 2 of SORA) and drew the parallel that were a child to be exposed to the plaintiff's conduct that such exposure would be of a similar character to transmitting indecent communication (porn, one suspects) over the internet, for example. Accordingly, the Court was satisfied that the plaintiff's offending constituted "an offence" because

it concluded that the offending came within the clear ambit of Schedule 2. It would be a far clearer matter if the plaintiff had actually been exposing himself to children or a child or to have been doing so observable from a school or similar place where children gather. He was not.

Sexual safety

Unfortunately, neither the Court nor the defence was able to definitively describe what "sexual safety" is. It is a submission of this paper that an understanding of what constitutes "sexual safety" should be an essential part of SORA as distinct from an amorphous threat to possibly any offence, other than, of course, driving offences.

SORA should be closely interpreted in a defendant's favour where there is no obvious risk of any actual harm to anyone. Certainly in the plaintiff's case in *Blyss,* the two female office workers who witnessed the conduct were not so worried as to avoid going back on another day for another look and to obtain the car registration number for police. Their police statements indicate that both women again attended at the site without any apparent sense of fear or apprehension, let alone appearing to have any regard for their "sexual safety".

Again, this is an act of obscenity, which is an offence against contemporary standards of public decency, rather than sexual safety. This is not to suggest that sexual offences are not of themselves also obscene.

So, what are the limits – or where should they be drawn? Are there in fact any limits to the applicability of SORA? In its broader context, Mr Blyss had engaged in conduct that was no more than expressing a bodily function to the public view. That he had allegedly made eye contact with one of the female witnesses should not of itself be seen as an assault, nor even that the conduct was directed "at" that particular individual. What other bodily functions can be exhibited to public view? Urinating or defecating in public would obviously be caught by s17 of the *Summary Offences Act 1966,* being obscene or offensive behaviour in public: should these offences be caught by SORA? But what of other, less obvious exposures of bodily function such as breastfeeding in public? Such behaviour is sometimes distressing. If, then, a threat to one's sexual safety can be exposure to "psychological harm" engendered by merely witnessing another person's indecent act, then surely distress can also be indicative of one's sexual safety having been harmed, or at the very least, disturbed.

Again, though, "sexual safety" appears to be indefinable. It is to be supposed, however, that a threat to sexual safety must actually require an act involving some level of sexual reference, and, from the above cited West Australian decisions, involve a real and actual threat, not merely an academic possibility. From the Court's reasoning in relation to the transmission of indecent material to minors, it is obvious that some movies and books etc, might all be considered as posing the relevant threat.

But where does this stop – particularly in this age of, in my opinion, the reflexively offended person? Should a threat to sexual safety be constituted by the taking of offence to an otherwise passive act? Should such an actor thereby be in danger of being placed on the sex offender's register? Perhaps we can go further and consider that the publishers of sexually explicit or offensive materials be placed on the register because these images or words might possibly be exposed to children. And what of Penguin Books and the *Obscene Publications Act 1959?* Should Sir Allen Lane, were Penguin Books to have been found guilty, have been sentenced as a registrable offender for publishing *Lady Chatterley's Lover?*

If we are to take sexual offences seriously and have the perpetrators seriously punished, then we also need to treat the statutory sanctions seriously. Statutory sanctions must be applied carefully and by employing a doctrine of parsimony. It is submitted that the purpose of SORA is to protect the community against repeat offenders who commit sexual crimes against actual victims and thereby pose a threat to persons or the community and that to employ its instruments too widely may run the risk of the register not being taken seriously enough if it be known that any offence might be registrable, notwithstanding driving offences. ■

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1. [2016] VSC 548 (13 September 2016).
2. (Hansard 3/6/02 at p1851).
3. *(Commissioner of Police v ABC* [2010] WADC 161 (28 October 2010).
4. *(Commissioner of Police v Tak* [2013] WADC 73 (15 May 2013).
5. At [49]-[51].

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