



Samoa
Law Reform Commission

Komisi o le Toefuataiga o Tulafono a Samoa



SEX
OFFENDERS'
REGISTER

FINAL REPORT

16/16

MAY 2015



GOVERNMENT OF SAMOA

**OFFICE OF THE PRIME MINISTER AND MINISTER FOR THE SAMOA LAW
REFORM COMMISSION**

The Honourable Speaker
THE LEGISLATIVE ASSEMBLY OF SAMOA

In compliance with section 9 (2) of the *Law Reform Commission Act 2008*, I have the honour to submit to you copies of the Report on Sex Offenders' Register as referred to the Samoa Law Reform Commission for review.

This report sets out the Commission's recommendations on Sex Offenders' Register after public consultations and research in accordance with section 4 of the *Law Reform Commission Act 2008*.

A handwritten signature in black ink, appearing to read 'Tuilaepa', written over a large, sweeping flourish.

(Honourable Tuilaepa Lupesoliai Fatialofa Dr. Sailele Malielegaoi)
**PRIME MINISTER AND MINISTER FOR THE SAMOA LAW REFORM
COMMISSION**



GOVERNMENT OF SAMOA

Honourable Tuilaepa Lupesoliai Fatialofa Dr. Sailele Malielegaoi
**PRIME MINISTER AND MINISTER FOR THE
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This report sets out the Commission's recommendations on Sex Offenders' Register after public consultations and research in accordance with section 4 of the *Law Reform Commission Act 2008*.

A handwritten signature in black ink, appearing to read 'Leota Theresa Potoi'.

(Leota Theresa Potoi)
EXECUTIVE DIRECTOR
SAMOA LAW REFORM COMMISSION

Preface

On 5 February 2013, the Samoa Law Reform Commission received a reference from the Attorney General to assess, if:

- it is appropriate in the context of Samoa to have a Sex Offender’s Register (**SOR**); and
- if such a register would help in the deterrence of sexual re-offending?

The call for a SOR originated from a Supreme Court case in December 2012, where a 45-year-old male was convicted and sentenced to 3 years imprisonment for indecent assault of a 7-year-old female child. The same offender was also convicted and sentenced to prison for a similar sexual offence of a 7 year old girl.¹ Justice Nelson, the sitting judge in the proceeding stated the following:

“It may also be such time for sex offenders in this country to register so that people may know what kind of people are around their children...it is clear that this defendant learnt nothing from the first time and the chance for re-offending is high.”

A Discussion Paper was published in April 2013 following preliminary research undertaken by the Commission in relation to the following issues: the purpose and the different types of SOR; whether an SOR can deter sexual re-offending; and whether a SOR is appropriate for Samoa.

The Commission conducted stakeholders’ consultations on 30 July and 1 August 2013,² followed by public consultations in October of the same year. Submissions from stakeholders and the public on whether or not a SOR is appropriate for Samoa have greatly assisted the Commission in its recommendations.

The Commission also considered relevant laws from other jurisdictions such as the United States of America, United Kingdom, New Zealand, Australia, Canada, Guam and America Samoa.

The Commission would like to acknowledge the assistance of its partners and stakeholders in particular, the Office of the Attorney General, Ministry of Police, Ministry of Justice, Courts and Administration, Samoa Returnee’s Charitable Trust, Transnational Crime Unit and the Department of Legal Affairs in America Samoa for providing relevant information related to the issues at hand. The Commission would also like to express its gratitude to Advisory Board members Lī’o Foleni and Seuala Patone Seuala for

¹ *Police v Filipo* [2013] WSSC 92.

² Consultations were held on 2 October 2013 in Upolu and 4 October 2013 in Savaii. Refer to Appendix A for the list of stakeholders consulted.

assisting the Commission with its public consultations in Upolu and Savaii, Ms Claire Bamford (intern from University of New South Wales) for her research contribution, and Ms Jocelyn Cole, volunteer from Australian Volunteer for International Development, for her contribution in the development of this Report.

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INTRODUCTION

The terms of reference (**TOR**) received from the Attorney General requested that the Samoa Law Reform Commission (**Commission**) assess:

- Whether it is appropriate in the context of Samoa to have a SOR; and
- Whether a register would help deter sexual re-offending.

To carry out this work, the Commission had to consider broader issues than the TOR seeks to address, including the various purposes for establishing a SOR, accessibility of a SOR, the potential impact of a SOR on the Samoan culture, and if established how it can be designed to best suit Samoa's needs.

The Commission also considered:

- the current situation in Samoa and how sexual offenders are dealt with;
- available crime statistics from 2008 - 2013 involving sexual offences;
- legislative reforms undertaken in response to the high level of sexual crimes in Samoa;
- submissions from stakeholders and public; and
- other mechanisms that may address some of the issues an SOR may be established to address, including measures aimed at rehabilitation.

This Report is divided into the following 5 Parts:

- **Part 1** will discuss how sex offences are currently regulated in Samoa and the broad legal framework that complements the justice system in dealing with sex offenders, as well as other existing mechanisms that may address some of the issues a SOR would aim to address.
- **Part 2** will discuss available statistics on reported sexual crimes from the period of 2009 – 2013 as well as indicative data on sex offences prosecuted before the Supreme Court in the period of 2009 – 2013. This part will also discuss issues raised by the public in submissions.
- **Part 3** will discuss whether a SOR is appropriate for Samoa. This discussion will include the different purposes and characteristics of a SOR in other jurisdictions such as the USA, Australia UK, Canada, Guam and America Samoa, and New Zealand's alternate provisions.
- **Part 4** will discuss whether a SOR can deter re-offending.
- **Part 5** will provide the Commission's views and recommendations.

PART 1: CURRENT SITUATION IN SAMOA

A. Legal Framework

Crimes Act 2013

- 1.1 In November 2008, the Commission was given a major reference (Criminal Law Review) by the Attorney General due to growing concerns among members of the community and members of the judiciary about the increased number of criminal cases tried before the Supreme Court.³ The Criminal Law Review included the review of the *Crimes Ordinance 1961* and the *Criminal Procedure Act 1972*.
- 1.2 A Criminal Law Review Working Group⁴ was established to assist and inform the Commission about practical issues involving charges and sentencing in the review of the *Crimes Ordinance 1961*.⁵ A Final Report was subsequently published by the Commission which included recommendations for reform, which was passed by Parliament. Most recommendations in the Final Report were enacted in the *Crimes Act 2013* which repealed the *Crimes Ordinance 1961*.
- 1.3 The *Crimes Act 2013* regulates all forms of crimes. Part VII of the *Crimes Act* deals specifically with sexual crimes and offences which include the following:
- sexual violation or rape;⁶
 - unlawful sexual connection;⁷
 - attempted sexual violation and assault with intent to commit sexual violation;⁸
 - sexual conduct with consent induced by threats;⁹
 - incest;¹⁰
 - sexual conduct with a family member;¹¹
 - sexual conduct with child under 12;¹²

³ Samoa Law Reform Commission, *Crimes Ordinance 1961 Final Report*, Report No 01/10 (2010) 8.

⁴ The Criminal Law Review Working Group was made up of senior representatives from the Ministry of Police, National Health Service, Ministry of Justice, Courts and Administration, Ministry of Health, Audit Office, Ministry of Women, Community and Social Development, Fire and Emergency Services, Central Bank of Samoa and the Office of the Attorney General.

⁵ Samoa Law Reform Commission, above n 3, 3.

⁶ *Crimes Act 2013*, s 52(1).

⁷ *Ibid* s 52(2).

⁸ *Ibid* s 53(1-2).

⁹ *Ibid* s 54 (1).

¹⁰ *Ibid* s 55.

¹¹ *Ibid* s 56.

- sexual conduct with young person under 16;¹³
- indecent assault;¹⁴
- using threats of intimidation for the purpose of sexual conduct;¹⁵
- sexual conduct with severely intellectually disabled person;¹⁶
- voyeurism;¹⁷
- adultery by married persons;¹⁸
- adultery with married person;¹⁹
- sodomy;²⁰
- attempt to commit sodomy.²¹

1.4 The *Crimes Act 2013* provided an increase in penalties for all sexual crimes except adultery and sodomy. For instance:

- incest now provides an imprisonment term not exceeding 20 years,²² whereas the repealed Ordinance provided a penalty of imprisonment not exceeding 7 years;
- sexual conduct with a family member under 21 years now provides an imprisonment term not exceeding 14 years.²³ This offence was previously sexual intercourse by a man with a young related girl living in his family and provided an imprisonment term not exceeding 7 years in the repealed Ordinance;
- sexual conduct with child under 12 now provides for life imprisonment,²⁴ whereas the previous penalty was an imprisonment term not exceeding 10 years;
- sexual conduct with young person under 16 now provides for an imprisonment term not exceeding 10 years,²⁵ whereas the previous penalty was an imprisonment term not exceeding 7 years;
- indecent assault now provides a penalty of imprisonment not exceeding 7 years,²⁶ whereas the previous penalty was imprisonment not exceeding 5 years.

¹²*Crimes Act 2013*, s 58.

¹³ *Ibid* s 59.

¹⁴ *Ibid* s 60.

¹⁵ *Ibid* s 62.

¹⁶ *Ibid* s 63.

¹⁷ *Ibid* s 64.

¹⁸ *Ibid* s 65.

¹⁹ *Ibid* s 66.

²⁰ *Ibid* s 67.

²¹ *Ibid* s 68.

²² *Ibid* s 55.

²³ *Ibid* s 56.

²⁴ *Ibid* s 58.

²⁵ *Ibid* s 59.

1.5 The *Crimes Act* also expanded the definition of rape or sexual violation²⁷ to include unlawful sexual connection,²⁸ which carries an imprisonment term of up to 14 years.²⁹ New sexual offences were also created including:

- sexual conduct with consent induced by threats which provides an imprisonment term not exceeding 14 years;³⁰
- using threats of intimidation for the purpose of sexual conduct which provides an imprisonment term not exceeding 5 years;³¹
- sexual conduct with a severely intellectually disabled person which provides for an imprisonment term not exceeding 7 years;³² and
- voyeurism which has an imprisonment term not exceeding 5 years or a fine of up to 500 penalty units.³³

1.6 The increase in penalties for sexual offences and the inclusion of new sexual crimes in the *Crimes Act* was intended to provide deterrence to the commission of such offences.³⁴

1.7 Other relevant legislation such as the *Prisons and Corrections Services Act 2013* and the *Family Safety Act 2013* will be discussed below. Furthermore a Child Care and Protection Bill has been developed and is now undergoing further review by the Office of the Attorney General and the Ministry of Women, Community and Social Development, as well as proposed amendments made to the *Village Fono Act 1990*. These proposed legislative measures all seek to keep Samoa safer.

Prisons and Corrections Services Act 2013

1.8 The Commission was provided with a reference in 2008 to review the *Prisons Act 1969*, focussing on the transition of prisoners from prison confinement to correctional services.³⁵ A Final Report

²⁶ *Crimes Act 2013*, s 60.

²⁷ *Ibid* s 52(1).

²⁸ *Ibid* s 52(2) –Unlawful sexual connection includes the penetration of all other orifices by an object or thing committed by any person.

²⁹ *Ibid* s 52.

³⁰ *Ibid* s 54(1).

³¹ *Ibid* s 62.

³² *Ibid* s 63.

³³ *Ibid* s 54.

³⁴ Samoa Law Reform Commission, *Crimes Ordinance 1961 Final Report*, Report No 01/10 (2010) 15.

³⁵ *Prisons and Corrections Act 2013*, s 3(e) – facilitating the shift of the underlying philosophy from the containment of prisoners to the provision of effective and appropriate correctional services.

was published in June 2011 including recommendations for reform, resulting in the enactment of the *Prisons and Corrections Act 2013*.

- 1.9 The *Prisons and Corrections Act* provides a number of guiding principles when carrying out duties, powers or functions under the Act.³⁶ This includes encouraging self-respect and a sense of personal responsibility in prisoners to rebuild their morale and to instil habits of good citizenship and hard work so they can lead a productive life after their discharge.³⁷
- 1.10 The *Prisons and Corrections Act* proposes a more human rights based approach for Samoa's prison system, recognising the benefits of rehabilitation to society and offenders alike. The Act also provides for the classification of prisoners with the objective of achieving effective rehabilitation of the prisoner.³⁸ Furthermore the Act also provides general guidelines on how prisoners are to be classified – mainly by separating female prisoners, young prisoners, prisoners on remand, civil prisoners and prisoners considered to be at risk within the prison environment.³⁹
- 1.11 The Act provides for early release programs to assist with the rehabilitation of prisoners by providing opportunities for prisoners to re-enter society through the performance of community work, paid employment or by enrolment in an education course.⁴⁰ Regulations can be made regarding schemes for pre-release and early release programmes, as well enabling weekend and short term release of prisoners into the care and supervision of community leaders for the purpose of facilitating their re-entry into their villages or communities.⁴¹ Regulations can also be made for the purpose of identifying classes of offenders, such as those convicted of serious sexual offences, who are not eligible for early release schemes.⁴²
- 1.12 The *Prisons and Corrections Regulations 2014* made under the Act establishes a Classification Committee. It also provides a system of classification of prisoners according to their security ratings, as a means of achieving effective rehabilitation of the prisoners.⁴³ In considering a prisoner's security rating, the Classification Committee is to consider appropriate criteria such as

³⁶ *Prisons and Corrections Act 2013*, s 3.

³⁷ *Ibid* s 3(f).

³⁸ *Ibid* s 39(1)(a).

³⁹ *Ibid* s 39(1)(b).

⁴⁰ *Ibid* s 50(1)(a)–(b).

⁴¹ *Ibid* s 51(1).

⁴² *Ibid* s 50(4)(h).

⁴³ *Prisons and Corrections Regulations 2014*, reg 51(3)(a).

the prisoner's commitment to rehabilitation programs including work, education or release programs.⁴⁴ One of the functions of the Classification Committee is to monitor early release programs, weekend and short term release schemes.⁴⁵

Village Fono Amendment Bill

1.13 The *Village Fono Act 1990* provides for statutory validation and recognition of the roles and functions of the *village fono* or council. The Act also outlines the powers to be vested in the *village fono*. The current powers of the *village fono* stipulated in the legislation consist of the power to make rules for the maintenance of hygiene in the village and the power to make rules governing the development and use of village land for the economic betterment of the village.

1.14 In 2011, the Commission was provided with a reference to review the *Village Fono Act*. In its Report, the Commission recommended that the role and functions of the village council should be extended beyond their existing powers under the current Act to include the making of *faiga faavae*⁴⁶ in relation to some of the following aspects such as village harmony; promoting social cohesion; promoting natural justice and fairness principles in decision making processes and procedures; and any other matter to give effect to or to promote wellbeing, development and maintenance of harmony and good order of the village and its inhabitants.⁴⁷

1.15 The Commission also developed a Bill (ie. *Village Fono Amendment Bill*) proposing amendments to the *Village Fono Act 1990* reflecting its recommendations – to provide for more cohesive and strengthened village good governance, which would result in improved compliance or enforcement of monitoring measures already in place. The Bill is currently being considered by the Ministry of Women Community and Social Development and the Office of the Attorney General.⁴⁸

Family Safety Act 2013

1.16 The Ministry of Justice and Courts Administration (**MJCA**) administers the *Family Safety Act 2013*. The purpose of the *Family Safety Act* is to provide a form of legal protection for victims of domestic violence. Under this Act, protection orders can be sought by persons who have been

⁴⁴ *Prisons and Corrections Regulations 2014*, reg 52(n).

⁴⁵ *Ibid* reg 51(3)(j).

⁴⁶ An example of monitoring measures is the village curfew where the young men or *taulelea* of the village patrol the entire village to ensure the village curfew (which is family prayer time for most families) is respected.

⁴⁷ Samoa Law Reform Commission, *Village Fono Act 1990 Final Report*, Report No 09/12 (2012).

⁴⁸ It is noted that the *Village Fono Amendment Bill* is still in its draft form and may be subject to changes.

subjected to, or are at risk of being subjected to domestic violence.⁴⁹ Protection orders are one measure of preventing sexual abuse in a domestic relationship. Such orders are issued under the jurisdiction of the Family Court and enforced by the Ministry of Police.

- 1.17 A unique feature of this Act is the legal obligation of a Police officer handling such matters to ensure that a charge or information is laid with the Court in order to commence prosecution under the *Crimes Act 2013*. Where the report of domestic violence involves any form of physical or sexual abuse and there is sufficient evidence of this occurring,⁵⁰ an officer in charge must endeavour to ensure that the matter is not withdrawn from criminal prosecution.⁵¹

Child Care and Protection Bill

- 1.18 The Commission was requested to carry out a legislative compliance review of Samoa's obligations under the United Nations Convention on the Rights of the Child (**UNCRC**) in 2009. A Final Report was then developed by the Commission which included recommendations for reform, as well as a Bill (ie. *Child Care and Protection Bill*) reflecting its recommendations.⁵² The key focus of the Bill is the security and welfare of children. For instance, it provides protection orders for the safety of children, authorises Child Welfare Officers to investigate children at risk, and mandates the Government and other groups or organizations to provide childcare services for victimised children.

- 1.19 The Bill proposes the establishment of processes and procedures, where there is suspicion of alleged harm, or alleged risk of harm to a child giving rise to reasonable suspicion by the relevant authority that the child is in need of protection.⁵³ In such instances, an authorized officer must immediately investigate the allegation and assess the child's need of protection, or take other action where appropriate to ensure that the best interests of the child are safeguarded.⁵⁴ It also proposes mandatory reporting to Police of any sexual abuse or exploitation of a child in a school, church or

⁴⁹ *Family Safety Act 2013*, s 2. – Domestic violence is defined to mean physical, sexual, emotional, verbal and psychological abuse and includes intimidation, harassment, stalking and any other controlling or abusive behaviour.

⁵⁰ *Ibid* s 16(1)(a).

⁵¹ *Ibid* s 16(1)(b).

⁵² As per the standard process, the *Child Care and Protection Bill* is currently being finalised by the Attorney General's Office with the Ministry of Women Community and Social Development, as the Government Ministry that would administer it. It is important to note that the Bill when tabled may potentially be quite different from the Bill developed by the Commission.

⁵³ *Child Care and Protection Bill 2013*, cl 12(2) – Harm is defined to include sexual abuse or exploitation.

⁵⁴ *Ibid* cl 12(1).

other religious institution, health facility, prison or corrections facility, or any other place where children are supervised or cared for.⁵⁵ Furthermore, such sexual abuse or exploitation of children must be immediately reported to the Police by a person who holds a position of authority or is employed in that place.⁵⁶ The rationale for the proposed mandatory reporting requirement is to assist in reducing risk of sexual offending of children, and assist Police officers to identify sexual predators.

B. Other mechanisms

1.20 This part of the Report will look into two key projects currently being developed by the Samoa Law and Justice Sector (**Law and Justice Sector**)⁵⁷ i.e. the National Crime Prevention Strategy and the Auafa Mau Database Project. In addition, the Samoa Returnees Charitable Trust (**Charitable Trust**) and the Transnational Crime Unit (**TCU**) will also be discussed in relation to the issue of criminal deportees and how they are monitored once in Samoa.

National Crime Prevention Strategy

1.21 A primary goal of the Law and Justice Sector Plan 2012 – 2016⁵⁸ is to ensure community safety through improved crime management and crime prevention. As part of the activities to achieve this goal, the Law and Justice Sector works to ensure that communities have an increased awareness and understanding of initiatives designed to reduce the fear of crime, increase community confidence in its justice system, and improve Police responsiveness and visibility.⁵⁹

1.22 One such initiative is the ‘*Malu Puiipua* program’, which is a ‘neighbourhood watch’ initiative set up in the Vaitele area to assist the Police in crime management through collaborative efforts between the Police and residents of Vaitele. Another initiative is the establishment of Police posts in the districts across both Upolu and Savaii to improve Police responsiveness and visibility.⁶⁰

⁵⁵ Child Care and Protection Bill 2013, cl 53(1).

⁵⁶ *Ibid* cl 53(2).

⁵⁷ The Samoa Law and Justice Sector was formed in 2008 to help Samoa achieve its national targets in the area of law and justice. The Sector comprises the following core agencies: Office of the Attorney General, Ministry of Justice and Courts Administration, Ministry of Women, Community and Social Development, Ministry of Police, the Office of the Ombudsman and the Samoa Law Reform Commission. The Sector Steering Committee includes representatives from the Samoa Council of Churches, Samoa Law Society and SUNGO.

⁵⁸ See <http://www.samoaljs.ws/english/> (accessed 03 February 2015); *Samoa Law and Justice Sector Plan 2008-2012* (2008) iv http://www.samoaljs.ws/english/index.php?option=com_content&view=article&id=95&Itemid=82 (accessed 03 February 2015)

⁵⁹ Samoa Law and Justice Sector, *Samoa Law and Justice Sector Plan 2012-2016* (2012) 15 http://www.samoaljs.ws/english/index.php?option=com_content&view=article&id=103&Itemid=99 (accessed 03 February 2015).

⁶⁰ *Ibid*.

1.23 In 2012, the Crime Prevention Task Force⁶¹ completed nationwide consultations on issues of crime prevention for the development of a National Crime Prevention Strategy for Samoa.⁶² A draft National Crime Prevention Strategy has now been developed, focusing on community safety through improved crime management and prevention, and identification of potential access to justice issues. The guiding principles in the draft strategy include community safety, restorative justice, rehabilitation and reintegration of offenders, and the recognition of Samoan customs and traditions to help curb offending.⁶³ It is anticipated that the National Crime Prevention Strategy will be finalised sometime in 2015.

Project Auafa Mau Database

1.24 The Auafa Mau project began in 2011. The goal of the project is to implement a centralized database system (**Auafa Mau database**) that would be maintained and operated by the Law and Justice Sector to collect and collate data from the various Sector agencies that could then be used to generate trend reports on crimes and crime demographics.⁶⁴ The objectives of the Auafa Mau database are to:

- compile centralised data for Sector reporting;
- enable a more comprehensive view of Sector statistics on crime and justice;
- enable improved analysis of data collected by the Sector;
- enhance an automated reporting process,
- improve strategic decision-making; and
- standardise reporting conventions throughout the Sector.

⁶¹ The Crime Prevention Taskforce is made up of representatives from the core Sector agencies and SUNGO.

⁶² Timothy P. Fadgen, *DRAFT Sāmoa's Crime Prevention Strategy: A report for the Sāmoa Law and Justice Secretariat and Crime Prevention Taskforce* (2014).

⁶³ *Ibid* 8.

⁶⁴ Interview with Roni Fereti, Sector Coordinator, Law and Justice Secretariat (Apia, 10 December 2014) – For example, data that may be collected from the Ministry of Police consists of the type of offence, gender of the offender and the victim, age of the offender and the victim, geographical location of the offence, occupation of the offender, education level of the offender, relationship of the offender to the victim (if applicable), prior convictions of the offender, and identity of policemen who were assigned the case.

- 1.25 Resourcing issues have hampered the full realisation of the capabilities of the Auafa Mau database, which is not yet fully operational and has not yet been able to generate trend reports due to various technical issues.⁶⁵
- 1.26 When fully operational, the Auafa Mau database would be expected to contain significant data and information about criminal offences (including sexual offences) and the incidence of re-offending, and could potentially be a platform for hosting a SOR, should one be established. Security classifications are already applied to information submitted to the Auafa Mau database, which can only be accessed by approved persons from approved agencies.⁶⁶

Transnational Crime Unit

- 1.27 The Transnational Crime Unit was established in 2003, under the Ministry of the Prime Minister and Cabinet. The role of the TCU is to ensure the safety of Samoa using high level local and global intelligence networks to detect and prevent transnational criminal activities.⁶⁷ This includes a key role in the deportation process of criminal deportees back to Samoa.⁶⁸
- 1.28 The deportation process includes the departing country (usually New Zealand, Australia or USA) notifying TCU and the Police Domestic Intelligence Unit (**Domestic Intelligence Unit**),⁶⁹ about an incoming deportee via the Interpol National Central Bureau for Samoa (**Samoa Interpol**).⁷⁰

⁶⁵ Interview with Roni Fereti, Sector Coordinator, Law and Justice Secretariat (Apia, 10 December 2014) – For instance, the information submitted by Sector agencies is contained in individually designed spreadsheets appropriate for each agency, which is not uniform. The information is therefore not in a format that is adaptable for publication and dissemination and the Sector has identified difficulties in correcting these anomalies. Furthermore, Sector agencies have expressed concerns in relation to ongoing and comprehensive capacity in relation to IT personnel and desk officers to assist in the operation and maintenance of the database.

⁶⁶ Ibid.

⁶⁷ Ministry of Prime Minister and Cabinet, *MPMC Corporate Plan 2010-2013* http://www.mpmc.gov.ws/wp-content/uploads/2013/02/ANNUAL_REPORT_2010-2011_ENGLISH.pdf (accessed 13 October 2014).

⁶⁸ Interview with Herbert Aati, Team Leader, Transnational Crime Unit (Apia, 27 March 2015), indicated that there are on average 30 criminal deportees deported to Samoa annually, most of whom are serious offenders deported from New Zealand.

⁶⁹ The Domestic Intelligence Unit is then responsible for informing Samoa Immigration, and the Commissioner of Police about the criminal deportee's arrival.

⁷⁰ Interpol, *Overview: Supporting Police Worldwide* (2014) <http://www.interpol.int/About-INTERPOL/Overview> (accessed 13 October 2014) – Interpol is an international policing agency that provides an international database accessible by law enforcement agencies around the world. In terms of sexual related offences, Interpol focuses on priority crime areas, which include fugitive investigations, human trafficking and people smuggling, transnational sex offenders and persons of interest; Interpol, *Member Countries: Samoa Police and Prison Service* (2014) <http://www.interpol.int/Member-countries/Asia-South-Pacific/Samoa> (accessed 11 December 2014).

Samoa Interpol is the main point of contact between the departing country and TCU.⁷¹ Depending on the departing country, the information received may or may not include full disclosure of the deportee's previous convictions in the departing country.⁷²

- 1.29 The information received by TCU from Samoa Interpol is entered onto its database and kept strictly confidential.⁷³ Details of criminal deportees have been entered in the database since 2009, although work on searching and compiling information of criminal deportees from 2005 is being carried out.⁷⁴
- 1.30 Samoa Interpol/ TCU provide the Domestic Intelligence Unit full disclosure of all the information about criminal deportees it receives.⁷⁵ However, the Customs Office, Samoa Immigration, the Attorney General's Office the Charitable Trust are provided very limited information about the incoming deportee depending on the purpose for which the information is needed.⁷⁶ For example, although the Attorney General's Office is given a list of the names of all criminal deportees, information about deportee's criminal record is only released to the Attorney General's Office where required for sentencing if the deportee commits an offence in Samoa.⁷⁷ Information about the criminal deportee's past offending is not released to the families of the deportees.
- 1.31 TCU normally gives the Charitable Trust an indication of the level of danger posed by the criminal deportee. TCU does this by classifying the criminal deportees into groups such as 'sexual

⁷¹ In practice, Samoa Interpol is manned by the same person who leads the work of TCU, and who is seconded from the Domestic Intelligence Unit, resulting in some confusion as to which hat is being worn at different parts of the deportation process.

⁷² Interview with Herbert Aati, Team Leader, Transnational Crime Unit (Apia, 27 March 2015) – New Zealand provides full disclosure of the prior convictions of criminal deportees it departs on the basis that this information is not released to the public. In contrast, the USA provides very minimal information usually indicating the last offence for which the criminal deportee was convicted of (for instance, sexual offence, armed robbery), but prior convictions are not revealed. Although a large number of criminal deportees from the USA were convicted of very serious offences, it is very difficult to obtain further information in this regard. Australia has only deported 2 criminal deportees since 2009.

⁷³ Ibid.

⁷⁴ Ibid – Apparently only the Team Leader and DIU have full access to the database.

⁷⁵ Ibid – At the time of this interview oversight of the Domestic Intelligence Unit had transferred temporarily back to Herbert Aati, awaiting a decision by the newly Police Commissioner upon the commencement of his appointment. Note: both Samoa Interpol and TCU are identified as responsible for providing information to the Domestic Intelligence Unit, as indicated in interviews of representatives from both agencies.

⁷⁶ Ibid.

⁷⁷ Ibid.

offenders’, violent offenders’, ‘burglary and theft offenders’ and ‘drug offenders and others’.⁷⁸ In relation to sexual offenders, TCU then distinguishes between what may be serious and less serious sexual offending,⁷⁹ and whether the criminal deportee may be a danger to society, to merit disclosure to the Charitable Trust.⁸⁰

Samoa Returnees Charitable Trust

1.32 The Charitable Trust is a community organization that was established in November 2010.⁸¹ The establishment of the Charitable Trust was a product of the Law and Justice Sector’s Criminal Deportees Taskforce as part of the implementation of Samoa’s Criminal Deportee Policy. The Charitable Trust was set up to address issues related to criminal deportees (referred to by the Charitable Trust as ‘Returnees’). The Charitable Trust is largely focused on the resettlement and rehabilitation of criminal deportees mainly from New Zealand, Australia and the US.⁸²

1.33 The main objective of the Charitable Trust is to promote, advance and carry out rehabilitation and reintegration programs for criminal deportees.⁸³ Its services include but are not limited to some of the following activities:

- registering criminal deportees with the Charitable Trust’s services;
- provision of transitional housing service;
- conducting inductions into Samoan life;
- advocacy on behalf of criminal deportees;
- connecting unregistered criminal deportees with the registered members of the Charitable Trust; and
- providing vocational training.

⁷⁸ Interview with Herbert Aati, Team Leader, Transnational Crime Unit (Apia, 27 March 2015); Telephone interview with Vernon Mackenzie, Program Coordinator, Samoa Returnees Charitable Trust (Apia, 28 March 2015), disclosed that a criminal deportee classified as a violent offender who was diagnosed with psychotic schizophrenia arrived early 2015 without TCU or the Charitable Trust being informed of his condition. Information was received by the Charitable Trust through other networks and was confirmed by the Mental Health Unit, National Health Services. The family of the deportee was subsequently informed for their own safety.

⁷⁹ Interview with Herbert Aati, Team Leader, Transnational Crime Unit (Apia, 27 March 2015) – This is done subjectively by the officer.

⁸⁰ Ibid – For example, a criminal deportee convicted of indecent assault in New Zealand is less likely to be considered.

⁸¹ The Charitable Trust is an incorporated trust registered under the Charitable Trust Act 1965 as from 20 April 2011.

⁸² Interview with Vernon Mackenzie, Program Coordinator, Samoa Returnees Charitable Trust (Apia, 28 October 2014).

⁸³ Samoa Law and Justice Sector, *Samoa Returnees Charitable Trust Integration Assistance Program* (2013) http://www.samoaljs.ws/english/index.php?option=com_content&view=article&id=162:srct-integration-assistance-programme&catid=59:current-projects&Itemid=95 (accessed 13 October 2014).

- 1.34 The Charitable Trust has a voluntary registration system where criminal deportees are encouraged to register, so that the Charitable Trust is able to monitor their reintegration progress within Samoa.⁸⁴ Voluntary registration means that criminal deportees who choose not to register are most often isolated and cannot be monitored, nor do they utilise the services offered by the Charitable Trust.⁸⁵ The Charitable Trust has had 60 registered members since its establishment.⁸⁶ However, there are an estimated 200 – 300 criminal deportees who arrived before the establishment of the Charitable Trust and are not registered.⁸⁷ The majority of criminal deportees that enter Samoa have been convicted of sexual offences (sometimes even classified by the deporting country as a paedophile) and are considered by the Charitable Trust as high risk.⁸⁸
- 1.35 As mentioned before, the Charitable Trust receives very basic information from TCU in relation to a criminal deportee that will be deported to Samoa, which does not include a full history of offending.⁸⁹ Further information on the criminal deportee’s history of offending may be requested by the Charitable Trust from TCU, which may only be provided to the Charitable Trust with the consent of the Police Commissioner.⁹⁰ The Charitable Trust then locates any immediate family of the deportee to notify them about the family member that will be deported from overseas and to arrange for the family to be at the airport. Representatives of the Charitable Trust, along with designated Police officers from the Domestic Intelligence Unit also meet the deportees at the airport⁹¹ and facilitate their resettlement transition in Samoa.⁹² The Charitable Trust does not reveal

⁸⁴ Interview with Vernon Mackenzie, Program Coordinator, Samoa Returnees Charitable Trust (Apia, 28 October 2014).

⁸⁵ Ibid.

⁸⁶ Ibid.

⁸⁷ Ibid.

⁸⁸ Ibid.

⁸⁹ Ibid – Information that the Trust receives from TCU includes bio-data, time and date of arrival to Samoa and details such as the criminal deportee’s full name, gender, date and country of birth, travel documents and reason for deportation.

⁹⁰ Ibid.

⁹¹ When the criminal deportee arrives into Samoa, he or she is interviewed by the Domestic Intelligence Unit although a representative of the Charitable Trust is normally present. As part of the interview, the criminal deportee may be required to provide personal details including contact details, all aliases known by, details of previous criminal activities, photograph, finger prints if necessary and the village he or she is to reside. The criminal deportee is then handed over to the Charitable Trust for a briefing on the available support they provide. If during the briefing a criminal deportee is assessed as being a danger to self or society, he or is referred to the relevant authority, including the psychiatric/disability services, National Health Services or Police, for assistance.

⁹² Interview with Vernon Mackenzie, Program Coordinator, Samoa Returnees Charitable Trust (Apia, 28 October 2014).

the criminal history or any information passed to them from TCU to the families of the criminal deportee, but encourages the deportee to reveal this information when they are ready to do so.⁹³

- 1.36 Consultation with representatives of the Charitable Trust has indicated that the basic information received from TCU is inadequate to prepare its staff members on appropriate methods of rehabilitating and resettling criminal deportee with violent criminal backgrounds. Furthermore, it is insufficient to ensure the safety of Charitable Trust staff from the criminal deportee.⁹⁴
- 1.37 Monitoring is carried out by staff of the Charitable Trust through weekly telephone calls to the criminal deportee, or site visits where warranted, in particular when a criminal deportee faces challenges in remaining a responsible citizen. However, as a community organization that faces significant resource challenges, the Charitable Trust finds it very difficult to monitor any high risk criminal deportee in such a way that could minimize the potential to re-offend.⁹⁵
- 1.38 If a registered criminal deportee commits an offence in Samoa, the Parole and Probation Services division of the Ministry of Justice and Courts Administration collaborates with the Charitable Trust to compile a report for court purposes. The report may include the complete background information (received from TCU, if authorised for disclosure by the Police Commissioner) of the criminal deportee including his or her criminal history.⁹⁶

Police Domestic Intelligence Unit (Domestic Intelligence Unit)

- 1.39 The Domestic Intelligence Unit was established in 2005 within the Ministry of Police to:
- provide intelligence led analysis to support police work relating to national security and crime reduction;
 - collect, record and analyse crime data for the dissemination of intelligence information to identify trends in crime and crime ‘hot spot’ areas;
 - update and maintain manual filing systems for safekeeping of records and intelligence information; and

⁹³ Interview with Vernon Mackenzie, Program Coordinator, Samoa Returnees Charitable Trust (Apia, 28 October 2014).

⁹⁴ Ibid.

⁹⁵ Ibid.

⁹⁶ Ibid.

- document, profile and monitor the whereabouts of criminal offenders, e.g. criminal deportees and ex-convicts.⁹⁷

1.40 The objective of the Domestic Intelligence Unit is to operate as the national point of contact for domestic law enforcement agencies requiring help in overseas investigations and to facilitate cross-border police cooperation to prevent and fight transnational crime.⁹⁸ The Domestic Intelligence Unit and the TCU, work together under Samoa Interpol, led by the Commissioner of the Police.

1.41 TCU automatically releases the deportation notice and all information received (including prior convictions) regarding the criminal deportee to the Domestic Intelligence Unit.⁹⁹ The Domestic Intelligence Unit is identified as the first point of contact for a criminal deportee upon their return to Samoa where they are interviewed and advised of services available to them in Samoa.¹⁰⁰ However, in practice a representative of the Charitable Trust is often the first point of contact and is normally always present.¹⁰¹ Once the initial interviews are completed, responsibility for the criminal deportee is transferred to the Charitable Trust, with the Domestic Intelligence Unit only involved again if the criminal deportee commits an offence in Samoa.¹⁰²

PART 2: SEXUAL OFFENDING IN SAMOA

A. Background

2.1 The Commission has faced various challenges in collecting relevant data and statistics in order to develop this Report. Such challenges include the inaccessibility or unavailability of important data, often due to format issues. At the time of carrying out research in connection with this Report, investigations within the Ministry of Police were underway, which complicated the process of information gathering by the Commission even further.¹⁰³ Similarly, data received from the

⁹⁷ Interview with Viliamu Faamatuainu, Domestic Intelligence Unit, Ministry of Police (Apia, 14 November 2014).

⁹⁸ Ibid.

⁹⁹ Interview with Herbert Aati, Team Leader, Transnational Crime Unit (Apia, 27 March 2015).

¹⁰⁰ Above n 97.

¹⁰¹ Interview with Vernon Mackenzie, Program Coordinator, Samoa Returnees Charitable Trust (Apia, 28 October 2014).

¹⁰² Above n 97.

¹⁰³ The resulting vacancy of the Police Commissioner and the fortnightly rotation of Assistant Police Commissioners into the role of Acting Police Commissioner further compounded the problem of obtaining relevant up-to-date information for this report.

Ministry of Justice and Courts Administration was mostly raw information unable to be systematically analysed, due to resourcing and capacity issues within that Ministry.¹⁰⁴

- 2.2 Statistics that the Commission was able to obtain to provide a general overview of the crime trends in Samoa were derived from the Pacific Legal Information Institute and related to the overall figures of sexual offences prosecuted and sentenced by the Supreme Court of Samoa.

B. Statistics

- 2.3 To determine the trend of sexual offences in Samoa, the Commission obtained statistics (Figure 1 and 2) provided by the Ministry of Police indicating the total numbers of reported crimes of a sexual nature. It remains unclear however, what reported sexual crimes were subsequently prosecuted, and furthermore the Police statistics are not disaggregated per year. Therefore, only the total number and percentage of sexual crimes that have been reported to the Police between the periods of 2009 – 2013 is shown. It also remains unclear whether these reported crimes include repeat sexual offenders. Also, no other relevant information, such as the age or gender of the offenders or location of offences, could be obtained regarding the offenders or offending. Furthermore, due to the generalised and high-level nature of the information available from the Ministry of Police, the Commission has been unable to identify any probable root causes or triggers for the commission of sexual crimes in Samoa.

¹⁰⁴ Interview with Lio Heinrich Siemsen, Assistant Chief Executive Officer, Ministry of Justice and Courts Administration (Apia, 20 August 2014).

Figure 1: Total Number of Reported Crimes of a Sexual Nature 2009 – 2013 (Ministry of Police)

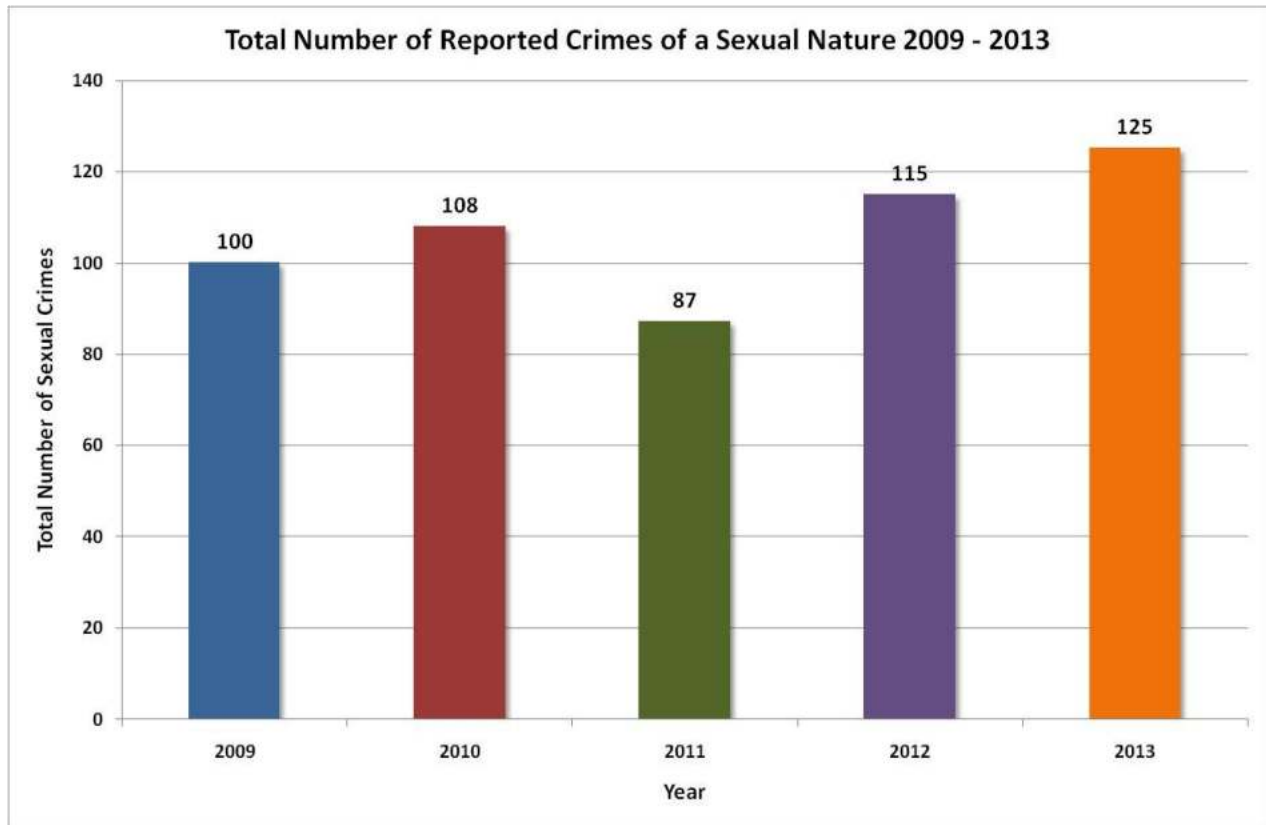
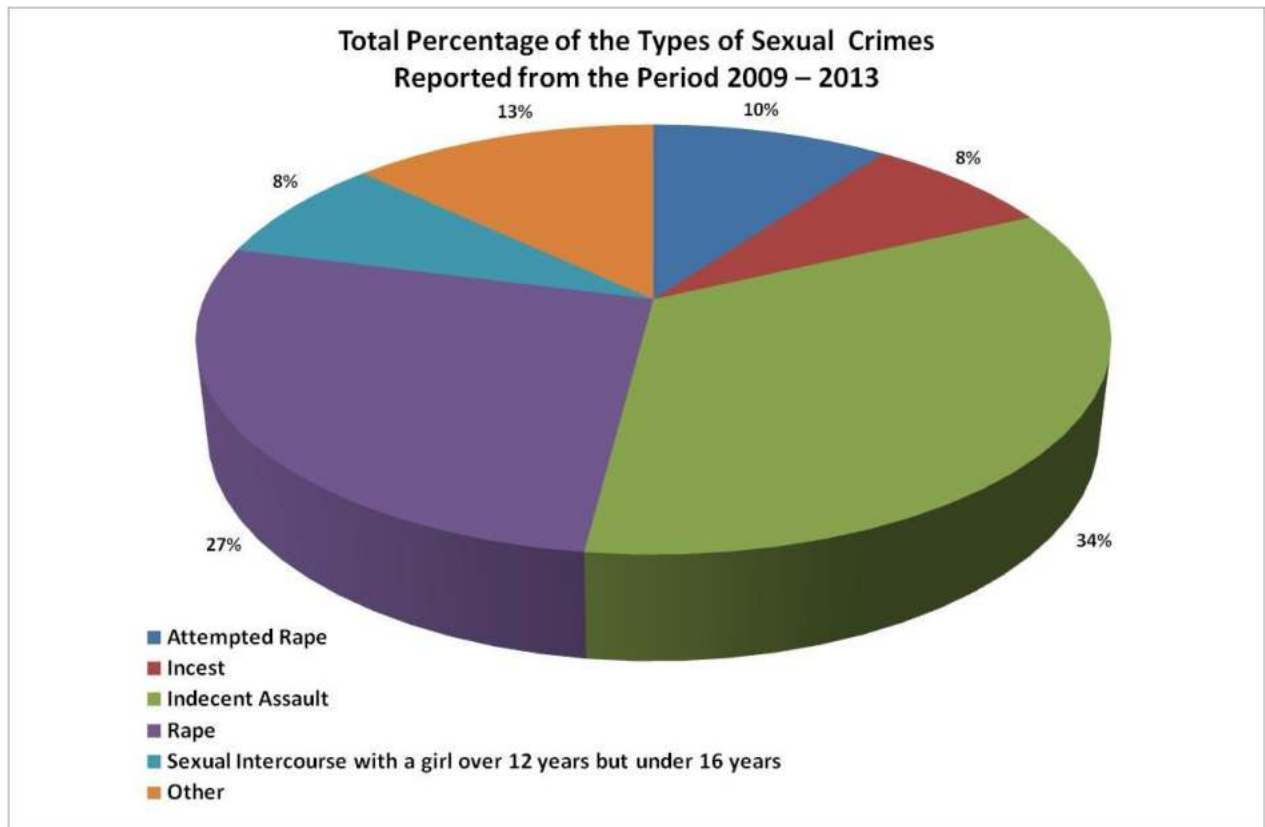
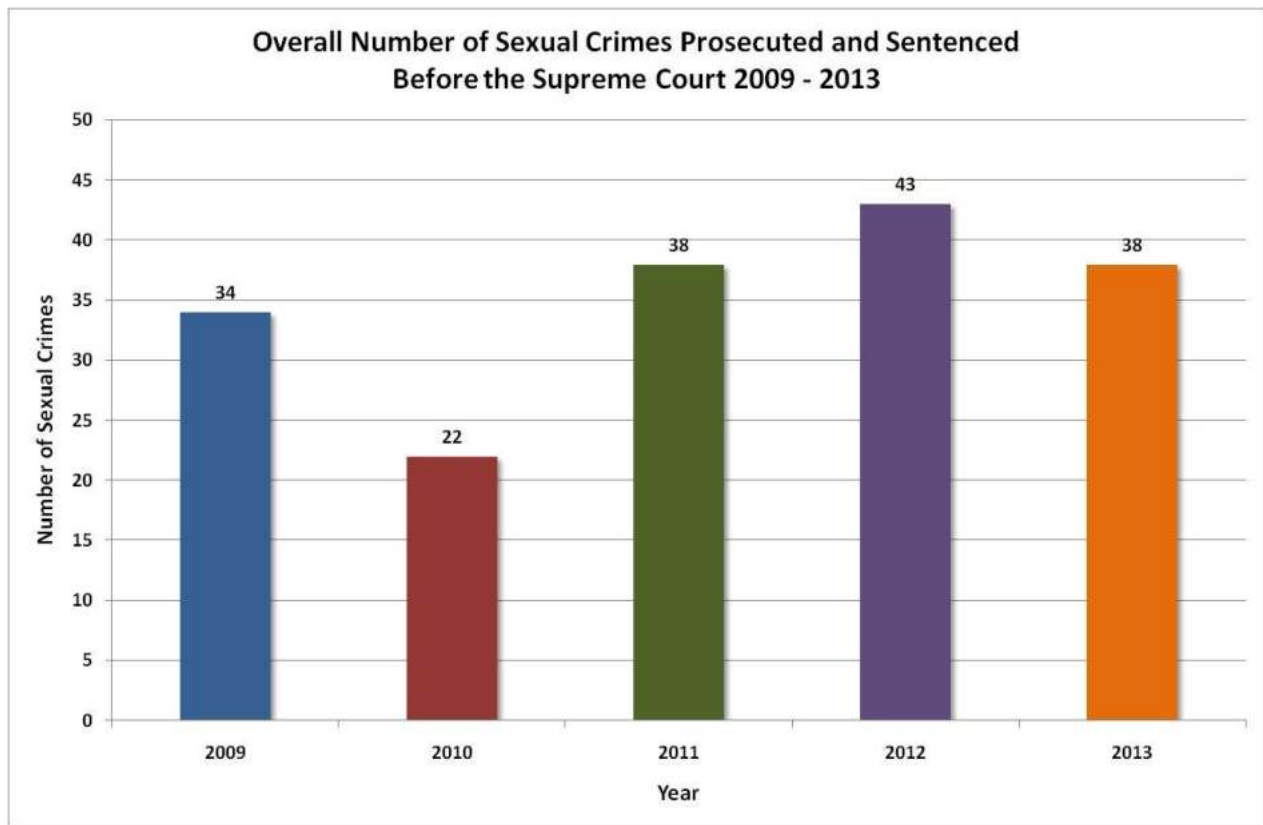


Figure 2: Total percentage of the types of Reported Crimes of a Sexual Nature 2009 – 2013 (Ministry of Police)



* **Other:** Adultery, Attempted Indecent Assault, Bigamy, Carnal Knowledge, Cyber Crime (Distribution of pornographic materials), Indecency between boys/males, Prostitution, Sexual Intercourse with girl under 12 years, Sexual intercourse with an imbecile girl/disabled, Sodomy and Solicitation.

Figure 3: Overall numbers of sexual crimes prosecuted and sentenced before the Supreme Court 2009 – 2013 (Pacific Legal Information Institute – PACLII)¹⁰⁵



¹⁰⁵ Pacific Legal Information Institute (PACLII) <http://www.pacii.org>.

C. Analysis

- 2.4 Figure 1 highlights the total numbers of reported crimes of a sexual nature from the period 2009 - 2013. In total, 535 were reported in that period, with the highest number of sexual crimes reported to the Ministry of Police in 2013. The most common types of reported sexual crimes over that whole period included rape, indecent assault, and attempted rape (see Figure 2). Figure 1 indicates a fluctuating trend where the number of reported sexual crimes reported to police decreased or increased by year, however as an overall trend, there was a 20 percent increase from 2009 to 2013 (with 100 reported sexual crimes in 2009, and 125 reported crimes in 2013).
- 2.5 Figure 3 indicates a fluctuating trend of sexual crimes prosecuted and resulting in convictions before the Supreme Court. It is unclear what types of reported sexual crimes in Figure 1 resulted in conviction as shown in Figure 3. For example, Figure 1 shows that in 2009, 100 sexual crimes were reported, however Figure 2 does not provide a breakdown of the types of sexual crimes reported in 2009 alone (i.e. how many of the 100 related to rape, incest, or indecent assault, etc). Furthermore, Figure 3 does not clarify which types of sexual crimes in 2009 were prosecuted, but only shows that 34 cases were prosecuted and sentenced before the Supreme Court in that year. Furthermore, Figure 3 was constructed on the basis that the defendant was only charged for one offence, not multiple offences. In sum, it has not been possible to distil actual numbers of reported cases that have resulted in a conviction, nor what type of offence it related to.
- 2.6 Information that would assist the Commission in identifying repeat offenders, ages and gender of offenders was also not available for analysis. The Commission considers it prudent to ensure that accurate information and data is kept up to date and in a form that can be used by the relevant Government Ministries to assist in future legislative and policy development in this very important area.

D. Consultations

- 2.7 Consultations with Government Ministries, Non Government Organisations and the public were undertaken by the Commission in July, August, and October 2013, whilst consultations with individuals were carried out in 2014. The majority of submissions received during public consultations expressed a general view that a SOR should be established for the purposes of protecting children. Many submitters were also of the view that such a register should be made public to further punish convicted sex offenders.
- 2.8 Some stakeholders expressed the view that the establishment of a SOR inferred that the current justice system was not working. Other views expressed by some stakeholders was that rather than

establishing a SOR, there should be a strengthening of current rehabilitation mechanisms already in place. Stakeholders also queried whether a SOR was necessary when there are sentencing records of sex offenders in existence at the Ministry of Justice and Courts Administration.

- 2.9 Submissions were also received by the Commission regarding the characteristics and form of a SOR for Samoa, in particular, that a SOR should clarify the types of registrable sex offences so that young offenders, first time offenders or individuals charged with statutory rape are given due consideration. These submissions emphasised the need to consider the effects of a SOR on offenders who may have the potential to be rehabilitated, but who, due to registration may face extreme difficulty in securing employment and being reintegrated back into society.
- 2.10 Additional concerns were expressed as to the potential negative effect of lengthy registration periods on an offender's rehabilitation and reintegration back into society. The National Human Rights Institution in Samoa expressed its concerns to balance the rights of offenders against those of the victims. Members of the Institution raised the offender's right to privacy as an issue for consideration under this review, (if a SOR was established), particularly when considering whether personal details of offenders should be made public.
- 2.11 Other matters raised in public consultations included the need for accurate, updated and available statistics that would allow trends of sexual offences committed in Samoa to be predicted. An additional concern raised was the need for control measures and awareness programs concerning cyber abuse found in social media, and the distribution of pornographic materials among young people, for example via 'Smart Phones'.¹⁰⁶ It was suggested that these may be considered as registrable offences under a SOR, if one was established.
- 2.12 Concerns were raised whether Samoa has the resources to implement a SOR and whether the authority that would administer the SOR would have the capacity to implement, maintain and monitor registrations. There were also concerns about enforcement. Furthermore, concerns were expressed as to the cultural implications of public disclosure or access to a SOR. This may include for example, the potential for a sex offender's family, village, community and church to be affected by inclusion of a sex offender's personal information on a SOR. There was also great uncertainty as to the extent to which the village council would deal with such matters if a public SOR was to be established, which may affect social cohesion within the village.

¹⁰⁶ Media reported on the expulsion of a College student after a sexually explicit video of the student was circulated to cell phones across Samoa. (Samoa Observer, 11 August 2011).

- 2.13 Given the population density and geographic size of Samoa, several issues raised in consultations encompassed concerns such as the reactions or unintended consequences of publicising names and residential addresses of registered sex offenders, to villages and community. One of the key concerns raised about making such information available to the public was public safety and the potential for harassment and discrimination being directed against not only the registered sex offenders, but also their families.

PART 3: IS A SEX OFFENDER'S REGISTER APPROPRIATE FOR SAMOA?

A. Background

- 3.1 Different jurisdictions have varied forms of a SOR. Part 1 of the Commission's Discussion Paper provided the following definition of a SOR adopted by the Home Office of the United Kingdom, the lead government department for immigration, passports, counter-terrorism, policing, drugs and crime, which defined a SOR as:

*"...not a form of punishment or sentence of the court but an add-on additional feature designed in the interests of public and child protection...a regulatory feature that followed automatically from a conviction and sentence and that is a...measure aimed at helping to protect the community from sex offenders ..."*¹⁰⁷

- 3.2 It is important to consider carefully the different forms and requirements of SORs established in other jurisdictions and what, if any, aspects of such registers are appropriate for Samoa, in the context of its customs and traditions. In doing so, consideration should be given to Samoa's various unique characteristics, such as its population size (that according to the 2011 census, reached 187,820),¹⁰⁸ geographic size, and its community structure and village system of justice.

¹⁰⁷ Home Office (1996) Sentencing and Supervision of Sex Offenders: A Consultation Document, Cm 3304. Cited in Thomas, T (2008) The Sex Offender 'Register': A Case Study in Function Creep, *The Howard Journal*, 47 (3): 227-237 (page 228). In Hallam Centre for Community Justice, *Briefing Paper: Sex Offender Registration – a review of practice in the United Kingdom, Europe and North American* (2009) http://www.shu.ac.uk/_assets/pdf/hccj-SexOffenderRegBriefPaper.pdf (accessed 06 February 2013).

¹⁰⁸ Samoa Bureau of Statistics, *Population and Housing Census Analytical Report* (2011) http://www.sbs.gov.ws/index.php?option=com_advlisting&view=download&fileId=1388&Itemid=164 (accessed 23 April 2014).

B. Purpose of a SOR

United States of America (USA)

3.3 The original purpose of registration on a SOR under USA law was to provide law enforcement with a database of information to help monitor known sex offenders and to assist in the investigation of new allegations.¹⁰⁹ The purpose was later expanded to include providing American citizens with information to protect themselves and their children from sexual predators, following the passing of *Megan's Law*, which allows public access to the SOR.¹¹⁰ It was anticipated that offenders subjected to community scrutiny would be less likely to re-offend and that those who do would be apprehended more quickly due to community assistance in reporting suspicious activities.¹¹¹

United Kingdom (UK)

3.4 In the UK, a SOR is used to assist the police identify suspects when a sexual crime is committed as registered offenders are usually the first to be investigated by police.¹¹² The SOR also assists the police in preventing sexual crimes from re-occurring and to act as a deterrent for potential re-offenders.¹¹³

Canada

3.5 In Canada, the purpose of a SOR is to help police services prevent and investigate crimes of a sexual nature, achieved through the registration of certain information relating to sex offenders.¹¹⁴

Guam

3.6 In Guam, the purpose of its SOR is to ensure the safety of the community from sex offenders through monitoring of the offenders to protect existing victims, prevent further victimisation, deter

¹⁰⁹ Elizabeth J. Letourneau et al, *Evaluating the Effectiveness of Sex Offender Registration and Notification Policies for Reducing Sexual Violence against Women* (2010) 5 <https://www.ncjrs.gov/pdffiles1/nij/grants/231989.pdf> (accessed 06 February 2013).

¹¹⁰ California Department of Justice, *California's Megan's Law* (2000) http://ag.ca.gov/megan/pdf/ca_megans.pdf (accessed 06 February 2013).

¹¹¹ Above n 109, 5.

¹¹² Hallam Centre for Community Justice, *Briefing Paper: Sex Offender Registration – a review of practice in the United Kingdom, Europe and North American* (2009) 3 <http://www.shu.ac.uk/assets/pdf/hcci-SexOffenderRegBriefPaper.pdf> (accessed 06 February 2013).

¹¹³ Ibid.

¹¹⁴ *Sex Offender Information Registration Act 2004* (Canada), s 2.

recidivism among offenders, increase public safety and community awareness and assist law enforcement agencies with investigations for new sex crimes.¹¹⁵

Victoria, Australia

3.7 Victoria's SOR was established by the *Sex Offenders Registration Act 2004*, which sets out its overall purpose being to reduce the risk of harm to children of sexual abuse, assist law enforcement and to reduce the risk of re-offending.¹¹⁶ The purpose of the scheme is:

- to require certain offenders who commit sexual offences to keep police informed of their whereabouts and other personal details for a period of time to reduce the likelihood of re-offending and facilitate the investigation and prosecution of any future offences that they may commit;
- to prevent registered sex offenders working in child related employment; and
- to empower the Police Ombudsman to monitor compliance in accordance with the Act.¹¹⁷

Tasmania, Australia

3.8 Tasmania's Community Protection Offender Register is established under the *Community Protection (Offender Reporting) Act 2005*. Its purpose is to reduce the likelihood that sex offenders will reoffend and to facilitate the investigation of any future offences that they may commit, to enable courts to make orders specifying certain offenders to be reportable offenders and for related purposes.¹¹⁸

Western Australia

3.9 The Community Protection Offender Register in Western Australia is established by the *Community Protection (Offender Reporting) Act 2004*. The purpose of this register is to reduce recidivism among sex offenders by keeping track of their whereabouts and to facilitate police investigation and prosecution should they reoffend in the future.¹¹⁹

¹¹⁵ Guam Judiciary, *Guam Sex Offender Registry* (2011) <http://www.guamcourts.org/sor/faq.asp> (accessed 01 April 2014).

¹¹⁶ Victorian Law Reform Commission, *The Purpose of the Sex Offender Registration Scheme*, http://www.lawreform.vic.gov.au/sites/default/files/SOR_Final%20Report_Ch%202_Purpose%20of%20the%20scheme.pdf (accessed 11 February 2013).

¹¹⁷ *Sex Offenders Registration Act 2004* (Victoria), s 1.

¹¹⁸ *Community Protection (Offender Reporting) Act 2005* (Tasmania).

¹¹⁹ *Community Protection (Offender Reporting) Act 2004* (Western Australia).

New South Wales, Australia

3.10 The *Child Protection (Offenders Registration) Act 2000* established the Child Protection Register in New South Wales. The purpose of the Child Protection Register is multifaceted. It includes to assist in the monitoring and management of child sex offenders in the community, increase and improve the accuracy of child sex offender intelligence held by police, assist in the investigation and prosecution of child sex offences committed by recidivist offenders and to provide a deterrent to re-offending.¹²⁰

American Samoa

3.11 The *Sex Offender Registration and Community Notification Code 2014* was passed by American Samoa to amend its predecessor that was enacted in 2011.¹²¹ This legislation proposes to achieve the following:

- incorporate a more comprehensive group of sex offenders and sex offences for which registration is required;
- impose a requirement that the current registered sex offenders keep their registration current in each jurisdiction they reside, work or go to school;
- impose a requirement for sex offenders to provide more extensive registration information and to make periodic in-person appearances to verify and update registered information;
- expand the amount of information available to the public regarding registered sex offenders; and
- make changes in the required minimum duration of registration for sex offenders.¹²²

C. Accessibility

USA

3.12 Under Megan's Law, California's SOR is available to the public via internet access through the State of California Department of Justice website that hosts the Megan's Law Sex Offender Locator Site.¹²³

¹²⁰ Australian Institute of Family Studies, *Offender registration legislation in each Australian state and territory* (2014) <http://www.aifs.gov.au/institute/pubs/carc/3b.html> (accessed 12 December 2014).

¹²¹ *Sex Offender Registration and Community Notification Code 2014* (American Samoa) s 46.2801.

¹²² Interview with Mitzie Jessop, Deputy Attorney General, American Samoa Legal Affairs Department (Apia, 22 July 2014).

¹²³ State of California Department of Justice, *About Megan's Law* <http://www.meganslaw.ca.gov/homepage.aspx?lang=ENGLISH> (accessed 06 February 2013).

UK

- 3.13 UK's *Sex Offenders Register Act 1997* establishes a SOR that is not accessible by the public and provides strict notification requirements that sex offenders must follow.

Canada

- 3.14 Canada's SOR requires that registration of information is carried out in a manner that ensures the confidentiality of the sex offender's information. The SOR also allows for the registered sex offender to receive information of his or her registration upon request. Upon request, a copy of the sex offender's information is then sent to the offender free of charge and without delay.¹²⁴ Access to the SOR is restricted to police services only to enable the police to prevent or investigate crimes of a sexual nature.¹²⁵ This is to protect the interests of sex offenders and their rehabilitation and reintegration into the community as law-abiding citizens and also to reflect the right to privacy enshrined in Canada's laws.

Guam

- 3.15 In November 1999, Guam enacted its Sex Offender Registry under Public Law No. 25-75, establishing the Judiciary of Guam Sex Offender Registry Management Office to register convicted sex offenders. It has now been amended by Public Law No. 30-223. Like the USA, Guam's SOR can be accessed by the general public through the Registry website.¹²⁶ The website classifies sex offenders so that the public may maintain awareness about any dangerous sex offenders who are living or working within close vicinity.

Victoria, Australia

- 3.16 Similar to the UK and Canada, the Victorian SOR remains confidential and private, being limited to authorized members of the Police appointed by the Chief Commissioner.¹²⁷ All authorized persons with access to the SOR are barred from disclosing the personal information on it. Exemptions can be made where information is disclosed externally for the purposes of law enforcement or judicial functions and in situations where the Chief Commissioner deems disclosure to be in the proper administration of the *Sex Offenders Registration Act 2004*.¹²⁸

¹²⁴ *Sex Offender Information Registration Act 2004* (Canada), s 8.1(6)(b).

¹²⁵ *Ibid* s 2(c)(ii).

¹²⁶ Guam Judiciary, *Guam Sex Offender Registry* (2011) <http://www.guamcourts.org/sor/searchoffender.asp> (accessed 01 April 2014).

¹²⁷ *Sex Offenders Registration Act 2004* (Victoria), s 63(1).

¹²⁸ *Ibid*.

Tasmania, Australia

3.17 Tasmania's SOR is private and access is limited to the Commissioner of Police and to authorised members of the Police appointed by the Commissioner. Any disclosure of information on the SOR outside of the Police Office must first be authorised by the Commissioner.¹²⁹

Western Australia, Australia

3.18 In Western Australia, access to the SOR is only permitted to police officers authorised by the Police Commissioner.¹³⁰ The information on the SOR may be disclosed externally including to Police Commissioners of another state or country, however only upon the Police Commissioner's authorisation.¹³¹

New South Wales, Australia

3.19 Access to the Child Protection Register in New South Wales is restricted to police officers authorised by the Commissioner of Police.¹³² The dissemination of the information on the Child Protection Register is prohibited unless any of the following occurs:

- the disclosure is made for law enforcement purposes;
- the offender has consented to the release of his or her personal information;
- there is a court order for the information to be released for the purposes of a hearing;
- it is authorised by the Commissioner of Police for the purposes of ensuring the safety or protection of children.¹³³

American Samoa

3.20 The *Sex Offender Registration and Community Notification Code 2014* establishes American Samoa's Sex Offender Registry and stipulates that such a register is to be publicly accessible.

New Zealand

3.21 In 2003, New Zealand elected to delay the introduction of a SOR by instead proposing that legislative provisions relating to extended supervision orders under the *Parole Act 2002* are given the opportunity to deal with sex offenders in alternate ways. However a SOR is presently under consideration. This is discussed in further detail at Parts 3 and 4 below.

¹²⁹ *Community Protection (Offender Reporting) Act 2005* (Tasmania), s 44.

¹³⁰ *Community Protection (Offender Reporting) Act 2004* (Western Australia), s 81(1)(a).

¹³¹ *Ibid* s 81(2).

¹³² *Child Protection (Offenders Registration) Act 2000* (New South Wales), s 19A.

¹³³ *Ibid* s 21E.

D. Form of Register

California

Registrable offences

3.22 Any person convicted in any court in California or in any federal or military court of a registrable offence is required to register. Registrable offences in California include the following classes of sex offences:

- being a sexually violent predator;
- murder resulting from a rape or attempted rape;
- kidnapping resulting in death by rape or sodomy;
- kidnapping of a child with intent for ransom, reward or extortion resulting in rape and other sexual contact;
- human trafficking including minors with intent for sexual purposes;
- lewd and lascivious acts committed on a child under 14 years;
- assault with intent to rape, sodomize or engage in oral copulation; or
- sexual penetrations against the victim's will causing bodily injury.¹³⁴

Classification

3.23 California's penal code classifies registrable offences into four levels. The type of offence committed determines the extent of the registered sex offender's information which is to be publicly accessible on the Megan's Law Sex Offender Locator Site. The four levels of classification are listed below:

- Home address category – offenders who are convicted of offences in this category are required to have their home addresses posted on the website along with their personal information.¹³⁵ Offences in this category include murder resulting from rape or attempted rape,¹³⁶ kidnapping with intent to rape or commit sexual penetration or sodomy upon a child under 14 years.¹³⁷

¹³⁴ The list is non-exhaustive but is considered the major sexual crimes that require registration under section 290 of California's Penal Code.

¹³⁵ *Penal Code of California 1873*, s 290.46(b) – The registered sex offender's information posted on the website include his or her name and known aliases, a photograph, a physical description, gender and race, date of birth, criminal history and any other information the Department of Justice deems necessary.

¹³⁶ *Ibid* s 290.46(b)(2)(A).

¹³⁷ *Ibid* s 290.46(b)(2)(B).

- Conditional home address category – offenders who are convicted of offences in this category are required to have their community of residence and ZIP code posted on the website along with their personal information. However, if an offender was convicted of 2 or more offences in this category, their home address must be disclosed on the website as well.¹³⁸ Offences in this category include assault with intent to rape, sodomize or engage in oral copulation,¹³⁹ rape where the victim is incapable because of a mental disorder, intoxication or being unconscious to give consent to the sexual intercourse and this is known by the offender,¹⁴⁰ sodomy where the victim is a child under 14 years,¹⁴¹ committing lewd or lascivious act upon a dependent person¹⁴² by force, violence, duress or threat of immediate and unlawful bodily injury on the victim.¹⁴³
- Zip code category – offenders convicted of offences in this category are required to have their community of residence and ZIP code along with their personal information disclosed on the website.¹⁴⁴ Offences in this category include touching the victim’s intimate parts against his or her will,¹⁴⁵ any person who entices a victim under 18 years into prostitution,¹⁴⁶ any person who induces the victim to engage in sexual intercourse, sexual penetration, oral copulation or sodomy and his or her consent is procured through false or fraudulent representation.¹⁴⁷
- Undisclosed category – offenders convicted of offences in this category are not disclosed on the website. However, these offenders are still required to register as sex offenders with local law enforcement agencies.¹⁴⁸ Offences in this category include molesting any child under 18 years¹⁴⁹ or any person who has in his or her possession, produces or publishes

¹³⁸ *Penal Code of California 1873, s 290.46(c).*

¹³⁹ *Ibid s 290.46(c)(2)(A).*

¹⁴⁰ *Ibid s 290.46(c)(2)(B).*

¹⁴¹ *Ibid s 290.46(c)(2)(C).*

¹⁴² *Ibid s 288(f)(3) – Dependent person is defined as any person who has a physical or mental impairment that substantially restricts his or her ability to carry out normal activities or to protect his or her rights.*

¹⁴³ *Ibid s 290.46(c)(2)(D).*

¹⁴⁴ *Ibid s 290.46(d).*

¹⁴⁵ *Ibid s 290.46(d)(2)(A).*

¹⁴⁶ *Ibid s 290.46(d)(2)(B).*

¹⁴⁷ *Ibid s 290.46(d)(2)(C).*

¹⁴⁸ *Ibid s 290.46(e).*

¹⁴⁹ *Ibid s 290.46(e)(2)(B).*

obscene matter depicting a person under the age of 18 engaging in or simulating sexual conduct.¹⁵⁰

Duration of registration

3.24 Section 290(a) of the California Penal code provides lifetime registration for sex offenders in California. However registered sex offenders in the undisclosed category may be released from the duty of registration upon obtaining a certificate of rehabilitation.¹⁵¹ The court may grant a certificate of rehabilitation to relieve a registered sex offender of the duty to register if the offender has complied with his or her registration and reporting duties for a continuous period of at least 10 years and has not reoffended during that period.¹⁵²

Reporting Requirements

3.25 Sex offenders must register with the Chief of Police of the city where he or she resides (or in cases where a sex offender resides in an area with no police department to the County Sherriff) within 5 working days of coming into or changing address.¹⁵³

United Kingdom

Registrable offences

3.26 The UK's SOR sets out definitions of registrable or qualifying offences that require mandatory registration. These are set out in the *Sexual Offences Act 2003* where offences include but are not limited to the following:

- Rape;
- Intercourse with a girl under 13
- Intercourse with a girl under 16 (if the offender was 20 or over);
- Incest where the victim was under 18;
- Indecent assault where the victim was under 18;
- Causing or encouraging the prostitution of, intercourse with or indecent assault on a girl under 16.¹⁵⁴

¹⁵⁰ *Penal Code of California 1873*, s 290.46(e)(2)(C).

¹⁵¹ *Ibid* s 290.5(a)(1).

¹⁵² *Ibid* s 290.5(a)(3).

¹⁵³ *Ibid* s 290; California Department of Justice, *Summary of California Law on Sex Offenders*

<http://www.meganslaw.ca.gov/registration/law.aspx?lang=ENGLISH> (accessed on 18 October 2014).

¹⁵⁴ *Sexual Offences Act 2003* (United Kingdom), Schedule 3.

Classification and duration of registration

3.27 The UK does not group or classify its registrable offences to ascertain the duration for registration.

How long a sex offender is to be registered in the UK is dependent on the sentence he or she receives upon being convicted of a registrable offence, for example:

- sex offenders sentenced to life imprisonment are required to register for life;
- sex offenders sentenced to imprisonment for a term or more than 6 months but less than 30 months are required to register for 10 years;
- sex offenders who have been sentenced to imprisonment for a term of 6 months or less are required to be registered for 7 years.¹⁵⁵

Registrable Information and Reporting Requirements

3.28 The SOR sets out personal details of an offender that must be provided to the police three days after conviction, such as:

- full name and any names previously used;
- home address and any other addresses where he or she regularly resides;
- copy of the passport and travel documents; and
- changes to any of these details.¹⁵⁶

3.29 Sex offenders must also report to the local police authorities within 3 days of release from confinement. Any changes made to their personal details, such as their name and address, must be reported to the police within 3 days of the change occurring. Otherwise, they are required to report to the police annually for the duration of registration if there are no changes to their personal details.¹⁵⁷

Canada

Registrable Offences

3.30 Canada's *Sex Offender Information Registration Act 2004* requires convicted sex offenders to register by Court order. Under that Act, if an offender has committed a registrable offence, the court is obliged to make an order requiring registration. Registrable offences in Canada include but are not limited to:

- Rape;

¹⁵⁵ *Sexual Offences Act 2003* (United Kingdom), s 82.

¹⁵⁶ *Ibid* s 83.

¹⁵⁷ *Ibid* s 84.

- Touching directly or indirectly any body part of a person under the age of 16 years for a sexual purpose;
- Parent or guardian procuring sexual activity from a person under the age of 18 years under his or her care;
- Touching directly or indirectly any body part of a person under the age of 16 years for a sexual purpose;
- Incest;
- Making, possessing, distributing or accessing of child pornography;
- Making sexually explicit material available to a child;
- Agreement or arrangement to commit a sexual offence against a child.¹⁵⁸

Classification and Duration of registration

3.31 Canada, similar to the UK, does not group or classify its registrable offences to determine or ascertain the duration of registration. The duration of reporting obligations is contained in Court orders, and the Court therefore may be able to exercise discretion on a case by case basis.¹⁵⁹ The length of the reporting period for sex offenders is determined by term of imprisonment for the offence committed. For example:

- if the maximum term of imprisonment for the registrable offence is 2 or 5 years, the reporting period is 10 years;
- if the maximum term of imprisonment for the registrable offence is 10 or 14 years, the reporting period is 20 years;
- if the maximum term of imprisonment for the offence is life, the reporting period is a lifelong obligation; and
- if a registered sex offender reoffends committing a registrable offence, the reporting period is a lifelong obligation.¹⁶⁰

Registrable Information and Reporting Requirements

3.32 Sex offenders must report to a designated registration centre within 7 to 15 days after the Court order is made, and provide their personal details as required by the *Sex Offender Information Registration Act 2004*. In addition to the basic information such as the convicted sex offender's full

¹⁵⁸ *Criminal Code* (Canada), s 490.011(1).

¹⁵⁹ *Sex Offender Information Registration Act 2004* (Canada), s 8.

¹⁶⁰ *Criminal Code* (Canada), s 490.013(2).

name, address, date of birth and contact details, an offender is also required to provide the following:

- place of employment and volunteering services;
- height and weight and a description of every physical distinguishing marks of the offender e.g. tattoos;
- license plate number, make, model, body type, year of manufacture and colour of the motor vehicles that the offender owns or uses regularly.¹⁶¹

3.33 Registrants are required to report annually (between 11 months and one year after they last reported) to the local police¹⁶² for the duration of registration. For example, if the maximum term of imprisonment for the registrable offence is 2 or 5 years, the reporting period is 10 years, or if the maximum term of imprisonment for the offence is life, the reporting period is a lifelong obligation.¹⁶³ Any change made to the offender's registered personal details must be reported to the police within 7 to 15 days of the change.¹⁶⁴

Guam

Registrable Offences

3.34 Under Guam's registry, any person who has been convicted of the following offences is under an absolute duty to register. Registrable offences include any of the following offences:

- a sexually violent offence;
- a criminal sexual conduct offence; or
- a criminal offence against a victim who is a minor.¹⁶⁵

Classification and Duration of registration

3.35 Guam, similarly to the UK, groups or classifies its registrable sex offenders into three levels which determines the duration of registration. The Courts determine which classification a convicted sex offender is to be categorised during sentencing. Except for during periods of incarceration, a registrant is required to be registered for the following periods:

- (i) Level 1 Offenders – persons convicted of a sexually violent offence who are required to register for life;

¹⁶¹ *Sex Offender Information Registration Act 2004* (Canada), s 5(1).

¹⁶² *Ibid* s 4.1(1)(c).

¹⁶³ *Criminal Code* (Canada), s 490.013(2).

¹⁶⁴ *Sex Offender Information Registration Act 2004* (Canada), s 4.1(1)(b).

¹⁶⁵ Guam Judiciary, *Guam Sex Offender Registry* (2011) <http://www.guamcourts.org/sor/faq.asp> (accessed 01 April 2014) <http://www.guamcourts.org/sor/faq.asp> (accessed 01 April 2014).

- (ii) Level 2 Offenders – persons not classified as a level one offender who are convicted of a criminal sexual conduct offence involving two or more victims, or a victim who is a minor or who is convicted of two or more separate sexual conduct offences and who is required to register for life;
- (iii) Level 3 Offenders – persons not classified as either a level one or level two offenders and who are convicted of a criminal sexual conduct or a criminal offence against a minor and who are registered for 15 years.¹⁶⁶

3.36 Rules for sex offenders who are either living in the community under supervision, or who are released from prison and who return to the community under supervision, are also provided. Such rules include:

- no contact with victims;
- no or limited contact with minors;
- attend sex offender-specific treatment;
- no use of alcohol or drugs;
- reporting to probation or parole officer as required.¹⁶⁷

3.37 Sex offenders who are under probation or parole supervision must have approval from the court as to where they can reside. This is based on the appropriateness of the location, for instance a place with no children within the vicinity. Convicted sex offenders who are not under a court order, correctional supervision or any supervision have no restrictions to reside in a location of their choice, unless they live in a jurisdiction that has residency restrictions.¹⁶⁸

Registrable Information and Reporting Requirements

3.38 Information on the Registry of the convicted sex offender includes his or her name, address, photograph, and criminal background.¹⁶⁹

3.39 Registered sex offenders are required to report to the Probation Division on a specified basis. The frequency of reporting obligations differs according to the classification of the registered sex offender. The registered sex offenders are required to verify and update their information during their visits to the Probation Division. Level 1 offenders have a lifelong reporting obligation,

¹⁶⁶ Guam Judiciary, *Guam Sex Offender Registry* (2011) <http://www.guamcourts.org/sor/faq.asp> (accessed 01 April 2014) <http://www.guamcourts.org/sor/faq.asp> (accessed 01 April 2014).

¹⁶⁷ *Ibid.*

¹⁶⁸ *Ibid.*

¹⁶⁹ *Ibid.*

reporting every 90 days. Level 2 offenders, also with lifelong reporting obligations, are required to report every 180 days. Level 3 offenders have an annual reporting obligation which lasts for 15 years. Furthermore, all registered sex offenders are required to report any change of their registered information within 3 days of the change.¹⁷⁰

Victoria, Australia

Registrable Offences and Classification

3.40 The registrable offences in Victoria, like Guam, are grouped or classified into four levels or groups as follows:

- (i) Class 1 – indecent assault, assault with intent to rape, indecent act with person with a cognitive impairment by medical, therapeutic or special program service providers, administration of drugs etc, abduction or detention, procuring sexual penetration by threats or fraud, sexual servitude, deceptive recruiting for commercial sexual services, burglary resulting with intent to commit a sexual or indecent assault or aggravated burglary with intent to commit a sexual or indecent assault;
- (ii) Class 2 – indecent assault where the person against whom the offence is committed is a child, assault with child under the age of 16, indecent act with 16 or 17 year old child, indecent act with person with a cognitive impairment who is a child by medical, therapeutic or special program service providers, administration of drugs where the victim is a child, occupier permitting unlawful sexual penetration, abduction or detention of a child, bestiality;
- (iii) Class 3 – rape, sexual penetration including sexual penetration where the victim is an adult, incest, or sexual penetration of person with cognitive impairment by medical, therapeutic or special program service providers;
- (iv) Class 4 – indecent assault, assault with intent to rape, indecent act with person with cognitive impairment by medical, therapeutic or special program service providers; sexual servitude, deceptive recruitment for commercial sexual services, abduction or detention.¹⁷¹

Registrable Information and Reporting Requirements

3.41 In Victoria, an offender is required to provide the basic information about himself or herself¹⁷² as well as the names and dates of birth of any children living in the same residence of the offender or

¹⁷⁰ Guam Judiciary, *Guam Sex Offender Registry* (2011) <http://www.guamcourts.org/sor/faq.asp> (accessed 01 April 2014) <http://www.guamcourts.org/sor/faq.asp> (accessed 01 April 2014).

¹⁷¹ *Sex Offenders Registration Act 2004* (Victoria), Schedule 1- 4.

¹⁷² This includes the convicted sex offender's full name, address, date of birth and contact details.

children with whom the offender has regular unsupervised contact, and employment details.¹⁷³ The Victoria Police are then required to inform the Department of Human Services (**DHS**) about any unsupervised contact to allow the DHS to take action in ensuring the safety of the child. In doing so, DHS also requires information about the registered sex offender from Corrections Victoria.¹⁷⁴

3.42 The reporting obligations placed on the registered offenders also depend on the level of classification of the offence. For instance, a class 1 offence has a reporting obligation of 15 years whereas a registered sex offender with multiple Class 1 offence convictions is obliged to report to the police for life. A Class 2 offence provides for an 8-year reporting obligation, however an offender with multiple Class 2 offence convictions has a reporting obligation of 15 years. Registered sex offenders with two or more Class 1 offences have a lifetime reporting obligation similar to a registered sex offender with three or more Class 2 offences, which also carry lifetime reporting obligations.¹⁷⁵

Tasmania, Australia

Registrable Offences and Classification

3.43 Registrable offences in Tasmania are also grouped or classified into categories similar to Victoria and Guam. The classifications of these categories however differ in the types of sexual crimes listed under the different levels. The classifications are divided into 3 levels or groups consisting of the following:

- (i) Class 1 – possessing, accessing or attempting to access child exploitation material, exhibiting obscene matter, loitering near children, exposing a person or assaulting with indecent intent;¹⁷⁶
- (ii) Class 2 – making or producing child exploitation material, distributing child exploitation material, sexual conduct involving a child under 16, sexual intercourse with a young person under 17, maintaining a sexual relationship with a young person under 17, sexual intercourse with a person with a mental impairment, indecent assault, incest, forcible abduction, abduction of a young person under 17 or stalking;¹⁷⁷

¹⁷³ *Sex Offenders Registration Act 2004* (Victoria), s 14(1).

¹⁷⁴ Ombudsman Victoria, *Whistleblowers Protection Act 2001 – Investigation into the failure of agencies to manage registered sex offenders* (2011) <https://www.ombudsman.vic.gov.au/Publications/Parliamentary-Reports/Whistleblowers-Protection-Act-2001-Investigation-i> (accessed 11 February 2013).

¹⁷⁵ *Sex Offenders Registration Act 2004* (Victoria), s 34.

¹⁷⁶ *Community Protection (Offender Reporting) Act 2005* (Tasmania), s 13.

¹⁷⁷ *Ibid* s 14.

(iii) Class 3 – procuring, inviting or attempting to procure a child to be involved in child exploitation material, involving a person under the age of 18 in the production of child exploitation material, sexual intercourse with a child under 16, inducing a child under 16 to engage in sexual intercourse, aggravated sexual assault (if the victim is a child), incest (if the victim is a child), rape, kidnapping or stalking (if the victim is a child).¹⁷⁸

3.44 Registration of sex offenders on the SOR is not automatically invoked without a court order. Section 6 of the *Community Protection (Offender Reporting) Act 2005* provides that the court is to make an order directing the Registrar to register a person whom the court sentences for a reportable offence and that the convicted offender is to comply with the reporting obligations under the Act. However, should the court be satisfied that the person does not pose a risk of committing a reportable offence in the future, the court may not make an order requiring the registration of the offender. In this way, the court retains some discretion concerning registration, similar to Canada.

Registrable Information and Reporting Requirements

3.45 The information required for registration in Tasmania includes the basic information about the offender¹⁷⁹ as well as any employment details, description of the registered sex offender's vehicle and intended travel (if any). Additional information that is also required consists of the following:

- names and dates of birth of children residing with the offender and children with whom the offender has regular unsupervised contact;
- details of any affiliation with any club or organisation that has child membership or participation in its activities; and
- details of any email addresses, social media accounts, internet user name, chat room user names or any identity by the registered sex offender on the internet.¹⁸⁰

3.46 The reporting obligations placed on the registered offenders also depend on the level of registration classification. For instance, a Class 1 offence has a reporting obligation of 8 years whereas a registered sex offender with multiple Class 1 offences must report to the police for 15 years. A Class 2 offence requires a 15 year reporting obligation similar to a registered sex offender under a Class 3 offence. Registered Class 3 sex offenders who have also committed Class 2 offences have

¹⁷⁸ *Community Protection (Offender Reporting) Act 2005* (Tasmania), s 15.

¹⁷⁹ This includes the convicted sex offender's full name, address, date of birth and contact details.

¹⁸⁰ Above n 178, s 17.

a lifetime reporting obligation. Additionally, a person who commits murder in conjunction with a Class 1, 2 or 3 offence is required to register for the duration of their life.¹⁸¹

Western Australia, Australia

Registrable Offences and Classification

3.47 In Western Australia registrable offences are grouped into 3 categories.¹⁸² Listed below are some examples of registrable offences belonging to each category.

- (i) Class 1: facilitating sexual offences against children outside Western Australia, murder of a child, sexual offences against child under 13, sexual offences against child of or over 13 and under 16, persistent sexual conduct with child under 16, sexual penetration without consent of a child, sexual offences by relatives and the like, sexual offences against an incapable person.¹⁸³
- (ii) Class 2: showing offensive material to a child under 16, occupier or owner allowing a child to be on the premises for unlawful carnal knowledge, involving a child in child exploitation, production, distribution or possession of child exploitation material, indecently recording a child of or over 13 and under 16, indecent assault of a child, causing, permitting or seeking to induce a child to act as prostitute.¹⁸⁴

3.48 In contrast to Class 1 and Class 2 offences, Class 3 offences are limited to only sexual offending against adults.

- (iii) Class 3: sexual penetration without consent, murder, aggravated sexual penetration without consent, sexual coercion.¹⁸⁵

Registrable Information and Reporting Requirements

3.49 In Western Australia the offender is required upon registration to provide the basic information about himself or herself.¹⁸⁶ In addition, the following information must be provided:

- passport details including number and expiry date;
- the internet service provider used and names or aliases used on the internet for the purposes of communication;

¹⁸¹ *Community Protection (Offender Reporting) Act 2005* (Tasmania), s 16.

¹⁸² *Community Protection (Offender Reporting) Act 2004* (Western Australia), s 9.

¹⁸³ *Ibid* Schedule 1.

¹⁸⁴ *Ibid* Schedule 2.

¹⁸⁵ *Ibid* Schedule 3.

¹⁸⁶ This includes the convicted sex offender's full name, address, date of birth and contact details.

- the names and ages of any children who generally reside in the same household as the offender;
- employment details.¹⁸⁷

3.50 After the initial registration, the offender is required to report to the police office for a stipulated length of time. An offender who committed a Class 1 offence is required to report for a period of 15 years,¹⁸⁸ while a Class 2 offender must report to the register for 8 years.¹⁸⁹ In Western Australia, if a registered sex offender later commits any sexual reoffending the reporting period then becomes a lifelong obligation.¹⁹⁰

3.51 All registered sex offenders are required to report annually, during the calendar month in which he or she first reported.¹⁹¹ Any changes to the offender's registered information must be reported within 7 days after the change occurs. However, where the change in circumstances concerns the change in the offender's residence or would result in the offender having unsupervised contact with a child, then the offender must report this change within 24 hours.¹⁹²

New South Wales, Australia

Registrable Offences and Classification

3.52 In New South Wales, registrable offences are grouped into 2 categories. Listed below are some examples of registrable offences belonging to each category.

- (i) Class 1: Murder of a child, an offence involving sexual intercourse with a child, persistent sexual abuse of a child, an offence of attempting, or of conspiracy or incitement, to commit an offence of a kind listed in this definition.¹⁹³
- (ii) Class 2: Manslaughter where the victim is a child, act of indecency, procuring or grooming child under 16 for unlawful sexual activity, kidnapping, promoting, benefitting from, or engaging in acts of child prostitution, an offence of attempting or of conspiracy or incitement, to commit an offence of a kind listed in this definition.¹⁹⁴

¹⁸⁷ *Community Protection (Offender Reporting) Act 2004* (Western Australia), s 26.

¹⁸⁸ *Ibid* s 46(2)(a).

¹⁸⁹ *Ibid* s 46(1).

¹⁹⁰ *Ibid* s 46(3).

¹⁹¹ *Ibid* s 28(2).

¹⁹² *Ibid* s 29(1).

¹⁹³ *Child Protection (Offenders Registration) Act 2000*, (New South Wales), s 3.

¹⁹⁴ *Ibid*.

Registrable Information and Reporting Requirements

3.53 In New South Wales, the offender is to provide certain basic personal information¹⁹⁵ when registering on the Child Protection Register as well as the following information:

- the internet service provider used and names or aliases used on the internet for the purposes of communication;
- the names and ages of any children who generally reside in the same household as the offender;
- details of any affiliation with any club or organisation that has child membership or participation in its activities;
- employment details;
- details of any tattoos or distinguishing marks the offender has;
- description of any vehicle owned by or generally driven by the offender.¹⁹⁶

3.54 The length of the reporting period differs depending on the class of offending. An offender found guilty of a Class 1 offence is required to be registered for 15 years. A Class 2 offender is required to be registered for a period of 8 years. Similar to Western Australia, in New South Wales, any reoffending automatically extends the reporting obligations to be a lifelong requirement.¹⁹⁷

3.55 All registered sex offenders must report annually on the anniversary month of his or her registration. During each reporting visit, the offender must update any personal information on the SOR.¹⁹⁸ Any changes to the offender's personal information on the SOR must be reported within 7 days after the change occurs. However, if the change concerns the presence of a child where the offender generally resides, this must be reported within 24 hours of the change occurring.¹⁹⁹

American Samoa

Registrable Offences and Classification

3.56 Sex offenders in American Samoa are organised into three tiers and their respective reporting periods are mandated accordingly:²⁰⁰

¹⁹⁵ This includes the convicted sex offender's full name, address, date of birth and contact details.

¹⁹⁶ *Child Protection (Offenders Registration) Act 2000* (New South Wales), s 9.

¹⁹⁷ *Ibid* s 14A.

¹⁹⁸ *Ibid* s 10.

¹⁹⁹ *Ibid* s 11.

²⁰⁰ *Sex Offender Registration and Community Notification Code 2014* (American Samoa), s 46.2803.

- (i) Tier I offences involve the false imprisonment of a minor, video voyeurism on a minor, possession or receipt of child pornography, and are punishable by a maximum term of imprisonment of one year or less;
- (ii) Tier II offences involve a sex offence punishable by more than one year in jail that has been committed by a person with a previous sex offence conviction;
- (iii) Tier III offences involve any sex offence that is punishable by more than one year in jail where the offender has at least one prior conviction or has become a Tier II sex offender.

Registrable Information and Reporting Requirements

3.57 Apart from the basic information,²⁰¹ a sex offender must also register the following information to the Department of Justice:

- physical description including any permanent distinguishing marks such as tattoos or scars;
- full criminal history;
- DNA sample including finger and palm prints;
- copy of the sex offender's driver's license;
- passport including any travel documents and identification cards;
- disclosure of previous and present places of employment;
- internet identifiers including all email addresses, instant message addresses; and
- place of study (if undertaking academic placement).²⁰²

3.58 Reporting obligations for sex offenders includes the following:

- Tier I offenders are required to report to the Attorney General's Office once annually for 15 years from the time of release from custody;
- Tier II offenders are required to report once every 180 days for 25 years from the time of release from custody;
- Tier III offenders have a lifetime registration period, reporting once every 90 days.²⁰³

3.59 The Act also contains provisions to reduce the reporting period for those who have not reoffended for a certain time. For example, Tier I and Tier II offenders may have their reporting period reduced to 10 years if they have maintained a clean record for 10 consecutive years. A Tier III offender may have his or her reporting period reduced to 25 years, if at the time the offence was

²⁰¹ This includes the convicted sex offender's full name, address, date of birth and contact details.

²⁰² *Sex Offender Registration and Community Notification Code 2014* (American Samoa), s 46.2808.

²⁰³ *Ibid* s 46.2809(a).

committed, the offender was a juvenile and he or she has maintained a clean record for 25 consecutive years.²⁰⁴

New Zealand

3.60 Although New Zealand does not have in place a SOR, the courts have regard to the seriousness of sex offences when sentencing offenders according to a tiering structure referred to as ‘bands’, which is similar in some ways to the classes of sex offences discussed above. The New Zealand structure is considered relevant to the discussion on registrable offences and is given more detailed discussion below.

E. Judicial Discretion

3.61 An important issue that needs to be considered is whether the decision requiring a sex offender to register on the SOR should be made by the courts, or alternatively to adopt a mandatory registration system where once the registrable offence has been committed, the court must order that the offender be registered, or registration is automatic. A number of jurisdictions have opted to legislate for a restricted discretion for the Court in certain circumstances. The restricted discretion renders it open to the Court to order those guilty of an offence that is not of itself a registrable offence to be registered if they exhibit troubling signs of future offending. The merit in this approach is that it may provide more comprehensive protection by registering potential sex offenders and possibly may assist the prevention of future offending. However the respective legislative provisions have been carefully drafted to restrict this discretion appropriately. The comparative jurisdictions are divided on this issue as some also have legislated against any form of judicial discretion through establishing a mandatory registration scheme.

Mandatory Registration

Canada

3.62 In Canada, the court is obliged to make an order requiring registration under the *Sexual Offender Information Registration Act 2004* if an offender has committed a registrable offence.²⁰⁵ The discretion of the court is only exercised subsequently during the consideration of an application to terminate a person’s registration obligation. If the court is satisfied that the impact of continuing registration obligations would be grossly disproportionate to the public interest in protecting

²⁰⁴ *Sex Offender Registration and Community Notification Code 2014* (American Samoa), s 46.2809(b)–(c).

²⁰⁵ *Criminal Code* (Canada), s 490.012(1); *R v B.T.Y.*, 2006 BCCA 331.

society through registration, then the court could make a termination order.²⁰⁶ The termination order may only be made after a certain period of time has lapsed since the date of sentencing, and cannot be applied for at the time of sentencing.²⁰⁷

United Kingdom

3.63 The United Kingdom has a mandatory registration system, where an offender who is convicted of a registrable offence is subject to registration on the SOR.²⁰⁸

Discretion to Register Non Registrable Offences

3.64 The jurisdictions discussed below also have mandatory registration systems. However, these jurisdictions have preserved the court's discretion to order persons who have not committed a registrable offence per se to be registered. The court's discretion is subject to restrictions provided in the respective legislation.

Victoria, Australia

3.65 Victoria has a mandatory registration system, however, the court retains a residual discretion to require a person who is guilty of an offence that is not of itself a registrable offence to comply with the reporting obligations under the *Sex Offenders Registration Act 2004*.²⁰⁹ This power is statutorily restricted in two ways. First, the court is only able to exercise its jurisdiction on an application for such an order by the prosecution.²¹⁰ Secondly, the court may only make this order if it is satisfied beyond reasonable doubt that the person poses a risk to the sexual safety of one or more persons or of the community.²¹¹

Western Australia, Australia

3.66 In Western Australia, the court retains discretion to require an offender convicted of an offence that is not a registrable offence, to register on the SOR.²¹² The court is able to exercise this discretion if it is satisfied that the offender poses a risk to the lives or the sexual safety of one or more persons

²⁰⁶ *Criminal Code* (Canada), s 490.016(1).

²⁰⁷ *Ibid* s 490.026(2).

²⁰⁸ *Sexual Offences Act 2004* (United Kingdom), s 80(1).

²⁰⁹ *Sex Offenders Registration Act 2004* (Victoria), s 11(1).

²¹⁰ *Ibid* s 11(6).

²¹¹ *Ibid* s 11(3).

²¹² *Community Protection (Offender Reporting) Act 2004* (Western Australia), s 13(1).

generally.²¹³ The court can exercise this discretion regardless of whether the prosecution makes an application for this order.²¹⁴

New South Wales, Australia

3.67 Similar to Victoria, New South Wales grants the court restricted discretionary power to order a person who is guilty of an offence that is not of itself a registrable offence to register on the SOR. This order is made if the court considers the person to pose a risk to the lives or sexual safety of one or more children.²¹⁵ The restricted discretion is invoked upon an application by the prosecution for an order to be made.²¹⁶ A person against whom an order has been made is subject to carry out reporting obligations as a class 2 offender.²¹⁷

Tasmania, Australia

3.68 Similar to New South Wales and Victoria, Tasmania also grants the court the discretion to require a person who is guilty of an offence that is not of itself a registrable offence to be registered. This order is made if the court is satisfied that the person poses a risk of committing a reportable offence in future.²¹⁸ In contrast to Victoria and New South Wales but similarly to Western Australia, in Tasmania the court can make this order regardless of the prosecution making an application for this order to be made.²¹⁹

New Zealand

3.69 In New Zealand, it was publically announced in August 2014 that Cabinet had approved the establishment of a Child Protection Offender Register.²²⁰ Prior to that, New Zealand's alternative to a SOR had been the use of extended supervision orders for sex offenders under the *Parole Act 2002*. The purpose of an extended supervision order is to protect members of the community from those who, following receipt of a determinate sentence, pose a real and ongoing risk of committing serious sexual offences.²²¹

²¹³ *Community Protection (Offender Reporting) Act 2004* (Western Australia), s 13(2).

²¹⁴ *Ibid* s 13(6).

²¹⁵ *Child Protection (Offenders Registration) Act 2000* (New South Wales), 3D(1) and 3D(2).

²¹⁶ *Ibid* s 3D(2).

²¹⁷ *Ibid* s 3D(6).

²¹⁸ *Community Protection (Offender Reporting) Act 2005* (Tasmania), s 7(1).

²¹⁹ *Ibid* s 7(4).

²²⁰ New Zealand Government, *Minister announces Child Protection Offender Register* (2014) <http://www.beehive.govt.nz/release/minister-announces-child-protection-offender-register> (accessed 14 August 2014).

²²¹ *Parole Act 2002* (New Zealand), s 107I(1).

3.70 The *Parole Act 2002* provides for the court’s discretion to make an extended supervision order. However this discretion is statutorily limited. The court may only make the order if after considering a report from a health assessor, it is satisfied that the offender has a pervasive pattern of serious sexual offending and if there is a high risk that the offender will in future commit a relevant sexual offence.²²² The court is also given discretion to determine the length of the extended supervision order after giving regard to the level of risk posed by the offender, the seriousness of the harm that might be caused to the victims and the likely duration of the risk.²²³ Previously, under the amendments to the *Parole Act* in 2004, extended supervision orders expired after 10 years. However, the subsequent amendments passed in December 2014 allow extended supervision orders to be expanded beyond the 10 year expiry date. The legislative change enables the courts to renew extended supervision orders on an ongoing basis with a mandatory review to be undertaken every 5 years.²²⁴

F. Relevant Sentencing Considerations in Samoa

3.71 Relevant to the discussion of discretionary or mandatory reporting requirements for a SOR is consideration of the current sentencing approach adopted by the Supreme Court in Samoa in relation to sex offences. This is based on a tiering or ‘banding’ model established by New Zealand courts, which as previously mentioned does not at present have in place a SOR.

R v AM

3.72 The case of *R v AM*, a New Zealand Court of Appeal case, sought to bring the judiciary some guidance in sentencing sexual crimes through the introduction of the banding guidelines.²²⁵

3.73 Before *R v AM*, there existed differing approaches taken by the courts in the sentencing of sexual crimes. The difficulties in determining an appropriate sentence is inherent in the nature of sexual violations as they cover a variety of circumstances and inevitably varying degrees of seriousness.²²⁶ The aim of the banding guidelines is to achieve consistency in the sentencing of rape and sexual violation cases.²²⁷ The bands categorised offending according to the seriousness of the offence with regard to both the offender’s culpability and the effects on the victim. The banding guidelines

²²² *Parole Act 2002* (New Zealand), s 107I(2).

²²³ *Ibid*, s 107I(5).

²²⁴ *Ibid*, s 107RA(2)(b).

²²⁵ *The Queen v AM* [2010] NZCA 114 at [2].

²²⁶ *Ibid* [71].

²²⁷ *Ibid* [88].

set out ranges of ‘starting points,’ not final sentences. The starting point is then adjusted up or down to reflect the circumstances personal to the offender. It is at this stage that mitigating factors can be taken into account and can consequently reduce the sentence.²²⁸

3.74 The New Zealand Court of Appeal divided the bands into two groups:

- (i) Bands for sexual violation where the lead offence is rape, penile penetration of the mouth or anus or violation involving objects (**rape bands**)
- (ii) Bands for other violation where unlawful sexual connection is the lead offence (**USC bands**).

i. Rape bands:

- Rape band one: 6-8 years
- Rape band two: 7-13 years
- Rape band three: 12-18 years
- Rape band four: 16-20 years²²⁹

ii. Other unlawful sexual connection (USC bands):

- USC band one: 2-5 years
- USC band two: 4-10 years
- USC band three: 9-18 years²³⁰

3.75 The New Zealand Court of Appeal used examples from previous cases to demonstrate the type of cases that would fall into each band.²³¹ In determining which band an offence falls within, the judge should take into account culpability factors. The presence of these factors would increase the offender’s culpability and thus the starting point for the offender’s sentence would start in a higher band. The culpability factors which were reiterated in *Police v Sione*²³² are provided below:

- planning and premeditation;
- violence, detention and home invasion;
- vulnerability of victim;
- harm to the victim;
- multiple offenders;

²²⁸ *The Queen v AM* [2010] NZCA 114 at [84].

²²⁹ *Ibid* [90].

²³⁰ *Ibid* [113].

²³¹ *Ibid* [93]–[127].

²³² *Police v Sione* [2011] WSSC 128 at [16].

- scale of offending;
- breach of trust;
- hate crime; and
- degree of violation.

3.76 The New Zealand Court of Appeal warned that this is not to be taken as an exhaustive list. The judge is to evaluate all of the circumstances rather than apply a mechanical approach.²³³

3.77 The case of *R v AM* has been approved and accepted as forming part of Samoa's jurisprudence.²³⁴

3.78 The Commission notes that at present, neither New Zealand nor Samoa have established sex offenders registers, and to some extent this New Zealand Court of Appeal banding model, as adopted by Samoan courts, appears to be a relevant consideration, particularly in relation to decisions about what offences should be registrable, if a SOR is considered appropriate for Samoa. As previously discussed, many jurisdictions have a registration system which categorises sexual offences into different levels or tiers, which determine the length of the reporting periods and the frequency of reporting.

3.79 The banding model distinguishes between serious and less serious offences, in that the seriousness of the offence and the levels of culpability of the offender are considered by the court. This is then factored into the band considered appropriate for the offender's sentence. Next, the court factors into its consideration any mitigating or aggravating factors before arriving at the final sentence term.

3.80 The banding model, which has now been applied by the Samoan courts in sentencing sexual crimes,²³⁵ could potentially be utilised to determine whether an offender should be registered if a SOR is established in Samoa. The use of the banding model or a system similar would minimise the potential for all offenders to be treated identically, as may be the result if a mechanical mandatory system were adopted.

3.81 Whilst this may raise concerns as to the effective deterrent effect of a non mandatory SOR insofar as judges may still be seen as exercising ultimate discretion as to whether or not an offender should be registered, this remains an issue that should be considered for a SOR for Samoa.

²³³ *The Queen v AM* [2010] NZCA 114 at [34].

²³⁴ *Police v Filipo* [2011] WSSC 127 at [39].

²³⁵ Including but not limited to: *Key v Police* [2013] WSCA 3, *Police v Luamanuvae* [2012] WSSC 4, *Police v Ieremia* [2014] WSSC 70, *Police v Filipo* [2011] WSSC 127, *Police v Sione* [2011] WSSC 128.

G. Non Compliance and Enforceability

California

3.82 There are various criminal penalties that apply to a person who fails to comply with the sex offender registration requirements. A person convicted of a registrable felony sex offence and who wilfully violates the registration law is guilty of a felony. A person convicted of a registrable misdemeanour sex offence and who violates the registration requirements is guilty of a misdemeanour on the first violation and any subsequent convictions for violating the registration law are classed as felonies.²³⁶

3.83 Under California's Penal Code, a felony where the term is not specified in the underlying offence shall be punishable by a term of imprisonment in a county jail for up to 16 months or 2 or 3 years.²³⁷

UK

3.84 In the UK, the failure of a registrable sex offender to comply with reporting requirements without a reasonable excuse or registering false information may result in either a summary conviction with an imprisonment term not exceeding 6 months, or a fine, or a conviction on indictment in imprisonment for a term not exceeding 5 years.²³⁸

Canada

3.85 In Canada, penalties apply where there is a failure to provide accurate information. For example, when a sex offender fails to register, update or provide accurate information, or fails to report to the local police within the specified time, he or she is liable on a summary conviction to a fine not exceeding \$10,000 or imprisonment not exceeding 2 years or both.²³⁹ Similarly, any person that breaches the confidentiality of the SOR is also subject to the same penalties of a summary conviction, imprisonment, or both.

Guam

3.86 In Guam, the intentional failure to make the initial registration is a third degree felony.²⁴⁰ Failure to make subsequent verifications is a misdemeanour. Second or subsequent failure to report is a

²³⁶ *Penal Code of California 1873*, s 290.018.

²³⁷ *Ibid* s 1170(h).

²³⁸ *Sexual Offences Act 2003* (United Kingdom), s 91.

²³⁹ *Sex Offender Information Registration Act 2004* (Canada), s 17.

²⁴⁰ 9 Guam Code Ann. §89.01, *amended by* Guam Pub.L.No.30-233:2 (2010), s 89.05(a).

felony of the third degree.²⁴¹ Providing false information during the initial registration or during subsequent reporting is a felony of the second degree.²⁴²

Victoria, Australia

3.87 Failure to comply with reporting obligations without a reasonable excuse carries a maximum imprisonment term of 5 years in Victoria,²⁴³ whilst intentionally providing false or misleading information carries a maximum penalty of 2 years.²⁴⁴ When determining whether a reasonable excuse exists for failing to comply with reporting obligations, the court is to have regard to the following matters:

- the person's age;
- whether the person has a disability that affects the person's ability to understand or comply with the reporting obligations;
- whether the form of notification given to the registrable offender as to his or her obligations was adequate to inform him or her of those obligations including the offender's circumstances; and
- any other matter the court considers appropriate.²⁴⁵

3.88 This is similar to UK's registration legislation where an offender may avoid punishment by providing a reasonable excuse. However, unlike the UK, Victoria provides a guide of considerations to be taken into account by the court when determining whether a reasonable excuse exists. The UK on the other hand is silent on this aspect.²⁴⁶

Tasmania, Australia

3.89 In Tasmania, failure to comply with reporting obligations without a reasonable excuse carries an imprisonment term of up to 2 years, or a fine not exceeding 100 penalty units or both.²⁴⁷ The intentional provision of false or misleading information carries the penalty of a fine not exceeding 50

²⁴¹ 9 Guam Code Ann. §89.01, *amended by* Guam Pub.L.No.30-233:2 (2010), s 89.05(a).

²⁴² *Ibid* s 89.05(b).

²⁴³ *Sex Offenders Registration Act 2004* (Victoria), s 46.

²⁴⁴ *Ibid* s 47.

²⁴⁵ *Ibid* s 46(2).

²⁴⁶ *Ibid*.

²⁴⁷ *Community Protection (Offender Reporting) Act 2005* (Tasmania), s 33.

penalty units, or an imprisonment term not exceeding 6 months or both.²⁴⁸ Tasmanian legislation also provides no time limits to commence prosecution for such offences under this Act.²⁴⁹

3.90 Tasmania's *Community Protection (Offender Reporting) Act 2005* is silent as to what constitutes a reasonable excuse, whereas Victoria clearly sets out the parameters that the courts should consider in the determination of the reasonableness of an excuse for non-compliance with the reporting requirements. On the other hand, absence of clear parameters in Tasmania may result in wider discretion for the court to determine the reasonableness of the excuse.

Western Australia, Australia

3.91 In Western Australia, a reportable offender who, without reasonable excuse, fails to comply with any of his or her reporting obligations may be liable to a maximum penalty of 5 years imprisonment or a fine of \$12000 and imprisonment for 2 years.²⁵⁰ If an offender knowingly provides false or misleading information, this carries a maximum penalty of 5 years imprisonment or a fine of \$12000 and imprisonment for 2 years.²⁵¹

New South Wales, Australia

3.92 In New South Wales, failure to comply with reporting obligations without a reasonable excuse or knowingly providing information known to be false or misleading carries a maximum penalty of 5 years or 500 penalty units or both.²⁵²

American Samoa

3.93 In American Samoa, failure to register on the SOR is a Class D felony (which has an imprisonment term of less than 5 years²⁵³) and any person who intentionally hides or harbours a sex offender with the intention of avoiding registration commits an offence.²⁵⁴

H. Foreign Convictions

California

3.94 California's *Penal Code* does not address the issue of registering foreign sex offenders.

²⁴⁸ *Community Protection (Offender Reporting) Act 2005* (Tasmania), s 34.

²⁴⁹ *Ibid* s 35.

²⁵⁰ *Community Protection (Offender Reporting) Act 2004* (Western Australia), s 63(1).

²⁵¹ *Ibid* s 64.

²⁵² *Child Protection (Offenders Registration) Act 2000* (New South Wales), s 17(1); s 18.

²⁵³ *Criminal Justice Code 2012* (American Samoa), s 46.1907(c,1,D).

²⁵⁴ *Sex Offender Registration and Community Notification Code 2014* (American Samoa), s 46.2818(b).

UK

3.95 The *Sexual Offences Act 2003* of the UK does not address the issue of registering foreign sex offenders.

Canada

3.96 Canada's *Sex Offender Information Registration Act 2004* provides for the registration of foreign offenders convicted of a sexual offence outside of Canada.²⁵⁵ The Act also clarifies that a crime is of a sexual nature if it consists of one or more acts that are either sexual in nature or committed with the intent to commit an act or acts that are sexual in nature.²⁵⁶

3.97 The obligation begins when the foreign offender is served with a Canadian Court notice to register under the *Sex Offender Information Registration Act 2004*.²⁵⁷ However, the foreign offender can apply to the Court for an exemption order a year after the notice to register was served. If the exemption order is successful, the offender's information may be removed from the database.²⁵⁸

3.98 Registration requirements also extend to Canadian offenders who offended in a foreign jurisdiction and were transferred to Canada to serve their sentences.²⁵⁹ If the transferred offender was convicted in a foreign jurisdiction of a sexual offence that constitutes a registrable offence in Canada, the offender is required to comply with registration and reporting obligations under the *Sex Offender Information Registration Act 2004*.²⁶⁰

Guam

3.99 Guam's law provides for the mandatory registration of foreign offenders or any person who is a non-resident of Guam and who has been convicted in another state, territory or tribe of a criminal sexual conduct offence or a criminal offence against a victim who is a minor.²⁶¹ For instance, under Title 9 of *Guam's Code Annotated*, convictions in a jurisdiction that is comparable to any sex offence has been defined as any type or degree of genital, oral or any anal penetration, including

²⁵⁵ *Criminal Code* (Canada), s 490.02902(1).

²⁵⁶ *Sex Offender Information Registration Act 2004* (Canada), s 3(2).

²⁵⁷ *Criminal Code* (Canada), s 490.02904.

²⁵⁸ *Ibid* s 490.02905.

²⁵⁹ *International Transfer of Offenders Act 2004* (Canada), s 3.

²⁶⁰ *Ibid* s 36.1.

²⁶¹ Guam Judiciary, *Guam Sex Offender Registry* (2011) <http://www.guamcourts.org/sor/faq.asp> (accessed 01 April 2014).

sexual touching of or sexual contact with a person's body, kidnapping of a minor or false imprisonment of a minor (to name a few), must be registered in Guam's registry.²⁶²

3.100A foreign conviction of a sexual crime is a registrable sex offence in Guam where it was either obtained under the laws of Canada, the UK, Australia, or New Zealand, and is identical or comparable to a registrable offence in Guam. In addition, a foreign conviction of a sexual crime is registrable in Guam where the offender was convicted in a foreign country of which the United States Department in its Country Reports on Human Rights Practices has deemed its independent judiciary to have enforced the right to a fair trial during the year in which the conviction occurred.²⁶³ Registration of non-residents with sexual offence convictions is only applicable to persons who are in Guam for employment or as a student.²⁶⁴

Victoria, Australia

3.101 In Victoria, registration requirements extend to foreign offenders under the *Sex Offenders Registration Act 2004*. These persons, termed 'corresponding registrable offenders,' are required to continue their reporting obligations in Victoria.²⁶⁵ The corresponding registrable offender is subject to reporting obligations even if the offence committed in the foreign jurisdiction does not qualify as a registrable offence in Victoria.²⁶⁶ It appears unclear how the level of corresponding offence is determined and by whom.²⁶⁷

Tasmania, Australia

3.102 In Tasmania, registration and reporting requirements are extended to corresponding foreign offences. However it goes a step further by requiring offenders who had committed in a foreign jurisdiction an offence, the elements of which if they had occurred in Tasmania, would have constituted a registrable offence, to be registered.²⁶⁸

²⁶² 9 Guam Code Ann. §89.01, *amended by* Guam Pub.L.No.30-233:2 (2010).

²⁶³ *Ibid.*

²⁶⁴ *Ibid.*

²⁶⁵ *Sex Offenders Registration Act 2004* (Victoria), s 9(1).

²⁶⁶ *Ibid* s 9(2).

²⁶⁷ *Ibid* s 37.

²⁶⁸ *Community Protection (Offender Reporting) Act 2005* (Tasmania), s 13 and s 17.

Western Australia, Australia

3.103 In Western Australia, the *Community Protection (Offender Reporting) Act 2004* extends registration requirements to foreign offences. Where an offender, who is registered on an SOR in a foreign jurisdiction and has ongoing reporting obligations in that jurisdiction subsequently moves to reside in Western Australia, that offender is required to register on the Community Protection Offender Register.²⁶⁹ The foreign offender, termed a ‘corresponding reportable offender’ is required to continue reporting obligations in Western Australia for the length of time imposed in the foreign jurisdiction.²⁷⁰

New South Wales, Australia

3.104 In New South Wales, registration and reporting requirements may be extended to foreign offences. If a person is registered on a SOR in a foreign jurisdiction and his or her reporting obligations are still in force, this reporting obligation carries on if the registered offender then moves to New South Wales.²⁷¹ This person is termed a ‘corresponding registrable offender’ and is required to continue his or her reporting obligations for the period remaining in the foreign jurisdiction.²⁷² This applies regardless of whether the offence in respect of which he or she is required to report in the foreign jurisdiction is not a registrable offence for the purposes of the *Child Protection (Offenders Registration) Act 2000*²⁷³ (similarly to Victoria).

American Samoa

3.105 In American Samoa, registration requirements extend to a foreign conviction involving a registrable offence where the offender was convicted in a foreign country deemed by the United States State Department as being a country that upholds the right to a fair trial.²⁷⁴

New Zealand

3.106 New Zealand is currently developing a Memorandum of Understanding with Australia to facilitate better information sharing when a person is deported to New Zealand.²⁷⁵ The inception of a

²⁶⁹ *Community Protection (Offender Reporting) Act 2004* (Western Australia), s 6(3); s 7.

²⁷⁰ *Ibid* s 49(1)(a).

²⁷¹ *Child Protection (Offenders Registration) Act 2000* (New South Wales), s 19BB(1).

²⁷² *Ibid* s 19BC.

²⁷³ *Ibid* s 19BB(2).

²⁷⁴ *Sex Offender Registration and Community Notification Code 2014* (American Samoa), s 46.2803(b).

²⁷⁵ New Zealand Parliament, Questions for written answer to Hon Amy Adams, 17 February 2015 http://www.parliament.nz/en-nz/pb/business/qwa/QWA_00678_2015/678-2015-jacinda-ardern-to-the-minister-

register for serious violent offenders (which appears to be broader than a SOR) spurred from the violent killing of 13 year old girl, Jade Bayliss in 2001 by her mother's partner who was convicted of killing a teenager while living in Australia and who was subsequently deported back to New Zealand.²⁷⁶

3.107 At the moment, when the Australian Immigration authorities deport a person who received a 2 year conviction to New Zealand, minimal information is provided to New Zealand Police. The Australian Immigration authorities do not disclose the deportee's criminal history. Such information can only be obtained by the New Zealand Police through a request of the person's criminal record from Interpol. Furthermore, due to privacy constraints in New Zealand, New Zealand police cannot disclose a person's criminal history unless there is an imminent threat to life. As a result deportees in New Zealand reintegrate into society without being subjected to the rigorous post release conditions and monitoring imposed on offenders who are released from prison domestically.²⁷⁷

3.108 Since the murder of Jade Bayliss, New Zealand has passed several amendments in an attempt to capture serious violent offenders deported from overseas who remain unmonitored. Amendments were made to the *Parole Act 2002* in December 2015 to bring New Zealanders who committed serious violent crimes overseas under the monitoring eye of the Corrections Department.²⁷⁸ Notably, the definition of offenders eligible to be served with an extended supervision order has been extended to include a person who committed a serious violent offence overseas and later moved to New Zealand.²⁷⁹ However, the new amendments include a statutory limitation. An offender is only eligible for an extended supervision order if he or she was released from a sentence and had moved to New Zealand within the 6 months preceding an application for an extended supervision order.²⁸⁰

3.109 The New Zealand government has also established a more aggressive domestic regime with regards to its extended supervision orders. Previously extended supervision orders were established for the monitoring of child sex offenders released from prison but were deemed to be at a high risk of

[of-justice](#) (accessed on 11 March 2015); Television New Zealand Limited, 'Jade Bayliss death prompts public register shake-up', *TVNZ One News* (online), 07 May 2013 <http://tvnz.co.nz/politics-news/jade-bayliss-death-prompts-public-register-shake-up-5430654> (accessed on 25 February 2015).

²⁷⁶ Television New Zealand Limited, 'Jade Bayliss death prompts public register shake-up', *TVNZ One News* (online), 07 May 2013 <http://tvnz.co.nz/politics-news/jade-bayliss-death-prompts-public-register-shake-up-5430654> (accessed on 25 February 2015).

²⁷⁷ *Ibid.*

²⁷⁸ *Parole Act 2002* (New Zealand), s 107I(2); Department of Corrections http://www.corrections.govt.nz/working_with_offenders/prison_sentences/release/extended-supervision.html

²⁷⁹ *Parole Act 2002* (New Zealand), s 107C(1)(b).

²⁸⁰ *Ibid* s 107C.

sexual reoffending. The amendments have extended the ambit of extended supervision orders to include sex offenders who committed sexual offences against adults as well as offenders who committed serious violent offences and were deemed to be at a high risk of committing further serious violent offences.²⁸¹

I. Retrospective Legislation

3.110 An important consideration for Samoa prior to the establishment of a SOR is whether it should operate retrospectively. A retrospective statute operates or takes effect on matters that took place before its enactment, for example, by penalising conduct that was not unlawful when it occurred.²⁸² In the context of a SOR, a retrospective statute would operate to subject sex offenders who offended before the passing of the statute to be registered on the SOR and subject to reporting obligations. There is a general presumption that Parliament intends all statutes to operate prospectively. However a statute will operate retrospectively if the language expressly states an intention to operate retrospectively.²⁸³

3.111 Certain jurisdictions have included retrospective provisions to varying effects within their respective legislation. Discussed below is the extent to which comparative jurisdictions have applied retrospective laws in establishing their sex offender registers.

Victoria and New South Wales, Australia

3.112 Victoria and New South Wales establish clear examples of retrospective legislations. The *Sex Offenders Registration Act 2004* in Victoria and the *Child Protection (Offenders Registration) Act 2000* in New South Wales apply retrospectively. Victoria's Act states that adult offenders who were serving their sentence immediately before 1 October 2004 for a Class 1 or a Class 2 offence are required to register.²⁸⁴ Similarly, the New South Wales legislation provides that it also includes offenders who were serving sentences at the time the legislation was passed.²⁸⁵ Both jurisdictions have explicitly included offences that were committed before the commencement of their legislations, making them apply retrospectively. However, both jurisdictions have limited the retrospective scope of their legislations to affect specifically those who committed registrable offences and who were serving their sentences immediately before the commencement of their legislations. Any person who

²⁸¹ *Parole Act 2002* (New Zealand), s 107C.

²⁸² EA Martin and J Law *A Dictionary of Law* (4th ed, Oxford University Press, New York, 2006) 467.

²⁸³ P Butt and D Hamer *Concise Australian Legal Dictionary* (4th ed, Lexis Nexis, Australia, 2011) 512.

²⁸⁴ *Sex Offenders Registration Act 2004* (Victoria), s 6(1).

²⁸⁵ *Child Protection (Offenders Registration) Act 2000* (New South Wales), s 3A(2)(d).

completed serving their sentence before the passing of these legislations remains unaffected by these retrospective provisions.²⁸⁶

Western Australia, Australia

3.113 The *Community Protection (Offender Reporting) Act 2004* operates retrospectively. The definition of a registrable offender in Western Australia extends to include a person sentenced before the passing of the legislation who was sentenced for 2 or more registrable offences, where at least one of those offences was committed 8 years before the legislation was passed.²⁸⁷ Similar to Victoria and New South Wales, offenders who were serving their sentence immediately before the date of the commencement of the legislation for a registrable offence are also required to register.²⁸⁸

J. Serious Violent Offenders

3.114 The inclusion of serious violent offenders on a register (such as the SOR) should be considered. This issue has featured prominently in New Zealand recently where the establishment of a register for serious violent offenders who have been deported to New Zealand is being considered.²⁸⁹ This issue is important to consider, particularly in relation to criminal deportees, many if not most, whom have been convicted of very serious sexual or violent criminal offences in New Zealand or the USA.

PART 4: CAN A SEX OFFENDER'S REGISTER DETER RE-OFFENDING?

4.1 One of the key issues raised in the Discussion Paper relates to the effectiveness of a SOR as a deterrent to re-offending by way of its branding and shaming of a sex offender by members of the community. The following part of this Report will look at this issue through the experience and information available in other jurisdictions that have established a SOR, such as the USA (in particular the State of California), Guam, American Samoa and Australia. New Zealand will also be discussed in this part of the report, insofar as its extended supervisory orders apply to convicted sex offenders who are released on parole.

²⁸⁶ Above n 284, Note 4 to s 6(1).

²⁸⁷ *Community Protection (Offender Reporting) Act 2004* (Western Australia), s 6(2)(b).

²⁸⁸ *Ibid* s 6(2)(a).

²⁸⁹ New Zealand Parliament, Questions for written answer to Hon Amy Adams, 17 February 2015 http://www.parliament.nz/en-nz/pb/business/gwa/QWA_00678_2015/678-2015-jacinda-ardern-to-the-minister-of-justice (accessed 11 March 2015); Television New Zealand Limited, 'Jade Bayliss death prompts public register shake-up', *TVNZ One News* (online), 07 May 2013 <http://tvnz.co.nz/politics-news/jade-bayliss-death-prompts-public-register-shake-up-5430654> (accessed on 25 February 2015).

USA

4.2 Data collected by the Department of Justice Administration in the USA shows four primary areas of collateral consequences reported by registering sex offenders, irrespective of the overall purpose for which a SOR was established and implemented.²⁹⁰ These include:

- Employment difficulties – Registered sex offenders find it difficult to gain employment due to being a registered sex offender. The prejudice held by employers against sex offenders most often results in the automatic refusal to hire a prior offender.²⁹¹
- Relationship difficulties – Registered sex offenders find it difficult to begin or maintain personal and social relationships due to the need to protect them from rejection and to protect their emotional and mental stability.²⁹²
- Harassment – Registered sex offenders anticipate being harassed physically and verbally once their names, photograph, address and other identifying information appear on the SOR.²⁹³
- Stigmatisation – society at large, including the criminal justice system, perceives all classes of sex offenders as equally reprehensible and all individuals associated with sexual offending are viewed as heinous, violent and dangerous.²⁹⁴

4.3 Sex offender registration laws and sex offender notification laws are distinguished in the United States. As discussed earlier in this report, sex offender registration laws require that sex offenders provide specific information to some division of government such as the local police, which is normally kept confidential.²⁹⁵

4.4 On the other hand, sex offender notification laws authorises the public availability of information about sex offenders, including for example, their criminal history, physical description and home address.²⁹⁶

²⁹⁰ Richard Tewksbury and Matthew Lees, *Perceptions of Sex Offender Registration: Collateral Consequences and Community Experiences* (2006) <http://dx.doi.org/10.1080/02732170500524246> (accessed 10 February 2013)

²⁹¹ Ibid 319 – 320.

²⁹² Ibid 322.

²⁹³ Ibid 325.

²⁹⁴ Ibid 327.

²⁹⁵ J.J Prescott and Jonah E. Rockoff, *Do Sex Offender Registration and Notification Laws affect Criminal Behaviour?* (2011) <http://www0.gsb.columbia.edu/faculty/jrockoff/papers/Prescott%20and%20Rockoff%20jle.pdf> (accessed 10 February 2013), 162.

²⁹⁶ Ibid 163.

- 4.5 There are studies that suggest that registered sex offenders may be more likely to re-offend when their information is made public. This is because the associated costs such as seeking employment, establishing and maintaining personal relationships or the mental effort involved in withstanding public abuse make a crime free life less attractive.²⁹⁷ On the other hand, other studies conducted from 1990 – 2005 (USA) have suggested that registration or notification laws may deter sex offenders from committing further sex crimes, as police will be more likely to connect victims to known sex offenders, thereby enhancing the ability of the police to monitor and apprehend registered sex offenders.²⁹⁸ The study also suggests that a decline in crime between the period of 1990 - 2005 in the different American states that established and implemented sex offender registers is due in part to the reduction of sex offences committed against known victims (acquaintances, neighbours, friends, family members) after registries were implemented.²⁹⁹
- 4.6 A further study found that a SOR may deter potential sex offenders or true first offenders from offending where information on the SOR is made public.³⁰⁰ A ‘true first offender’ meaning a defendant with no prior contact of any kind with the criminal justice system as compared to a ‘first offender’ which is an offender with a prior arrest or dismissed charge.³⁰¹

Guam

- 4.7 Research on the effectiveness of Guam’s registry in deterring sexual re-offending is limited to what is available on its Government websites. Statistics available relating to registered sex offenders in Guam since its establishment in 1999 shows that in 2008, there were 481 convicted sex offenders, however of that number, only 454 registered or reported to the Guam Sex Offender Registry Management Office.³⁰² Over a period of 8 years from 2000 to 2008, the Guam Sex Offender Registry Management Office saw a 234% increase in registered sex offenders from 136 in 2000 to

²⁹⁷ Ibid 165.

²⁹⁸ J.J. Prescott and Jonah E. Rockoff, *Do Sex Offender Registration and Notification Laws affect Criminal Behaviour?* (2011) <http://www0.gsb.columbia.edu/faculty/jrockoff/papers/Prescott%20and%20Rockoff%20jle.pdf> (accessed 10 February 2013), 168.

²⁹⁹ Amanda Y. Agan, ‘Sex Offender Registries: Fear without Function’ (2011) 54(1) *Journal of Law and Economics* 207 <http://www.jstor.org/stable/full/10.1086/658483> (accessed 10 February 2013).

³⁰⁰ J.J. Prescott and Jonah E. Rockoff, ‘Do Sex Offender Registration and Notification Laws affect Criminal Behaviour?’ (2011) 54(1) *Journal of Law and Economics* 161 <http://www0.gsb.columbia.edu/faculty/jrockoff/papers/Prescott%20and%20Rockoff%20jle.pdf> (accessed 14 February 2013).

³⁰¹ Ibid.

³⁰² The discrepancy where it states that there are 481 convicted sex offenders yet only 454 registrants is because the unaccounted 27 sex offenders failed to register.

454 in 2008.³⁰³ More recent figures however indicated that over a period of 2 years from 2008 to 2010, the Registry Management Office saw a 30% increase in registered sex offenders from 454 in 2008 to 537³⁰⁴ in 2010.³⁰⁵ Reasons for the significantly higher increase of registered offenders in the earlier period (2000-2008) as compared to the later period (2008-2010) are not apparent and further research is recommended before any reliable conclusions may be derived from these figures. Statistics for re-offending are also unavailable.

American Samoa

- 4.8 The predecessor to the *Sex Offender Registration and Community Notification Code 2014* that established the initial SOR in American Samoa was passed in 1999. Information received from the Office of the Attorney General in American Samoa suggested that one of the biggest issues surrounding its earlier SOR was the lack of resources to implement and enforce it.³⁰⁶ The process whereby sex offenders were registered in American Samoa involved the offenders themselves writing down personal information in a simple exercise book kept and maintained by the American Samoa Corrections Facility. Other issues included uncertainty as to which Government department was responsible for monitoring sex offenders.³⁰⁷ The initial SOR also did not extend to foreign offenders, including sex offenders from Samoa, despite the fact that sex offenders convicted in American Samoa often also had prior sex offence convictions in Samoa. These challenges essentially made the initial SOR very ineffective.
- 4.9 Further amendments were made in October 2014 to the American Samoan legislation, resulting in the *Sex Offender Registration and Community Notification Code 2014*. This legislation identified the Legal Affairs Department as responsible for hosting American Samoa's SOR and also set out how registration should be carried out. The amended law also now provides for the registration of sex offenders convicted in foreign jurisdictions.

³⁰³ Bureau of Statistics and Plans *Fiscal Year 2009-2012 Drug Control, Violent Crime and Criminal Justice Systems Improvement Strategy* http://www.bsp.guam.gov/Attachment1_RecoveryJAG_2009_PUBLICNOTICE.pdf (accessed 09 April 2014).

³⁰⁴ In 2010, of the 630 convicted sex offenders, only 537 registered with the Guam Sex Offender Registry Management Office. The sex offenders unaccounted for failed to register.

³⁰⁵ Bureau of Statistics and Plans *Fiscal Year 2011 Strategy Update for Drug Control, Violent Crime and Criminal Justice Systems Improvement* (2011) http://www.bsp.guam.gov/Final_2011%20Strategy%20Update.pdf (accessed 09 April 2014).

³⁰⁶ Interview with Mitzie Jessop, Deputy Attorney General, American Samoa Legal Affairs Department (Apia, 22 July 2014).

³⁰⁷ *Ibid.*

4.10 However, due to the recent enactment of this legislation, information as to its effectiveness in American Samoa is not yet available.

Victoria, Australia

4.11 As previously discussed, Victoria's *Sex Offenders Registration Act 2004* requires a convicted sex offender to report personal details as well as any unsupervised contact with a child to the Victoria Police. The Police are then required to inform the Department of Human Services (**DHS**) about such unsupervised contact to allow the DHS to take action in ensuring the safety of the child.³⁰⁸

4.12 In May 2010, the Ombudsman of Victoria received an anonymous disclosure under the provisions of the *Whistleblowers Protection Act 2001* which alleged that due to an administrative error, the Police had failed to inform the Department of Human Services of more than 300 registered sex offenders who were living with, or who had unsupervised contact with children.³⁰⁹ It indicated that as a result of the inaction by the Police, hundreds of children may have been exposed to registered sex offenders without any investigation being undertaken to ensure their safety.³¹⁰

4.13 An investigation by the Ombudsman was then carried out into the key agencies i.e. Victoria Police, Department of Human Services and Corrections Victoria and the failure of the *Sex Offenders Registration Act 2004*. It reported that the failure of the Act was a result of five key factors.

- (i) Failure of police to report to the DHS – This led to a large number of investigations required by the DHS, causing the DHS to struggle with its operational responsibilities. The failure of the Police to report the circumstances of children exposed to registered offenders to the DHS arose due to a combination of:
 - a. inadequate commitment to the SOR by the Police;
 - b. lack of a shared understanding between the Police and the DHS of the concept of 'risk' and how it should be applied to the SOR;
 - c. lack of understanding by Police members of the instances in which information may be disclosed under the *Sex Offenders Registration Act 2004*;

³⁰⁸ Ombudsman Victoria, *Whistleblowers Protection Act 2001 – Investigation into the failure of agencies to manage registered sex offenders* (2011), 6 <https://www.ombudsman.vic.gov.au/Publications/Parliamentary-Reports/Whistleblowers-Protection-Act-2001-Investigation-i> (accessed 11 February 2013).

³⁰⁹ Ombudsman Victoria, *Whistleblowers Protection Act 2001 – Investigation into the failure of agencies to manage registered sex offenders* (2011), 6 <https://www.ombudsman.vic.gov.au/Publications/Parliamentary-Reports/Whistleblowers-Protection-Act-2001-Investigation-i> (accessed 11 February 2013).

³¹⁰ *Ibid.*

- d. failure of the key agencies to share responsibility for ensuring the SOR contributed to the protection of children;
 - e. failure to understand obligations under the Charter of Human Rights & Responsibilities Act 2006 (Victoria); and
 - f. lack of capacity as historically, key staff had varying levels of experience in sex offenders registry management.³¹¹
- (ii) Lack of coordination between the relevant agencies (ie. DHS and Corrections Victoria) – Although the Minister of Corrections permitted information to be disclosed to the DHS upon request, this was ineffective. Released information was not sufficiently provided promptly or adequately, due to the requirement for the offender to consent to its release.³¹²
- (iii) Inadequate storage and usage of information – Information was either not entered on the electronic database, entered negligently, or the electronic information was not automatically transferred/made accessible to the national police. The DHS failed to detect this failure as they managed a case management system.³¹³
- (iv) The Act was silent as to what process/action should be undertaken by the Victoria Police once a registered offender disclosed contact with a child. It also failed to resolve ambiguities as to limitations and also to provide any definition of ‘unsupervised contact’.³¹⁴ Furthermore, the centralised processes established by the taskforce (Police and DHS) were identified as being time consuming.³¹⁵
- 4.14 The Ombudsman’s report is silent on whether Victoria’s SOR has been effective in acting as a deterrent to re-offending. However, it indicates that that Victoria’s SOR may become better coordinated and maintained for future reference, and therefore more effective to achieve the purpose for which it was established.³¹⁶

³¹¹ Ibid 33.

³¹² Ombudsman Victoria, *Whistleblowers Protection Act 2001 – Investigation into the failure of agencies to manage registered sex offenders* (2011), 33 <https://www.ombudsman.vic.gov.au/Publications/Parliamentary-Reports/Whistleblowers-Protection-Act-2001-Investigation-i> (accessed 11 February 2013).

³¹³ Ibid.

³¹⁴ Ibid 14.

³¹⁵ Ibid 23.

³¹⁶ Ibid 36.

4.15 In view of the amount of resources available to the various Ministries in Victoria, it may be reasonable to assume that the difficulties identified by the Ombudsman in Victoria are also likely to apply in Samoa, given its relative lack of resources.

New Zealand

4.16 A *Sex Offenders Registry Bill* was developed in New Zealand in 2003. The purpose of the Sex Offenders Registry Bill was to create a crime-fighting and law enforcement tool by establishing a registry of persons who have been convicted of sexual offences and to include mechanisms to keep the registry up to date, so that the police have reliable information available to them as to the whereabouts of sex offenders.³¹⁷ However in examining it, the Justice and Electoral Parliamentary Committee recommended that the Bill not be passed on the basis that it would not achieve its intended purpose.³¹⁸

4.17 The Bill was not passed. In the first Parliamentary reading of this Bill several concerns were raised by members of parliament. In particular, the Minister of Justice, Hon Phil Goff, said that although the intention of the SOR may help police solve crimes more quickly, what it does not do is act to prevent future offending. Minister Goff further stated that:

*“Prevention requires the active management of sex offenders in the community and that means a combination of controls such as supervision and court reporting requirements as well as the availability of and support in undertaking regular counselling and relapse prevention programs.”*³¹⁹

4.18 Although New Zealand does not have a SOR as such, its alternative has been the registration and supervision of sex offenders under the *Parole Act 2002*. Under this Act, an offender who has been convicted of certain sexual offences and assessed by a health assessor, may be made subject to an extended supervision orders by the court.³²⁰ The purpose of an extended supervision order is to protect members of the community from those who, upon receipt of a determinate sentence, pose a real, high and ongoing risk of committing sexual offences against children or young persons.³²¹

³¹⁷ New Zealand, *Parliamentary Debates*, House of Representatives, (30 July 2003) 610 NZPD 7494 <http://www.parliament.nz/resource/0000025642> (accessed 10 February 2013).

³¹⁸ Justice and Electoral Committee *Sex Offenders Registry Bill 2003* (25 August 2006), 2.

³¹⁹ *Ibid.*

³²⁰ *Parole Act 2002* (New Zealand), s 107A.

³²¹ *Ibid* s 107I.

- 4.19 The report from a health assessor should include the nature of the likely future sexual offending by the offender including the age and sex of likely victims, the offender's ability to control his or her sexual impulses, the offender's predilection and proclivity for sexual offending, the offender's ability to self regulate, their ability to show remorse or concern for victims together with acceptance of responsibility and remorse for past offending and any other relevant factors.³²²
- 4.20 Factors that the sentencing court must take into consideration when making an extended supervision order for the safety of the community includes the level of risk posed by the offender, the seriousness of the harm that might be caused to victims and the likely duration of the risk.³²³
- 4.21 The *Parole Act 2002* sets out two types of early release from prison which may apply to convicted offenders, namely, parole and compassionate release. Parole is available to an offender who is subject to a long-term sentence and granted by the Board,³²⁴ subject to release conditions. An offender on parole from a determinate sentence is subject to recall at any time until his or her statutory release date, whereas an offender on parole from an indeterminate sentence is subject to recall for life.³²⁵ Compassionate release is where the offender may be subject to release conditions and recall.³²⁶
- 4.22 An extended supervision order by a court may extend beyond ten years and involves the imposition of conditions on how such offenders are to be supervised.³²⁷ It is subject to standard release conditions, as well as any special conditions imposed by the Parole Board³²⁸ which may vary from prohibiting the offender from entering or remaining in a specified place or area at specified times to a requirement that the offender be subject to electronic monitoring.³²⁹
- 4.23 It is not readily apparent whether extended supervision orders have been effective in minimising recidivism. However, a recent empirical study was undertaken to review the effect extended

³²² Ibid s 107F(2).

³²³ Ibid.

³²⁴ Ibid Part 1A.

³²⁵ *Parole Act 2002* (New Zealand), Part 1A.

³²⁶ A ground for compassionate release includes where an offender has given birth to a child or is seriously ill and is unlikely to recover.

³²⁷ Previously, extended supervision orders had an expiration period of 10 years. Amendments in 2014 now allow extended supervision orders to be renewed after the 10 year expiry date with a mandatory review to be undertaken by the courts every 5 years. Refer to paragraph 3.70.

³²⁸ *Parole Act 2002* (New Zealand), s 107A.

³²⁹ Ibid.

supervision orders had on curbing recidivism.³³⁰ The study was carried out over a number of offenders under extended supervision orders and a group of sexual offenders who were assessed at a matched level of risk but who had been released prior to the enactment of the amendments introducing the extended supervision orders. Over a period of 28 months, the study revealed that 4.5% of offenders under extended supervision orders sexually reoffended compared to a 17.6% of sexual reoffending by offenders without the orders. Therefore, although the scheme does not completely eliminate sexual offending, it appears to contribute to a reduction in sexual recidivism.³³¹

4.24 In August 2014 the former Police and Corrections Minister, Anne Tolley, announced that New Zealand will establish a Child Protection Offender Register with the purpose of keeping communities safe, providing an additional tool to assist Police and Corrections to reduce the risk of harm to children and families and deterring offenders. In a press release, the then Minister Tolley stated that the Child Protection Offender Register will be held on a secure database and will only be accessible to a risk management unit of Police and Corrections staff and psychologists.³³² She further announced that the proposed register is expected to be operational by 2016 and will include the following characteristics and form:

- It will apply to sex offenders convicted in New Zealand and those who move to New Zealand following a similar conviction overseas;
- The term of registration may take up to a term of life, 15 years or 8 years;
- Offenders aged 18 and over would be required to register provided that they have been:
 - Convicted of a qualifying offence³³³ and sentenced to prison;
 - Convicted of a qualifying offence and sentenced to a non-custodial sentence and directed to be registered by the sentencing judge;
 - Convicted of an equivalent offence and sentenced overseas if they intend to reside in New Zealand for six months or more.³³⁴

³³⁰ James Vess, 'Extended Supervision or Civil Commitment for Managing the Risk of Sexual Offenders: Public Safety and Individual Rights' (2009) 1(2) *Sexual Abuse in Australia and New Zealand* 70, 76.

³³¹ Ibid.

³³² New Zealand Government, *Minister announces Child Protection Offender Register*, (2014) <http://www.beehive.govt.nz/release/minister-announces-child-protection-offender-register> (accessed 14 August 2014).

³³³ A particular offence that is identified as a qualifying offence under legislation, for example: s 52 of Samoa's Crimes Act 2013 is a sex offence under this legislation but may be defined as a qualifying offence in a sex offender's register legislation.

³³⁴ Above n 332.

4.25 At the time of writing this Report, details as to further progress in the development of an SOR in New Zealand are unavailable. However, what is apparent is that more work is currently being undertaken in New Zealand in the area of sex offender registration, which at present bears a similarity to Samoa's situation.³³⁵

PART 5: COMMISSION'S VIEW AND RECOMMENDATIONS

A. Establishment of a SOR

5.1 Data received from the Ministry of Police (as shown in Part 1 of the report) suggests that there has been an increase in the number of sexual crimes reported to police. However data on sexual crime convictions in the Supreme Court indicates a less dramatic increase. Available data does not provide any information regarding sexual re-offending, however the overall trend indicates that there is an increase in sexual crimes reported to police.

5.2 The TOR specifically asks whether a SOR would help in the deterrence of sexual offending. The Commission notes that research carried out in jurisdictions that have established such registers, have uncovered very little, if any, solid evidence that a SOR would act as a deterrent to sexual recidivism. The Commission also notes that the purpose for establishing SOR in various jurisdictions includes assisting in law enforcement and other related purposes.

5.3 As discussed in Part 1, some mechanisms are already in place in Samoa that may assist in the deterrence of criminal offending. This includes the enactment of the *Prisons and Corrections Act 2013* which establishes the Prisons and Corrections Services with functions that include the rehabilitation of the prisoners lawfully held in custody,³³⁶ as well as the increase in penalties with the enactment of the *Crimes Act 2013*.³³⁷ It is also expected that the National Crime Prevention Strategy which proposes new strategies for crime prevention (including sexual offending) will (when finalised) strengthen existing mechanisms, and will be well complemented by a SOR.

5.4 The Commission is of the view that postponing the establishment of a SOR to await pending further research or evidence that it will indeed deter sexual recidivism, may simply result in further delays, will still not provide any certainty. This is reminiscent in the different jurisdictions that have established

³³⁵ New Zealand Government, *Minister announces Child Protection Offender Register*, (2014) <http://www.beehive.govt.nz/release/minister-announces-child-protection-offender-register> (accessed 14 August 2014) – In the Minister's announcement, it was said that Cabinet has agreed additional funding of \$35.5m over a period of 10 years for the technology component of the new register.

³³⁶ *Prisons and Corrections Act 2013* (Samoa), s 4(2c).

³³⁷ Discussed in Part 1.

SORs for many years, and that still have great difficulties in producing indisputable evidence that a SOR would deter re-offending. The Commission therefore considers that the absence of, or uncertainty in information relating to a SOR as an effective deterrent should not be used as a reason for postponing or failing to establish a SOR.

5.5 In most jurisdictions, a SOR is established by statute. For example, the United Kingdom's SOR is established under the UK *Sex Offenders Register Act 1997*. Similarly in Canada, the applicable legislation is the *Sex Offender Information Registration Act 2004*. In Guam, the SOR is established under *Public Law No. 25-75*. Likewise, a SOR for Samoa should be established by statute which could be called the '*Sex Offender Registration Act*' (**Legal Framework**).

Recommendation 1. A Sex Offender's Register should be established by legislation (called for example the Sex Offender Registration Act) (**Legal Framework**). The Legal Framework should include a mandatory review by the implementing agency of the operation and effectiveness of the SOR no later than 3 years following enactment.

B. Setting up a SOR

5.6 The Auafa Mau Database includes data provided by the Law and Justice Sector agencies that include the Ministry of Police, the Ministry of Justice and Courts administration, the Attorney General's Office, and the Samoa Prisons and Corrections Services. The data provided will create trend reports and will identify emerging issues for the Law and Justice Sector.

5.7 As previously noted, various challenges (including resource and funding issues) have delayed the Auafa Mau database from becoming fully operational.³³⁸ However it is considered that the Auafa Mau Database could be integral to the operation of a SOR and could potentially be used as the platform for the technology component of a SOR, for example by expanding the database so that relevant information relating to sexual offenders and re-offenders are included. To do so, could minimize set up costs of a SOR and would reduce duplication of resources. The Commission considers that a review of the Auafa Mau database system and its feasibility as a platform for a SOR should be considered, including how it

³³⁸ Interview with Roni Fereti, Sector Coordinator, Law and Justice Secretariat (Apia, 10 December 2014) – For instance, the information submitted by Sector agencies is contained in individually designed spreadsheets appropriate for each agency, which is not uniform. The information is therefore not in a format that is adaptable for publication and dissemination and the Sector has identified difficulties in correcting these anomalies. Furthermore Sector agencies have expressed concerns in relation to ongoing and comprehensive capacity in relation to IT personnel and desk officers to assist in the operation and maintenance of the database.

may be improved and expanded, as well as reviewing processes relating to access or information and security classifications.

Recommendation 2: The challenges preventing the Auafa Mau database from being fully operational should be addressed and a clear timeframe set for when it will be fully operational.

Recommendation 3: Without necessarily waiting for the database to be fully operational, a review should be carried out on how the Auafa Mau database could be used as the platform for the technology component of a SOR, as well as on processes relating to provision of information, access and confidentiality of information, and security classifications.

Recommendation 4: Data and statistics on sexual offending and re-offending should be collated and regularly updated by relevant Government Ministries (such as the Ministry of Police and Ministry of Justice and Court Administration) so that Government is fully and properly informed on any decision it makes in addressing the prevalence of sexual crimes. Such information should be entered onto the Auafa Mau Database, once that facility is completed and operational.

C. Purpose of a SOR

5.8 The Commission notes that the purpose for establishing a SOR in other jurisdictions is multifaceted and that there are various benefits for establishing a SOR. Establishing a SOR as a deterrent for potential re-offenders is only one of the many purposes for the establishment of a SOR. Others include assisting Police in the facilitation of investigating sexual related crimes; to monitor known sex offenders; and reduce the risk of harm to children.

5.9 The Commission considers that one of the key purposes for the establishment of a SOR for Samoa should be to assist in law enforcement.³³⁹ This would include requiring offenders who commit registrable offences in Samoa (as well as those who are deported back to Samoa following a conviction for a sexual conviction overseas³⁴⁰), to provide information to the police (such as personal details), and to keep them informed of their whereabouts for a period of time. This would increase the rapid identification of suspects of during investigations, as registered offenders could be more quickly investigated by police. A SOR may also potentially assist in crime prevention by acting as a deterrent to potential re-offenders, and

³³⁹ This would include the investigation and prosecution of sex offences crimes. This has been discussed in Part 3.

³⁴⁰ Discussed in Part 3.

may also reduce the risk of sexual harm to children as child sex offenders will be known to police and may be monitored.³⁴¹

Recommendation 5: The purposes for a SOR should include:

1. to assist in law enforcement and crime prevention;
2. to assist in the investigation and prosecution of sex offences (or more particularly, child sex offences);
3. to require offenders who commit registrable offences to provide personal details to the police, and keep them informed of their whereabouts;
4. to require persons who move to Samoa or are deported to Samoa following a sexual conviction overseas, to provide personal details to the police, and keep them informed of their whereabouts;
5. to reduce the likelihood of offenders who have committed sexual offences from re-offending;
6. to assist in the monitoring and management of sex offenders in the community;
7. to aid courts when making certain orders prohibiting certain offenders from engaging in specific conduct (example working in child related employment);
8. Other related purposes.

D. Administration of the SOR

5.10 The Commission considers that the relevant Ministry to administer the SOR should be the Ministry of Police given its enforcement and monitoring role. The Commission considers that is feasible for the Ministry of Police to take up this role as they would be the key users of information on the SOR. This may be implemented by a new division within the Ministry of Police set up to administer the Legal Framework, or alternatively the functions of an existing division (such as the Domestic Intelligence Unit) may be expanded to capture the administration of the Legal Framework. Such decision would depend on what the Police Commissioner in consultation with relevant Government agencies such as the Attorney General's Office, MJCA would consider as necessary and appropriate in relation to the purpose and scope of the SOR.

5.11 The Commission notes that establishing an independent Ministry or Authority separate from the Ministry of Police to administer the Legal Framework would have cost implications, and may add unnecessary bureaucracy, which may reduce the effectiveness of the SOR.

³⁴¹ Reference can be made to related legislation in UK, Canada and Guam.

Recommendation 6: The Legal Framework (and therefore the SOR) shall be enforced and administered by the Ministry of Police. This may require establishment of a new division within the Ministry, or the expansion of functions of an existing division, as the Police Commissioner (in consultation with the relevant Government agencies such as the Attorney General’s Office and MJCA in relation to the purpose and scope of the SOR) may consider necessary and appropriate.

E. Public Access to the SOR

5.12 As discussed earlier, one of the key purposes for the establishment of a SOR in other jurisdictions is to assist police in the investigation and prosecution of sex offences. In many jurisdictions personal information of an offender on a SOR is not publicised or publically available, but rather, it is restricted to police purposes and shared in very limited circumstances.³⁴² Such circumstance in which information is shared includes for the maintenance of the law (including the prevention, investigation, and detection of offences), sentencing purposes³⁴³, immigration purposes³⁴⁴, and where the protection of the welfare of a child is concerned.³⁴⁵

5.13 Jurisdictions that allow public access to the SOR are often jurisdictions that have established such registers for the specific purposes of providing community or public awareness about dangerous sex offenders living in the vicinity, so that the public had some information to take preventative measures to keep themselves and their children safe.³⁴⁶

5.14 For reforms to meet the needs of the community and promote Samoan customs and traditions³⁴⁷ it is essential to note how a sex offender in Samoa may be dealt with by his or her village. In Samoa, an offender may be dealt with and punished by his or her village before he or she is even convicted and appears for sentence in Court. Quite often such punishment imposed by the village council affects or involves the offender’s family. In relation to the sentencing of a criminal offender, the Samoan Courts are required by law to take into account as mitigation of sentence any punishment already imposed on the

³⁴² For example in the UK, Canada and Australia (New South Wales, Tasmania, Victoria, Western Australia).

³⁴³ Sentencing purposes may include information about convictions in an overseas jurisdiction.

³⁴⁴ Immigration purposes may include considering whether to grant a travel visa or permit, and for requests from Immigration overseas for confirmation as to whether a person is a registered sex offender or not.

³⁴⁵ This may include where an employer or potential employer requests information regarding whether a person within their employment or being considered for employment is a registered sex offender, where the employment or potential employment concerns working with children.

³⁴⁶ For example in California, Guam and American Samoa.

³⁴⁷ *Law Reform Commission Act 2008* (Samoa), s 4.

offender by his or her village council or any *ifoga*³⁴⁸ by the family of the offender to the victim's family for the offending that took place.

5.15 If information on a SOR were made public, there is potential for vigilantism or families or communities to take matters into their own hands. To put this into perspective, it is important to recognise the value of a Samoan woman in the *faasamoa*, and the concept of *feagaiiga* or the sacred relationship or covenant between a brother and a sister³⁴⁹ – encapsulated in the Samoan expression '*ole tuafafine ole 'i'oimata o lona tuagane*'.³⁵⁰ A Samoan woman is highly valued in a brother-sister relationship and more importantly in extended families, and it is highly likely that a SOR that is accessed by the general public in Samoa may impact negatively on the family of the offender (not to mention the shame brought upon the family by the offender for committing the offence), which may threaten peace and stability within a village and cause disorder and disturbance on matters that may have already been reconciled culturally and by the Courts.

5.16 An equally important consideration in relation to the accessibility or not by the public to information is that Samoa does not have in place any laws that promote or protect individual privacy in general, or which establishes any principles in respect to the collection, use, and disclosure, by public and private sector agencies, of information relating to individuals.³⁵¹ This is unlike many if not most other countries with a SOR discussed in this report. Nevertheless, Samoa's existing international obligations under Conventions to which Samoa has acceded to, such as the International Covenant on Civil and Political Rights, where the right to privacy is protected from unlawful interference,³⁵² is an appropriate and relevant consideration to be taken into account as part of this review.

5.17 Although legally there appears to be no impediment for making such information public (adding weight to a proposal for a public SOR), the Commission considers that maintaining peace and harmony within relatively small communities, and the interest of an offender's family, as well as that of a rehabilitated offender, outweighs the interest in a public SOR. Furthermore, establishing a SOR for the key purposes of assisting in law enforcement would not require public access to information on the SOR.

³⁴⁸ An *ifoga* is the practice in the Samoan custom of seeking forgiveness through the offender and his or her family providing a formal apology to the family of a victim. The purpose of this is twofold, to seek forgiveness from the victim's family, as well as to preserve peace between the offender and the victim and between their respective families. Nowadays it is rare for an *ifoga* not to be accepted.

³⁴⁹ Malama Meleisea, *The Making of Modern Samoa: Traditional Authority and Colonial Administration in the History of Western Samoa*, (Institute of Pacific Studies of the University of the South Pacific, Suva Fiji, 1987).

³⁵⁰ A sister is the pupil of her brother's eye.

³⁵¹ See for example *Privacy Act 1993* (New Zealand).

³⁵² *International Covenant on Civil and Political Rights*, 999 UNTS 171 (entered into force 23 March 1976, Samoa acceded to the ICCPR on 15 February 2008), art 17 <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.

5.18 The Commission is of the view however that there is merit in making public, information on a SOR relating to serious recidivist sex offenders, for example where children or people with disabilities are victimized. This may be done in various ways (which would need to be set out clearly in the Legal Framework if a SOR is established). For example, information about a sex offender may be automatically transferred to a public part of the SOR when there is serious repeat offending by that offender. Another approach may be for the Court to be given discretion when sentencing a serious repeat offender, to order that the information on a SOR in relation to that sex offender be made publicly available, where he or she has a pervasive pattern of serious sexual offending, or poses a high risk to re-offending. Such order could be made upon an application by prosecution. To make information relating to this group of sex offenders publically available, would increase community awareness and public safety and may assist in preventing sexual crimes from recurring.

5.19 The Commission considers that with the exception of sex offenders described in the preceding paragraph, in relation to all other sex offenders, limited access to the SOR by an ‘Approved Agency’ for particular purposes would be more culturally sensitive and appropriate for Samoa. Such purposes could include law enforcement, sentencing by courts, to prevent employment of an offender in an environment with children, or on reasonable grounds to enable the proper administration of the SOR.

5.20 The Commission considers that an Approved Agency should be specified in the Legal Framework (or regulations made under it). The Legal Framework should also include criteria, which if met by an agency would make it eligible for the Police Commissioner’s consent to be an Approved Agency.³⁵³ Such approval by the Police Commissioner’s should be valid for set period (for example a maximum of 3 years). This will ensure that information is only released to agencies that are still in operation and carrying out the same functions upon which consent was given, and that information received from the SOR would be used for the purpose for which it was requested.

5.21 The process for the release of information on a SOR should be specified in the Legal Framework (or in regulations made under it). Although such process may be done by way of policy, the Commission considers that the inclusion of such process in the Legal Framework would be more legally robust, provide more certainty, and result in better compliance and enforcement. Such processes should include that a request:

1. Must be made in writing to the Commissioner of Police;
2. Must be kept confidential between the Commissioner of Police and the requesting agency; and

³⁵³ This provides some flexibility for Approved Agencies to be added without amending the Act or regulations as the case may be.

3. May take the form of confirmation as to whether the person of interest under inquiry is a registered sex offender and the whereabouts of this person.

5.22 Guidelines should also be developed in relation to access and disclosure of personal information about registered sex offenders.

Recommendation 7: The Legal Framework should provide that the information on the SOR should not be made publically available.

Recommendation 8: However, information on a SOR relating to serious recidivist sex offenders, for example where children or people with disabilities are victimized, should be made publically available. This may be done by requiring information about offenders to be automatically transferred to a public part of the SOR when there is serious repeat offending by that offender. Alternatively the Court could be given discretion when sentencing a serious repeat offender, to order that the information may be made publicly available if there is a pervasive pattern of serious sexual offending and a high risk to re-offending, upon an application by prosecution.

Recommendation 9: Except as provided in recommendation 8, the Legal Framework should require personal information of a sex offender on a SOR to be kept strictly confidential, and that such information may only be made available to an Approved Agency in limited circumstances. This may include the following purposes:

1. The maintenance of the law, including the prevention, investigation, and detection of offences;
2. Where the protection or welfare of a child is concerned;
3. Sentencing purposes;
4. Immigration purposes.

Recommendation 10: The Legal Framework (or regulations made under it) should specify agencies that are Approved Agencies.

Recommendation 11: The Legal Framework should also include criteria, which if met by an agency may be eligible for the Police Commissioner's consent to be an Approved Agency for a set period of time, provided that that agency is still in operation and carrying the same functions upon which the approval was granted.

Recommendation 12: The Legal Framework should set out the processes for the request and release of personal information about sex offenders on a SOR. Guidelines should also be developed as may be necessary. Such process should include that such requests:

1. Must be made in writing to the Commissioner of Police;
2. Must be kept confidential between the Commissioner of Police and the requesting agency;
and
3. May take the form of confirmation as to whether the person of interest under inquiry is a registered sex offender and the whereabouts of this person.

Recommendation 13: The requesting agency must keep information received from the SOR confidential and should only use it for the specific purpose for which it was requested and obtained.

F. Types of Registrable Offences and Duration of Registration

5.23 Further considerations for a SOR concerns various issues including the type of sex offences that should be registered, the duration of registration, the type of information that should be included on the SOR, whether registration should be mandatory, or whether a sentencing judge should retain some discretion including for the removal of a convicted sex offender from the SOR.

5.24 The Commission has discussed under Part 3 how other jurisdictions have categorised types of registrable offences and duration of these offences. For example, Guam’s registry classifies its sex offenders into 3 levels. Level 1 representing the most serious sexual offences with offenders registered for life, and Level 3 representing the least serious with offenders registered for 15 years.³⁵⁴ On the other hand, American Samoa’s legislation³⁵⁵ organizes sex offenders into 3 tiers, tier 3 representing the most serious sexual offences with lifetime registration and tier 1 the least serious with offenders registered for 15 years.³⁵⁶

5.25 In NSW where the SOR is established to assist in the monitoring, management, investigation and prosecution of child sex offenders,³⁵⁷ registrable offences are divided into 2 classes relating to specific offences against children.³⁵⁸ For example Class 1 includes murder of a child and offences involving sexual intercourse with a child with offenders registered for 15 years, while Class 2 includes procuring or

³⁵⁴ See paragraph 3.35.

³⁵⁵ *Sex Offender Registration and Community Notification Code 2014* (American Samoa).

³⁵⁶ Level 3 offenders are required to be registered for 15 years. See paragraph 3.60.

³⁵⁷ See paragraph 3.10

³⁵⁸ See paragraph 3.52

grooming child under 16 for unlawful sexual activity, kidnapping, promoting, benefiting from or engaging in acts of child prostitution with offenders registered for 8 years.³⁵⁹ Any reoffending automatically extends the registration so that offenders are registered for life.³⁶⁰

5.26 In the UK registrable offences or qualifying offences that must be registered are expressly set out in legislation. This includes rape, intercourse with a girl under 13, or under 16 (if the offender is 20 or over), and indecent assault where the victim was under 18. The duration of registration depends on the sentence that is imposed, for example life imprisonment requires registration for life, imprisonment for 6-30 months requires offenders to be registered for 10 years, and imprisonment for less than 6 months requires offenders to be registered for 7 years.³⁶¹

5.27 The Commission considers that registrable offences should be expressly set out in the Legal Framework or in the Act in which the offence is created – and should be categorised into different groups depending on the level of severity.

5.28 The Commission also considers that the Legal Framework should provide for the mandatory registration of registrable offences. Furthermore, the Commission is of the view that not all sexual crimes in Part VII of the *Crimes Act* should be registrable offences and captured by the SOR. For example, voyeurism, adultery and sodomy may be considered of a lower level of severity particularly in comparison to rape, unlawful sexual connection, and the like. The Commission also considers that some other offences that are not listed as sexual crimes in Part VII in the *Crimes Act* but that have a sexual element, should be registrable offences. This should include the sexual exploitation of a person under the age of 18 (including the transmission of still or moving images of that person under the age of 18),³⁶² solicitation of children,³⁶³ publication, distribution or exhibition of indecent material on child.³⁶⁴

5.29 The Commission considers that grouping registrable offences depending on the severity of the sexual offence³⁶⁵ is a practical approach that may be implemented in Samoa. The grouping of more severe sexual offences would be expected to result in a longer registration periods, than the grouping of less severe sexual offences. As illustrated in the different jurisdictions, grouping methods have some similarities and also differences. For example, some registrable offences are grouped according to similar

³⁵⁹ Ibid.

³⁶⁰ This is similar to Victoria, Tasmania and Western Australia, with slight variations.

³⁶¹ See paragraph 3.27.

³⁶² *Crimes Act 2013* (Samoa), s 157(1)(a)(i), (d)(i)(e)I, (f)(i), (g)(i).

³⁶³ Ibid s 218.

³⁶⁴ Ibid s 82.

³⁶⁵ Referred to in other jurisdictions discussed as classes, levels or tiers.

severity, whilst others are grouped based on the penalty the offender may be liable to, or the penalty imposed, or even grouped based on whether the offence involved children or involved re-offending.

5.30 The Commission is of the view that when developing the Legal Framework the identification of sexual offences that should be registrable offences, the grouping of such offences and the duration of registration of such offences should be carried out by the Attorney General's Office in close collaboration with the Ministry of Justice and Courts Administration, the Ministry of Police, the Ministry for Corrections Services and the Office of the Ombudsman.

5.31 The Commission is of the strong view that recidivist offenders, and offenders of sexual crimes against children and severely intellectually disabled persons, should be considered at the higher end of severity, with a longer registration period.

5.32 The Commission also considers that the 'maximum penalty the sex offender may be liable to' may be used as an indication of the severity of an offence, and that grouping based on this method may be considered appropriate for Samoa. If this grouping method is pursued, then the following may be used as a guide:

1. **Level 1 (most serious):** Any repeat offender who is convicted of a Level 2 or Level 3 offence against a child or a severely intellectually disabled person; any offender who has committed any of the following offences which penalty is life imprisonment or an imprisonment term not exceeding 20 years:
 - s 52(1) - sexual violation/ rape (life imprisonment);
 - s 55 – incest (imprisonment not exceeding 20 years).
 - s 58(1) - sexual connection with a child under 12 (life imprisonment);
2. **Level 2:** any offender who has committed any of the following offences which penalty an imprisonment term not exceeding 14 years or not exceeding 10 years:
 - s 52(2) Unlawful sexual connection (imprisonment not exceeding 14years);
 - s 53(1) Attempted sexual violation (imprisonment not exceeding 14 years);
 - s 53(2) Assault with intent to commit sexual violation (imprisonment not exceeding 14 years);
 - s 54(1) Sexual conduct with consent induced by threats (imprisonment not exceeding 14 years);
 - s 56(1) Sexual connection with a dependent family member under 21 years (imprisonment not exceeding 14 years);

- s 56(2) Attempted sexual connection with a dependent family member under 21 years (imprisonment not exceeding 14 years);
 - s 56(3) Commits indecent act with or on a person who is a dependent family member under 21 years (imprisonment not exceeding 14 years);
 - s 58(2) Attempts to have sexual connection with a child (imprisonment not exceeding 14 years);
 - s 58(3) Commits indecent act with or on a child (imprisonment not exceeding 14 years);
 - s 59(1) Sexual conduct with person under 16 (imprisonment not exceeding 10 years);
 - s 59(2) Attempts to have sexual connection with a young person (imprisonment not exceeding 10 years);
 - s 131 Abduction of a child under 16 with intent to have sexual connection (imprisonment not exceeding 10 years).

 - s 157 Dealing in people under 18 for sexual exploitation, removal of body parts, or engagement in forced labour (imprisonment not exceeding 14 years);
3. **Level 3:** any offender who has committed any of the following offences which penalty an imprisonment term not exceeding 7 years or not exceeding 5 years:
- s 54(2) Indecent acts on another person with consent induced by threats (imprisonment not exceeding 7 years);
 - s 59(3) Commits an indecent act with or on a young person (imprisonment not exceeding 7 years);
 - s 60 Indecent Assault (imprisonment not exceeding 7 years);
 - s 62 Using threats of intimidation for the purpose of sexual conduct (imprisonment not exceeding 5 years);
 - s 63(1) Commits or attempts to have sexual conduct with severely intellectually disabled person (imprisonment not exceeding 7 years);
 - s 63(2) Indecently assaults or attempts to indecently assault a severely intellectually disabled person (imprisonment not exceeding 7 years);
 - s73 Solicitation – offering to any person monetary payment for sexual intercourse or sexual connection (where the victim is a child) (imprisonment not exceeding 5 years);
 - s 82 Publication, distribution or exhibition of indecent material on child (imprisonment not exceeding 7 years);³⁶⁶

³⁶⁶ In New Zealand, the Objectionable Publications and Indecency Legislation Bill 2013 currently before Parliament is set to increase the penalties for producing, trading, or possessing child pornography. In particular, the bill will

- s 218 Solicitation of children (imprisonment not exceeding 7 years).

5.33 The Commission notes, that the above grouping method may be considered too mechanical an approach. There may be preference for a method that allows the evaluation all of the circumstances³⁶⁷ such as grouping based on the actual sentence a sex offender receives upon being convicted of a registrable offence,³⁶⁸ with a judge ultimately determining whether to register the sexual offender or not by virtue of the sentence imposed. Arguably such method may provide a less effective deterrent for re-offending. Furthermore, given that some maximum penalties in the *Crimes Act* may already be considered quite low and sentences imposed do not normally reach the maximum penalty, this method may result in a very serious sex offence being grouped or classified as less severe.³⁶⁹ Hence, the Commission recommends that this grouping method should only be pursued following a review of maximum penalties for offences that would be captured by the SOR.

5.34 The Commission considers that the Legal Framework should ensure that sex offenders that have been convicted of registrable offences in the Youth Court³⁷⁰ should be excluded from registration in the SOR. Alternatively the Court may exercise discretion to exclude a sex offender convicted in the Youth Court from registration in the SOR, unless it is satisfied that the offender has a persuasive pattern of serious sexual offending and that there is a high risk that the offender will commit a similar offence in future.³⁷¹ The Commission also considers that a further conviction of that same offender of a registrable offence as an adult, should be categorised on the higher end of severity (as a repeat offender), with a longer registration duration period.

result in an increase in the maximum penalties for possession, import, export, supply, distribution, and making of objectionable publications, which include child pornography, from 10 years imprisonment to 14 years imprisonment. The bill also increases the penalty for knowingly possessing an objectionable publication from a 5 year maximum imprisonment term to a 10 year maximum imprisonment term. The bill also introduces a new offence whereby any person of or above 16 years is liable to imprisonment for a term not exceeding 3 years if he or she intentionally exposes a person under the age of 16 to indecent material in communicating in any manner, directly or indirectly, with the young person. New Zealand Parliament, *Objectionable Publications and Indecency Legislation Bill 2013 Bills Digest*, <http://www.parliament.nz/en-nz/pb/legislation/bills/digests/50PLLaw20911/objectionable-publications-and-indecency-legislation-bill> (accessed 07 April 2015).

³⁶⁷ For example as applied to the banding guidelines used in *Police v Sione* [2011] WSSC 128.

³⁶⁸ This is the approach taken in the United Kingdom and Canada where the registration period for registered sex offenders is determined by the term of imprisonment of the offence committed. See paragraphs 3.27 and 3.31.

³⁶⁹ For example section s 63(1) and (2) relating to sexual conduct or indecent assault of a severely intellectually disabled person, and s 82 relating to publication distribution or exhibition of indecent material on a child, which all have a maximum imprisonment term of 7 years.

³⁷⁰ Currently the Youth Court deals with offenders aged 17 years and under. Note that following the Commission's Child Care and Protection Legislation Final Report's recommendation 38, the Child Care and Protection Bill 2013 is intended to amend this age to 18 years and under consistent with our obligations to the United Nations Convention on the Rights of the Child.

³⁷¹ This is similar to New Zealand's approach in relation to the Court's discretion to make an extended supervision order. See paragraph 3.70.

Recommendation 14: Samoa should have a mandatory registration system, with registrable sexual offences expressly set out in the Legal Framework or in the Act in which the offence is created and which categorises sexual offences into different groups depending on level of severity. A grouping method based on the penalty a sex offender may be liable to, may be used as a guide to indicate the severity of an offence and is the Commission’s preference. Alternatively a grouping method based on the actual sentence a sex offender receives upon conviction of a registrable offence may be used after a review is carried out of the maximum penalty for offences that would be captured by the SOR.

Recommendation 15: The identification of registrable offences, grouping of such offences, and the duration of registration of such offences should be carried out by the Attorney General’s Office, in close collaboration with the Ministry of Justice and Courts Administration, the Ministry of Police, the Ministry for Corrections Services and the Office of the Ombudsman. However the Commission expresses the preference that:

1. Registrable offences should include serious sexual offences such as rape and other sexual offences of similar severity. Sexual offences that are considered less serious, for example voyeurism, adultery and sodomy should not be registrable offences.
2. The group containing more severe sexual offences should result in a longer registration period than the group containing less severe sexual offences.
3. Recidivist sex-offenders, child sex offenders, and sex offenders of severely intellectually disabled persons should be considered on the higher end of severity with a longer registration period.

Recommendation 16: If the grouping method to determine the severity of a sex offence is based on the maximum penalty a sex offender may be liable to, then the following may be used as a guide:

1. **Level 1 (most serious):** Any repeat offender who is convicted of a Level 2 or Level 3 offence against a child or a severely intellectually disabled person; any offender who has committed any of the following offences of which the penalty is life imprisonment or an imprisonment term not exceeding 20 years:
 - s 52(1) - sexual violation/ rape
 - s 55 – incest
 - s 58(1) - sexual connection with a child under 12
2. **Level 2:** any offender who has committed any of the following offences which penalty an imprisonment term not exceeding 14 years or not exceeding 10 years:
 - s 52(2) Unlawful sexual connection

- s 53(1) Attempted sexual violation
- s 53(2) Assault with intent to commit sexual violation
- s 54(1) Sexual conduct with consent induced by threats
- s 56(1) Sexual connection with a family member under 21 years
- s 56(2) Attempted sexual connection with a family member under 21 years
- s 56(3) Commits indecent act with or on a person who is a dependent family member under 21 years
- s 58(2) Attempts to have sexual connection with a child
- s 58(3) Commits indecent act with or on a child
- s 59(1) Sexual conduct with person under 16
- s 59(2) Attempts to have sexual connection with a young person
- s 131 Abduction of a child under 16 with intent to have sexual connection
- s 157 Dealing in people under 18 for sexual exploitation, removal of body parts, or engagement in forced labour

3. **Level 3:** any offender who has committed any of the following offences which penalty an imprisonment term not exceeding 7 years or not exceeding 5 years:

- s 54(2) Indecent acts on another person with consent induced by threats
- s 59(3) Commits an indecent act with or on a young person
- s 60 Indecent Assault
- s 62 Using threats of intimidation for the purpose of sexual conduct
- s 63(1) Commits or attempts to have sexual conduct with severely intellectually disabled person
- s 63(2) Indecently assaults or attempts to indecently assault a severely intellectually disabled person
- s73 Solicitation – offering to any person monetary payment for sexual intercourse or sexual connection (where the victim is a child)
- s 82 Publication, distribution or exhibition of indecent material on child
- s 218 Solicitation of children
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Recommendation 17: Sex offenders who have been convicted of registrable offences in the Youth Court should be excluded from registration in the SOR. Alternatively the Court may exercise

discretion to exclude a sex offender convicted in the Youth Court from registration in the SOR, unless it is satisfied that the offender has a persuasive pattern of serious sexual offending or if there is a high risk that the offender will commit a similar offence in future. However a further conviction of that same offender of a registrable offence as an adult, should be categorised on the higher end of severity (as a repeat offender), with a longer registration period.

Recommendation 18: Should a SOR be established, consideration should be given to whether the scope of the SOR should extend to include persons convicted of serious violent offences, not of a sexual nature.

G. Registrable Information and Reporting Requirements

5.35 The Commission has discussed in detail in Part 3 the type of information that comparative jurisdictions require from registered sex offenders. The common details required include the registered sex offender's name, age, address, photo identification, passport details, employment details (if employed), criminal background and the license plate number of the vehicle owned or used by the registered sex offender.

5.36 Also discussed previously is that more extensive information is required in some jurisdictions. This includes providing a DNA sample including finger and palm prints,³⁷² physical descriptions of the registered sex offenders (including any permanent distinguishing marks such as tattoos or scars),³⁷³ details about the internet service provider used by the offender as well as names or aliases used on the internet for communication purposes,³⁷⁴ requiring the provision of the names and ages of any children residing in the same household as the offender, or details of any affiliation with a club or organisation with child membership or participation.³⁷⁵

5.37 Registered sex offenders are also required to update the information on the registry, if there are any changes to the details provided.³⁷⁶ In the UK and Guam, registered sex offenders are required to report

³⁷² *Sex Offender Registration and Community Notification Code 2014* (American Samoa), s 46.2808; Guam Judiciary, *Guam Sex Offender Registry* (2011) <http://www.guamcourts.org/sor/registerduty.asp> (accessed 01 April 2014).

³⁷³ *Ibid.*

³⁷⁴ *Sex Offenders Registration Act 2004* (Victoria), s 14; *Community Protection (Offender Reporting) Act 2005* (Tasmania), s 17; *Community Protection (Offender Reporting) Act 2004* (Western Australia), s 26; *Child Protection (Offenders Registration) Act 2000* (New South Wales), s 9.

³⁷⁵ *Ibid.*

³⁷⁶ In the UK and Guam, registered sex offenders are required to report any changes to their personal details within 3 days of the change. See *Sexual Offences Act 2003* (United Kingdom), s 83; Guam Judiciary, *Guam Sex Offender*

any changes to their personal details within 3 days of the change. The Commission considers that such information should similarly be required to be provided by the offender on registration. Also the offender should be required to update the information on the registry if there are any changes to the details provided. To ensure compliance, it should be an offence not to comply with these requirements.

Recommendation 19: Personal information to be registered shall include the offender's name (including any matai titles held), age, current residence, villages, affiliations, employment, photo identification and registrable offence, distinguishing marks (such as tattoos or scars).

Recommendation 20: The Commission proposes that registered sex offenders should report to the Domestic Intelligence Unit:

1. On an annual basis;
2. Any changes to their information provided on the SOR or to their circumstances within a certain period of time (for example 10 working days of the change);
3. Immediately, the date of departure and the date of return if proposing to leave the country.

H. Conviction of a Sexual Offence in Foreign Jurisdiction

5.38 The Commission has discussed under Part 3 how other jurisdictions have addressed the issue of a person convicted of a sexual offence in a foreign jurisdiction. For example, where a sex offence in a foreign jurisdiction constitutes a registrable offence in Canada, the offender must comply with registration and reporting obligation under the relevant Canadian legislation.³⁷⁷ Foreign convictions for a sexual offence that are registrable in Guam include offences under the laws of Canada, the UK, Australia, New Zealand, etc, and which are identical or comparable to a registrable offence in Guam. In NSW and Victoria registration requirements are extended to those registered on foreign registers (corresponding offenders) even if the offence committed is not registrable in NSW or Victoria. In Western Australia it depends on whether the offender has ongoing reporting requirements in the jurisdiction the offence took place. If so, the foreign offender is required to continue reporting obligations in Western Australia.

5.39 The Commission also discussed in Part 1 the important roles played by the TCU that oversees criminal deportees returned to Samoa³⁷⁸ and the Charitable Trust which focuses on the resettlement and

Registry (2011) <http://www.guamcourts.org/sor/registerduty.asp> (accessed 01 April 2014). In Canada, any changes must be reported within 7 days. See *Sex Offender Information Registration Act 2004* (Canada), s 4.1.

³⁷⁷ *Sex Offender Information Registration Act 2004* (Canada).

³⁷⁸ See paragraph 1.27.

rehabilitation of criminal deportees and which has assumed to role of monitoring deportees .³⁷⁹ Before the arrival of the deportee, TCU notifies the Police Domestic Intelligence Unit and the Charitable Trust who will meet the deportee at the airport. The TCU provides limited information to the Charitable Trust that includes the deportee's name, date and country of birth, time and date of arrival in Samoa and reason for deportation. TCU does not disclose a deportee's criminal record. Neither the TCU, the Domestic Intelligence Unit, or the Charitable Trust reveal information regarding the deportee's criminal past to the deportee's families.³⁸⁰ Due to capacity issues and limited manpower, Domestic Intelligence Unit is unable to carry out continuous and regular monitoring of the criminal deportees, which as mentioned above is a function assumed by the Charitable Trust. The presence of the Domestic Intelligence Unit is only again engaged when a deportee offends in Samoa.³⁸¹

5.40 The Charitable Trust through its reintegration and rehabilitation programs is able to monitor the deportees through weekly telephone calls, home visitations and through various community projects and vocational trainings. However, the extent of the monitoring provided by the Charitable Trust is very limited, as its programs are dependent on the deportee voluntarily registering with the Charitable Trust, meaning that deportees who choose not to register cannot be monitored or use the services offered by the Charitable Trust.³⁸² Voluntary registration also means that the deportees outside the ambit of the Charitable Trust cannot be monitored in a way that could minimise the potential to re-offend.³⁸³

5.41 As is illustrated from the above, the current monitoring system of deportees in Samoa is inadequate. Recent statistics provided by TCU illustrated that the majority of criminal deportees were deported for committing violent and sexual offences. In 2009, 75% of criminal deportees arriving in Samoa were violent and sexual offenders and in 2014, 85% of criminal deportees consisted of violent and sexual offenders.³⁸⁴ These criminal deportees are resettling in Samoa among families, villages and communities who are unaware of their criminal pasts – which may only be known when he or she has re-offended in Samoa. Criminal deportees who committed sexual offending against children overseas are resettled in family situations where there are children present. Without proper monitoring, there exists a significant

³⁷⁹ The Charitable Trust has had 60 registered members since its establishment.

³⁸⁰ Interview with Vernon Mackenzie, Program Coordinator, Samoa Returnees Charitable Trust (Apia 28 October 2014); Interview with Viliamu Faamatuainu, Domestic Intelligence Unit, Ministry of Police (Apia, 14 November 2014).

³⁸¹ Ibid.

³⁸² Ibid.

³⁸³ Interview with Vernon Mackenzie, Program Coordinator, Samoa Returnees Charitable Trust (Apia 28 October 2014).

³⁸⁴ Samoa Transnational Crime Unit, *Deportee Report*, (09 April 2015), 4.

potential for reoffending. The importance of maintaining a stable monitoring of criminal deportees returned to Samoa was highlighted in a recent case before the Family Court.

5.42 In *SVSG v Vaa and Others*, Judge Tuala-Warren issued an interim protection order against a mother, step father and the offender (mother's uncle) to ensure the safety and well being of a 5 year old female child who was sexually abused by the offender. During the trial, the offender's sister revealed that the offender had a history of sexually abusing young girls in his family. The offender's sister also disclosed that the offender was a registered sex offender in California and provided a print out of the offender's record on the California Sex Offender Archive. Judge Tuala-Warren confirmed the evidence through a Google search, which revealed that the offender had previous convictions and was registered on California's Sex Offender Archive for the offence of rape by force/fear.³⁸⁵

5.43 This case highlights the need to consider whether offenders who were convicted of sexual crimes overseas should be required to register, if an SOR is established in Samoa.

5.44 The Commission also considers that adequate information about deportees should be disclosed to the Charitable Trust, not only so that rehabilitation programmes may be more properly tailored, but more importantly to ensure the safety of the staff of the Charitable Trust – so that they know the risk posed by the deportee (for example any existing mental issues), as the majority of the Charitable Trust's registered members are sex offenders categorised as very high risk.³⁸⁶

5.45 The Commission considers that the role of the Domestic Intelligence Unit in dealing with criminal deportees registered on the SOR should be strengthened to include the following:

1. To establish and develop a comprehensive database that collates information from TCU for monitoring and policing;
2. To continue to work collaboratively with the Charitable Trust in the resettlement, monitoring and rehabilitation of the criminal deportees;
3. If absolutely necessary, to request written reports from a designated person in the community about the deportee (such as a family member, faifeau, or relevant village mayor).

Recommendation 21: Offenders convicted of a sexual offence outside of Samoa should be registered on the SOR. This should include:

1. Offenders convicted in a foreign jurisdiction of a sexual offence that constitutes a registrable

³⁸⁵ *SVSG v Vaa & Others* [2014] WSFC.

³⁸⁶ Interview with Vernon Mackenzie, Program Coordinator, Samoa Returnees Charitable Trust (Apia 28 October 2014).

offence in Samoa; and

2. Offenders convicted in a foreign jurisdiction of a sexual offence, the elements of which, had they occurred in Samoa, would have constituted a registrable offence in Samoa.

Recommendation 22: In determining the duration that an offender convicted of a sexual offence outside of Samoa should be registered in Samoa, the length of time imposed in the foreign jurisdiction and the length of time imposed in Samoa for the comparable registrable offence may be considered appropriate.

Recommendation 23: An offender convicted of a sexual offence outside of Samoa who is convicted in Samoa of another sexual offence should be treated as a repeat offender in regards to registration requirements.

Recommendation 24: The Criminal Deportee Policy should be reviewed in order to improve and strengthen national policies on the arrival, rehabilitation and reintegration of criminal deportees. There should be improved clarity of the roles of Samoa Interpol, the Transnational Crime Unit, the Police Domestic Intelligence Unit and the Charitable Trust in relation to the deportation processes around criminal deportees to increase efficiency and effectiveness of these agencies and reduce the potential overlapping of roles. The role of the Domestic Intelligence Unit in dealing with criminal deportees registered on the SOR should be strengthened to include the following:

1. To establish and develop a comprehensive database that collates information from TCU for monitoring and policing;
2. To continue to work collaboratively with the Charitable Trust in the resettlement, monitoring and rehabilitation of the criminal deportees;
3. If absolutely necessary, to request written reports from a designated person in the community about the deportee (such as a family member, faifeau, or relevant village mayor).

Recommendation 25: Policies should be developed to set out criteria that must be met for TCU officials to properly classify an offence rather than such assessment left to the subjective view of staff members. Adequate information about criminal deportees should then be disclosed to the Charitable Trust, not only so that rehabilitation programmes may be more properly tailored, but more importantly to ensure the safety of the staff of the Charitable Trust – so that they know the potential risk posed by the deportee.

I. Retrospective Effect

5.46 A significant issue to be considered is whether a SOR, if established, should apply retrospectively to offenders who carried out sex offences before its establishment, and the extent to which the SOR should apply retrospectively.

5.47 The Commission notes discussion on other jurisdictions where such retrospective legislation exists, such as Victoria, New South Wales and Western Australia. For example, in Victoria any person whom a court sentenced on or before 1 October 2004 for a registrable offence is a registrable offender, if immediately before 1 October 2004 the offender was an inmate, a detainee (in a youth residential centre), serving a non-custodial supervision order, or in custody under a foreign jurisdiction serving a sentence or subject to a similar order for the registrable offence.³⁸⁷

5.48 The Commission also notes Article 10(2) of the Constitution of Samoa which states that ‘no person shall be held guilty of any offence on account of any act or omission which did not constitute an offence at the time when it was committed; nor shall a heavier penalty be imposed than the one that was applicable at the time that the offence was committed’.

5.49 The Commission considers it conceivable that opponents of a SOR may argue that retrospective application of a SOR could be inconsistent with Article 10(2), on the basis that the inclusion of an offender on a SOR that was not existence at the time the offence was committed, may in effect be an extension of an offender’s sentence or imposition of a heavier penalty that was not was not existence at the time the offence was committed. On the other hand, the Commission considers that the argument would have less weight if the SOR is established for law enforcement and related purposes, and if access to the SOR by the general public is prohibited or restricted.

5.50 Having considered the common law presumption against retrospectivity and Article 10(2) of the Constitution and earlier discussions about approaches taken in comparable jurisdictions, the Commission is of the view that the Legal Framework establishing the SOR should apply retrospectively in certain circumstances, including the following:

1. Where the offender was convicted of a sexual offence involving a child, that was carried out (within a certain time frame or by a certain date set out in the Legal Framework), before the SOR was established;
2. If the offender is serving a sentence for a sexual offence that became a registrable offence when the SOR was established;

³⁸⁷ *Sex Offenders Registration Act 2004 (Victoria)*, s 3(1).

3. If the offender was convicted in a foreign jurisdiction of a sexual offence and is transferred to Samoa to serve their sentence and was serving the sentence for that offence that became a registrable offence when the SOR was established.

Recommendation 26: The Legal Framework establishing the SOR should apply retrospectively in certain circumstances, including the following:

1. Where the offender was convicted of a sexual offence involving a child, that was carried out (within a certain time frame or by a certain date set out in the Legal Framework), before the SOR was established;
2. If the offender is serving a sentence for a sexual offence that became a registrable offence when the SOR was established;
3. If the offender was convicted in a foreign jurisdiction of a sexual offence and is transferred to Samoa to serve their sentence and was serving the sentence for that offence that became a registrable offence when the SOR was established.

J. Penalties and Consequences of Non-Compliance

5.51 The Commission notes the importance of ensuring compliance with the requirements of a SOR is established. The initial SOR of American Samoa provides a good example where requirements were not enforced as reporting requirements were not clear and the lack of penalty provisions resulted in poor enforcement of the requirements to register.

5.52 Additionally, in 2010 the Ombudsman of Victoria, Australia commenced an investigation into 2 key agencies i.e. Victoria Police and the Department of Human Service and Corrections Victoria. The findings of the Ombudsman highlighted several key issues as to why Victoria's SOR failed to accomplish its intended purpose.³⁸⁸ In particular it was discovered that due primarily to a lack of coordination among relevant agencies,³⁸⁹ inadequate storage and usage of information,³⁹⁰ inadequate human resource support services and technical assistance allocated to it,³⁹¹ the SOR was severely limited in fulfilling its intentions

³⁸⁸ Ombudsman Victoria, *Whistleblowers Protection Act 2001 – Investigation into the failure of agencies to manage registered sex offenders* (2011) 33 <https://www.ombudsman.vic.gov.au/Publications/Parliamentary-Reports/Whistleblowers-Protection-Act-2001-Investigation-i> (accessed 11 February 2013).

³⁸⁹ Ibid.

³⁹⁰ Ibid 10.

³⁹¹ Ibid 25.

(the protection of children from sex offenders).³⁹² The failure was also due to a general lack of understanding and capacity of Victoria Police about how the SOR is to be maintained.

5.53 The Commission considers that criminal offences should be created to punish non compliance with SOR reporting requirements (including updating information) and confidentiality requirements – which would also act as a deterrent.

5.54 It is important to consider however that if the conduct in question is unlikely to be enforced, or enforced only rarely, the question of whether a criminal sanction is warranted should be examined carefully, because creating offences that are not going to be enforced brings the law into disrepute.³⁹³

Recommendation 27: Criminal offences should be created to punish non compliance with SOR reporting requirements (including updating information) and confidentiality requirements.

³⁹²Ombudsman Victoria, *Whistleblowers Protection Act 2001 – Investigation into the failure of agencies to manage registered sex offenders* (2011) 33 <https://www.ombudsman.vic.gov.au/Publications/Parliamentary-Reports/Whistleblowers-Protection-Act-2001-Investigation-i> (accessed 11 February 2013).

³⁹³ New Zealand Legislation Advisory Committee, *Guidelines on Process and Content of Legislation 2001 Edition and Amendments*, May 2001 www.justice.govt.nz/lac/index.html, 254.

Summary of Recommendations

Recommendation 1. A Sex Offender's Register should be established by legislation (called for example the Sex Offender Registration Act) (**Legal Framework**). The Legal Framework should include a mandatory review by the implementing agency of the operation and effectiveness of the SOR no later than 3 years following enactment.

Recommendation 2: The challenges preventing the Auafa Mau database from being fully operational should be addressed and a clear timeframe set for when it will be fully operational.

Recommendation 3: Without necessarily waiting for the database to be fully operational, a review should be carried out on how the Auafa Mau database could be used as the platform for the technology component of a SOR, as well as on processes relating to provision of information, access and confidentiality of information, and security classifications.

Recommendation 4: Data and statistics on sexual offending and re-offending should be collated and regularly updated by relevant Government Ministries (such as the Ministry of Police and Ministry of Justice and Court Administration) so that Government is fully and properly informed on any decision it makes in addressing the prevalence of sexual crimes. Such information should be entered onto the Auafa Mau Database, once that facility is completed and operational.

Recommendation 5: The purposes for a SOR should include:

1. to assist in law enforcement and crime prevention;
2. to assist in the investigation and prosecution of sex offences (or more particularly, child sex offences);
3. to require offenders who commit registrable offences to provide personal details to the police, and keep them informed of their whereabouts;
4. to require persons who move to Samoa or are deported to Samoa following a sexual conviction overseas, to provide personal details to the police, and keep them informed of their whereabouts;
5. to reduce the likelihood of offenders who have committed sexual offences from re-offending;
6. to assist in the monitoring and management of sex offenders in the community;
7. to aid courts when making certain orders prohibiting certain offenders from engaging in specific conduct (example working in child related employment);
8. Other related purposes.

Recommendation 6: The Legal Framework (and therefore the SOR) shall be enforced and administered by the Ministry of Police. This may require establishment of a new division within the Ministry, or the expansion of functions of an existing division, as the Police Commissioner (in consultation with the relevant Government agencies such as the Attorney General’s Office and MJCA in relation to the purpose and scope of the SOR) may consider necessary and appropriate.

Recommendation 7: The Legal Framework should provide that the information on the SOR should not be made publically available.

Recommendation 8: However, information on a SOR relating to serious recidivist sex offenders, for example where children or people with disabilities are victimized, should be made publically available. This may be done by requiring information about offenders to be automatically transferred to a public part of the SOR when there is serious repeat offending by that offender. Alternatively the Court could be given discretion when sentencing a serious repeat offender, to order that the information may be made publicly available if there is a pervasive pattern of serious sexual offending and a high risk to re-offending, upon an application by prosecution.

Recommendation 9: Except as provided in recommendation 8, the Legal Framework should require personal information of a sex offender on a SOR to be kept strictly confidential, and that such information may only be made available to an Approved Agency in limited circumstances. This may include the following purposes:

1. The maintenance of the law, including the prevention, investigation, and detection of offences;
2. Where the protection or welfare of a child is concerned;
3. Sentencing purposes;
4. Immigration purposes.

Recommendation 10: The Legal Framework (or regulations made under it) should specify agencies that are Approved Agencies.

Recommendation 11: The Legal Framework should also include criteria, which if met by an agency may be eligible for the Police Commissioner’s consent to be an Approved Agency for a set period of time, provided that that agency is still in operation and carrying the same functions upon which the approval was granted.

Recommendation 12: The Legal Framework should set out the processes for the request and release of personal information about sex offenders on a SOR. Guidelines should also be developed as may be necessary. Such process should include that such requests:

1. Must be made in writing to the Commissioner of Police;
2. Must be kept confidential between the Commissioner of Police and the requesting agency; and
3. May take the form of confirmation as to whether the person of interest under inquiry is a registered sex offender and the whereabouts of this person.

Recommendation 13: The requesting agency must keep information received from the SOR confidential and should only use it for the specific purpose for which it was requested and obtained.

Recommendation 14: Samoa should have a mandatory registration system, with registrable sexual offences expressly set out in the Legal Framework or in the Act in which the offence is created and which categorises sexual offences into different groups depending on level of severity. A grouping method based on the penalty a sex offender may be liable to, may be used as a guide to indicate the severity of an offence and is the Commission's preference. Alternatively a grouping method based on the actual sentence a sex offender receives upon conviction of a registrable offence may be used after a review is carried out of the maximum penalty for offences that would be captured by the SOR.

Recommendation 15: The identification of registrable offences, grouping of such offences, and the duration of registration of such offences should be carried out by the Attorney General's Office, in close collaboration with the Ministry of Justice and Courts Administration, the Ministry of Police, the Ministry for Corrections Services and the Office of the Ombudsman. However the Commission expresses the preference that:

1. Registrable offences should include serious sexual offences such as rape and other sexual offences of similar severity. Sexual offences that are considered less serious, for example voyeurism, adultery and sodomy should not be registrable offences.
2. The group containing more severe sexual offences should result in a longer registration period, than the group containing less severe sexual offences.
3. Recidivist sex-offenders, child sex offenders, and sex offenders of severely intellectually disabled persons should be considered on the higher end of severity with a longer registration period.

Recommendation 16: If the grouping method to determine the severity of a sex offence is based on the maximum penalty a sex offender may be liable to, then the following may be used as a guide:

- 1. Level 1 (most serious):** Any repeat offender who is convicted of a Level 2 or Level 3 offence against a child or a severely intellectually disabled person; any offender who has committed any of the following offences of which the penalty is life imprisonment or an imprisonment term not exceeding 20 years:
 - s 52(1) - sexual violation/ rape
 - Section 55 – incest
 - s 58(1) - sexual connection with a child under 12
- 2. Level 2:** any offender who has committed any of the following offences which penalty an imprisonment term not exceeding 14 years or not exceeding 10 years:
 - s 52(2) Unlawful sexual connection
 - s 53(1) Attempted sexual violation
 - s 53(2) Assault with intent to commit sexual violation
 - s 54(1) Sexual conduct with consent induced by threats
 - s 56(1) Sexual connection with a family member under 21 years
 - s 56(2) Attempted sexual connection with a family member under 21 years
 - s 56(3) Commits indecent act with or on a person who is a dependent family member under 21 years
 - s 58(2) Attempts to have sexual connection with a child
 - s 58(3) Commits indecent act with or on a child
 - s 59(1) Sexual conduct with person under 16
 - s 59(2) Attempts to have sexual connection with a young person
 - s 131 Abduction of a child under 16 with intent to have sexual connection
 - s 157 Dealing in people under 18 for sexual exploitation, removal of body parts, or engagement in forced labour
- 3. Level 3:** any offender who has committed any of the following offences which penalty an imprisonment term not exceeding 7 years or not exceeding 5 years:
 - s 54(2) Indecent acts on another person with consent induced by threats
 - s 59(3) Commits an indecent act with or on a young person
 - s 60 Indecent Assault
 - s 62 Using threats of intimidation for the purpose of sexual conduct
 - s 63(1) Commits or attempts to have sexual conduct with severely intellectually disabled person
 - s 63(2) Indecently assaults or attempts to indecently assault a severely intellectually disabled person

- s73 Solicitation – offering to any person monetary payment for sexual intercourse or
- sexual connection (where the victim is a child)
- s 82 Publication, distribution or exhibition of indecent material on child
- s 218 Solicitation of children

Recommendation 17: Sex offenders who have been convicted of registrable offences in the Youth Court should be excluded from registration in the SOR. Alternatively the Court may exercise discretion to exclude a sex offender convicted in the Youth Court from registration in the SOR, unless it is satisfied that the offender has a persuasive pattern of serious sexual offending or if there is a high risk that the offender will commit a similar offence in future. However a further conviction of that same offender of a registrable offence as an adult, should be categorised on the higher end of severity (as a repeat offender), with a longer registration period.

Recommendation 18: Should a SOR be established, consideration should be given to whether the scope of the SOR should extend to include persons convicted of serious violent offences, not of a sexual nature.

Recommendation 19: Personal information to be registered shall include the offender’s name (including any matai titles held), age, current residence, villages, affiliations, employment, photo identification and registrable offence, distinguishing marks (such as tattoos or scars).

Recommendation 20: The Commission proposes that registered sex offenders should report to the Domestic Intelligence Unit:

1. On an annual basis;
2. Any changes to their information provided on the SOR or to their circumstances within a certain period of time (for example 10 working days of the change);
3. Immediately, the date of departure and the date of return if proposing to leave the country.

Recommendation 21: Offenders convicted of a sexual offence outside of Samoa should be registered on the SOR. This should include:

1. Offenders convicted in a foreign jurisdiction of a sexual offence that constitutes a registrable offence in Samoa; and
2. Offenders convicted in a foreign jurisdiction of a sexual offence, the elements of which, had they occurred in Samoa, would have constituted a registrable offence in Samoa.

Recommendation 22: In determining the duration that an offender convicted of a sexual offence outside of Samoa should be registered in Samoa, the length of time imposed in the foreign jurisdiction may be considered appropriate, or the length of time imposed in Samoa for the comparable registrable offence.

Recommendation 23: An offender convicted of a sexual offence outside of Samoa who is convicted in Samoa of another sexual offence should be treated as a repeat offender in regards registration requirements.

Recommendation 24: The Criminal Deportee Policy should be reviewed in order to improve and strengthen national policies on the arrival, rehabilitation and reintegration of criminal deportees. There should be improved clarity of the roles of Samoa Interpol, the Transnational Crime Unit, the Police Domestic Intelligence Unit and the Charitable Trust in relation to the deportation processes around criminal deportees to increase efficiency and effectiveness of these agencies and reduce the potential overlapping of roles. The role of the Domestic Intelligence Unit in dealing with criminal deportees registered on the SOR should be strengthened to include the following:

1. To establish and develop a comprehensive database that collates information from TCU for monitoring and policing;
2. To continue to work collaboratively with the Charitable Trust in the resettlement, monitoring and rehabilitation of the criminal deportees;
3. If absolutely necessary, to request written reports from a designated person in the community about the deportee (such as a family member, faifeau, or relevant village mayor).

Recommendation 25: Policies should be developed to set out criteria that must be met for TCU officials to properly classify an offence rather than such assessment left to the subjective view of staff members. Adequate information about criminal deportees should then be disclosed to the Charitable Trust, not only so that rehabilitation programmes may be more properly tailored, but more importantly to ensure the safety of the staff of the Charitable Trust – so that they know the potential risk posed by the deportee.

Recommendation 26: The Legal Framework establishing the SOR should apply retrospectively in certain circumstances, including the following:

1. Where the offender was convicted of a sexual offence involving a child, that was carried out (within a certain time frame or by a certain date set out in the Legal Framework), before the SOR was established;
2. If the offender is serving a sentence for a sexual offence that became a registrable offence when the SOR was established;
3. If the offender was convicted in a foreign jurisdiction of a sexual offence and is transferred to Samoa to serve their sentence and was serving the sentence for that offence that became a registrable offence when the SOR was established.

Recommendation 27: Criminal offences should be created to punish non compliance with SOR reporting requirements (including updating information) and confidentiality requirements.

APPENDIX “A”

“SEX OFFENDERS’ REGISTER
BILL”
(REFLECTING SEX OFFENDERS’
REGISTER FINAL REPORT
RECOMMENDATIONS)

Samoa
Law Reform Commission
Komisi o le Toefuataiga o Tulafono a Samoa