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Legislative Summary

BILL S-12:
AN ACT TO AMEND THE CRIMINAL CODE, THE SEX OFFENDER INFORMATION REGISTRATION ACT AND THE INTERNATIONAL TRANSFER OF OFFENDERS ACT

44-1-S12-E

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Legislative Summary of Bill S-12
(Preliminary version)

44-1-S12-E

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LEGISLATIVE SUMMARY OF BILL S-12: AN ACT TO AMEND THE CRIMINAL CODE, THE SEX OFFENDER INFORMATION REGISTRATION ACT AND THE INTERNATIONAL TRANSFER OF OFFENDERS ACT

1 BACKGROUND

On 26 April 2023, the Honourable Senator Marc Gold introduced Bill S-12, An Act to amend the Criminal Code, the Sex Offender Information Registration Act and the International Transfer of Offenders Act, in the Senate on behalf of the Government of Canada.[1] As of 29 May 2023, the bill is at second reading in the Senate.

According to the government, Bill S-12 aims to "strengthen the National Sex Offender Registry [NSOR] and make the criminal justice system more responsive to the needs of victims."[2] Among other things, its main amendments make:

- Changes to the processes for the registration of sexual offenders:
  - serious child sexual offenders and repeat sexual offenders are registered automatically;
  - sexual offenders who demonstrate that they do not pose a public risk, among other considerations, will not be registered; and
  - additional offences are added to the list of those that may lead to registration on the NSOR.
- Changes to the *Criminal Code*[3] (Code) as it relates to victims:
  - judges are required to ask prosecutors if they have consulted with the victim on whether to impose a publication ban;
  - opportunities are included to allow victims and others to apply to the court to remove a publication ban; and
  - judges are required to ask if the victim wants to receive ongoing information about the offender after sentencing:
    - if the victim's preferences are known, they must be entered into the record of proceedings.

Bill S-12 responds to the Supreme Court of Canada's 2022 decision in *R. v. Nhdlovu*,[4] which held that two provisions of the Code that relate to the registration of sex offenders under the *Sex Offender Information Registration Act* (SOIRA)[5] are unconstitutional. Since 2011, section 490.012 of the Code has required the mandatory registration in the NSOR of anyone who committed a sexual offence.

Section 490.013(2.1) required that anyone found guilty of more than one sexual offence be registered in the NSOR for life.

The Supreme Court struck down section 490.013(2.1) with immediate and retroactive effect. Section 490.012 was declared invalid, but the effect of this declaration was delayed one year to give Parliament time to respond to the decision with legislation; the provision will become invalid in October 2023. (See below for further discussion of *R. v. Nhdlovu*.)

1.1 PUBLICATION BANS AND VICTIMS' RIGHTS

The *Canadian Victims Bill of Rights* (CVBR)[6] grants victims of crime certain rights to information, to protection, to participation in the criminal justice system, and to seek restitution. It became law in 2015 when Parliament passed Bill C-32, An Act to enact the Canadian Victims Bill of Rights and to amend certain Acts.[7] That bill also made other amendments to the Code and the *Corrections and Conditional Release Act* (CCRA)[8] to increase victims' access to information about offenders.

Section 12 of the CVBR provides that "every victim has the right to request that their identity be protected if they are a complainant to the offence or a witness in proceedings relating to the offence." Supporting this right, sections 486.4 and 486.5 of the Code enable a court to order a publication ban, at the request of the victim, witness, or the Crown. Section 486.4 of the Code permits publication bans of information that could identify witnesses or victims in proceedings involving certain sexual offences, including:

- sexual interference (section 151);
- sexual exploitation (section 153);
- child pornography (section 163.1);
- child luring (section 172.1);
- sexual assault (section 271);
- aggravated sexual assault (section 273); and
- human trafficking (section 279.03).

Section 486.5 of the Code permits a general publication ban on the identity of victims or witnesses for any offence if it is in the interests of the administration of justice. Publication bans can also be requested by a "justice system participant," which is defined in section 2 of the Code and includes a list of various persons involved in the administration of criminal justice (such as a prosecutor, lawyer, juror, judge, etc.), persons who play a role in certain types of proceedings (such as proceedings

involving security or criminal intelligence proceedings), and legislators. A publication ban on the identity of other justice system participants can be requested for proceedings involving certain offences, including:

- intimidation of a justice system participant (section 423.1);
- a serious offence committed for the benefit or at the direction of a criminal organization;
- terrorism; and
- others, if it is in the interests of the administration of justice.

Under a publication ban, any information that could identify a victim, witness, or participant cannot be published in a document or broadcast. Such individuals' names cannot be reported in the news, nor can anyone communicate with the media in any way that would identify the victim. If a victim no longer wishes to continue a publication ban, they must obtain a court order to end it. Under section 486.6, it is an offence for anyone, including witnesses or victims, to violate a publication ban.[9]

The House of Commons Standing Committee on Justice and Human Rights' 2022 study on Support for Victims of Crime examined publication bans and how they affect victims.[10] Some victims and advocates informed the committee that the publication ban provisions of the Code do not always protect victims' interests or preferences. They argued that publication bans should not be imposed without their consent, and that witnesses or victims should be able to opt out of a publication ban. While they said that publication bans should always be available to witnesses and victims who need them, in some cases, they also prevent victims who wish to speak publicly about their experiences from doing so. They noted that the process of lifting one's own publication ban can be difficult, "humiliating, rampant with delays, and retraumatizing."[11]

Bill S-12 implements recommendation 11 of the committee's report, which calls for section 486.4 of the Code to be amended so that victims must be informed before a publication ban is imposed and given the opportunity to opt out.

Bill S-12 also reflects recommendation 4 of the committee's report, which calls for the CVBR to be amended to clarify that the information to which victims of crime are entitled should be provided automatically rather than on request.

1.2 THE *SEX OFFENDER INFORMATION REGISTRATION ACT*

1.2.1 Legislative Background

The SOIRA became law in 2004.[12] It creates the legislative framework for the NSOR, the federal database of registered offenders created to help police services prevent and investigate crimes of a sexual nature. This database is maintained by the Royal Canadian Mounted Police (RCMP).[13] It includes information such as the address and telephone number of offenders, a description of their physical distinguishing marks, every alias they use, the nature of the offence committed, and the age and gender of victims and their relationship to the assailant.[14]

According to section 2, the Act should be "carried out" in accordance with the following principles:

- To protect society, police services must have rapid access to certain information relating to sex offenders in order to prevent and investigate crimes of a sexual nature.
- To ensure this information is current and reliable, accurate information must be continuously collected.
- To respect the privacy interests of sex offenders and the public interest in their rehabilitation and reintegration into the community as law-abiding citizens, the information concerning sex offenders must only be collected to enable police services to prevent or investigate crimes of a sexual nature. Accordingly, access to this information, and the use and disclosure of it, is restricted.

The SOIRA operates together with sections 490.011 to 490.032 of the Code. These provisions permit a court to order offenders to supply information for the NSOR when they have been convicted of, or in some cases found not criminally responsible on account of mental disorder, a "designated offence." These offences are defined in section 490.011 of the Code and include sexual exploitation offences, sexual assault offences, sexual offences involving minors, and trafficking offences, among others.

Section 490.012 requires a court to make an order when imposing a sentence for a designated offence, subject to certain provisions. Section 490.013 provides rules for the duration of orders made under section 490.012.

Orders to comply with the SOIRA can be imposed for past designated offences and their equivalents committed outside Canada, including where an offender has been transferred to Canada further to the *International Transfer of Offenders Act* (ITOA).[15] The *National Defence Act*[16] contains provisions to ensure that individuals under the disciplinary jurisdiction of the Canadian Forces must comply with any orders to register under the Code, the SOIRA and the ITOA.[17]

The Code adds that failure to comply with a court order to supply information to the NSOR is a hybrid offence (section 490.031), as is knowingly providing false or misleading information (section 490.0311).

Whereas the Code provisions largely concern when an order may be imposed, how long the obligation lasts, various procedures for applying to modify or end obligations, and appeal processes, the SOIRA sets out the details of the obligations placed upon sex offenders. These include the timing of the first and subsequent obligations to report to a registration centre (section 4), the type of information that must be provided (section 5), and obligations imposed for reporting before travel away from a main residence (section 6). The SOIRA also includes prohibitions that concern how and when information may be accessed and disclosed (section 16).[18] Breach of one of these prohibitions is a summary conviction offence (section 17 of the SOIRA).

When the SOIRA was first created, it built upon several other Canadian initiatives at both the federal and provincial levels. For example, Ontario had previously created a registry of convicted sex offenders in 2001 through *Christopher's Law (Sex Offender Registry 2000)*[19] and the Canadian Police Information Centre already maintained a database of criminal records.[20] The United Kingdom also had a similar sex offender registration law, as had the United States, at both the federal and state levels.[21]

The SOIRA has been amended by several bills over the years, including: Bill C-26, An Act to amend the Criminal Code, the Canada Evidence Act and the Sex Offender Information Registration Act, to enact the High Risk Child Sex Offender Database Act and to make consequential amendments to other Acts[22] (41st Parliament, 2nd Session) and Bill S-2, An Act to amend the Criminal Code and other Acts[23] (40th Parliament, 3rd Session). More information on the development of the SOIRA and the amendments made by these bills is contained in the relevant legislative summaries prepared by the Library of Parliament.[24]

Among other things, Bill S-2 modified section 490.012 of the Code by making registration automatically required for offenders found guilty of offences designated under sections 490.011(1)(a), (c), (c.1), (d) or (e) (or who are found not criminally responsible on account of mental disorder). For certain offences of a non-sexual nature (as listed in sections 490.011(2)(b) and (f) of the Code), it remained the prosecutor's responsibility to request an order for inclusion in the national registry and to establish beyond a reasonable doubt that the person who committed the offence did so with the intent to commit an offence of a sexual nature (those listed in sections 490.011(1)(a), (c), (c.1), (d) or (e)).[25]

1.2.2 *R. v. Ndhlovu*

Many of the amendments in Bill S-12 respond to the Supreme Court's decision in *R. v. Ndhlovu*. Ndhlovu had challenged the constitutionality of sections 490.012 and 490.013(2.1) of the Code on the basis that they violated his section 7 right to life, liberty and security of the person as guaranteed by the *Canadian Charter of Rights and Freedoms* (Charter).[26] Ndhlovu had pled guilty to two counts of sexual assault against two people at a party he attended when he was 19 years old. The trial judge sentenced him to six months in jail, followed by three years of probation. The two counts for which the offender was guilty constituted "more than one offence" under section 490.013(2.1), which automatically required that Ndhlovu be subject to a lifetime registration on the NSOR and compliance with the SOIRA.

The Supreme Court held that the two challenged sections violate section 7 of the Charter and this could not be justified in a free and democratic society (in accordance with section 1 of the Charter).[27] It found that the impact of a SOIRA order on "an offender's liberty can only fairly be described as serious" and that "registration has a serious impact on the freedom of movement and of fundamental choices of people who are not at an increased risk of re-offending."[28] Furthermore, it held that registering offenders who are not at risk of committing a future sex offence is disconnected from the purpose of registration, which is to capture information about offenders to help police prevent and investigate sex offences. It found that, as such the law was overbroad, in violation of section 7. The Court explained that:

> A law is overbroad when it is so broad in scope that it includes some conduct that bears no relation to its purpose, making it arbitrary in part. ... In other words, overbreadth addresses the situation where there is no rational connection between the purpose of the law and some, but not all, of its impacts. … [L]aws that are broadly drawn to make enforcement more practical run afoul of s. 7 should they deprive the liberty of even *one* person in a way that does not serve the law's purpose.[29]

The Supreme Court struck down section 490.013(2.1). It granted Ndhlovu an exemption to section 490.012, so he did not have to register with the NSOR. The court also suspended the declaration of invalidity for section 490.012 until 28 October 2023 (i.e., for one year), after which time it would also be struck down and sexual offenders would no longer be required to register with the NSOR. This suspension allows Parliament an opportunity to amend these sections, and make any consequential amendments, as required.

1.3 *INTERNATIONAL TRANSFER OF OFFENDERS ACT*

Bill S-12 also makes consequential amendments to the ITOA related to the SOIRA obligations of sex offenders who are transferred to Canada under an agreement with another country. The ITOA's purpose is to "enhance public safety and to contribute to the administration of justice and the rehabilitation of offenders and their reintegration into the community by enabling offenders to serve their sentences in the country of which they are citizens or nationals."[30] In other words, it allows Canadians to serve a sentence imposed by another country in Canada and under Canada's correctional system. The offenders' conduct must also constitute an offence under the Code, if the offence had occurred in Canada.

2 DESCRIPTION AND ANALYSIS

Bill S-12 contains 49 clauses. Clauses 2 to 5 make amendments to the publication ban sections of the Code. Clauses 34 and 35 make amendments to the Code to ensure that victims can make their wishes known and documented if they want information about the sentence of an offender and its administration. Clause 48 includes coordinating amendments. Clauses 36 to 40 amend various forms used in the Code that are impacted by the Bill. Other clauses amend sections of the Code that relate to the obligations for a person to register under the SOIRA and that make consequential change to the SOIRA and the IOTA. Only the key elements of Bill S-12 are discussed below.

2.1 PUBLICATION BANS

2.1.1 Amendments to the *Criminal Code* (Clauses 2 to 5)

As explained in section 1.1 of this document, in proceedings concerning the offences listed in section 486.4(1)(a), a presiding judge or justice has the authority to make an order prohibiting the publication or broadcasting of any information that would identify a victim or witness. The listed offences are primarily sexual offences, though they also include offences such as human trafficking and extortion.

Section 486.4(2) states that a prosecutor, a witness under the age of 18 years, or a complainant may make an application for a publication ban. The judge or justice of the peace must inform an underage witness or victim of the process.

Section 486.4(2.1) allows for a publication ban for any offence when the victim is under 18 years of age, if it is in the interest of the proper administration of justice.

Publication bans may also be requested on application by a prosecutor on behalf of a victim or witness (section 486.5(1)), or by a justice system participant.

Clauses 2 to 5 amend sections 486.4, 486.5, and 486.6(2) of the Code and add section 486.51, all of which allow for a court to order a publication ban. Many of these amendments modify the language that defines what may constitute the act of publishing information that could identify a victim. Where the current sections read that the information "shall not be published in any document or broadcast or transmitted in any way," these clauses add that the information may not be "or otherwise made available." This broadens the scope of activities that are prohibited after an order is made so that these provisions cover any way a person has made information available to another person that would identify a victim.

Clause 2 updates the list of offences for which a publication ban may be ordered by adding the offence of knowingly publishing, distributing, transmitting, advertising, or otherwise making available an intimate image without consent (section 162.1).

Key amendments in these clauses are designed to bolster the rights of victims and give opportunities for them to have a say as to whether they wish to have a publication ban ordered or to have a ban lifted so they can speak publicly about their case.

Clause 2 adds new section 486.4(3.1) to ensure that where the prosecutor makes an application for a publication ban, the judge or justice of the peace must inquire if reasonable steps were taken to consult the victim.

Clause 4 adds new sections 486.51(1) and (2) to permit a court to hold a hearing to determine whether a publication ban made under section 486.4 or 486.5 should be varied or revoked. The hearing must proceed if it is requested by the victim. In determining whether to vary or revoke the original order, the court "must take into account any material change of circumstance, including the victim's wishes" and what decision is in the "interests of justice."

2.2 INFORMATION-SHARING WITH VICTIMS

2.2.1 Victims and Information-Sharing Regarding Sentence Administration (Clauses 34, 35 and 49)

Clauses 34 and 35 add provisions to Part XXIII of the Code, which includes procedures and principles relevant to sentences. These are intended to ensure that victims can make their wishes known and documented if they want information about the sentence of an offender and its administration.

Clause 34 adds new section 726.3 to require that when imposing a sentence, a court must inquire with the prosecutor if "reasonable steps were taken to determine whether the victim wishes to receive information with regard to the sentence and its administration." If these wishes are known, the court is required to enter them into the record of proceedings.[31]

Clause 35 amends section 743.2, which requires a court that imposes a sentence to provide its reasons to the Correctional Service of Canada (CSC) and enter the terms and reasons into the record of proceedings. It adds that a court must also share with the CSC the name and contact information of any victim who wants to receive information under the CCRA.

Clause 49 establishes that section 35 comes into force on a date to be fixed by order of the Governor in Council.

2.3 AMENDMENTS TO THE *CRIMINAL CODE* REGARDING THE *SEX OFFENDER INFORMATION REGISTRATION ACT*

2.3.1 Definitions (Clause 6)

Clause 6 amends the definitions in section 490.011 that are used for sections 490.012 to 490.02915 of the Code, which deal with the various aspects of registration under the SOIRA. This section lists the "designated offences" for which a court is required to order registration under the SOIRA. In other words, when a person is being sentenced for committing, attempting, or conspiring to commit a designated offence, or was found not criminally responsible on account of mental disorder for committing one, then the court must apply these sections of the Code where they are relevant to the circumstances.

The term "designated offence" continues to be used in the amended sections. Clause 6 amends this list and establishes two subcategories: "primary offence" and "secondary offence." These two subcategories are largely made from the original list of designated offences, although the offence of distributing an intimate image without consent is added as a primary offence (section 162.1). Also, the offences pertaining to administering a "noxious thing" (i.e., a drug) with the intent to either endanger life or cause bodily harm or to aggrieve or annoy (sections 245(1)(a) and 245(1)(b)), and pertaining to extortion (section 346), are added as secondary offences.

These two subcategories are relevant to the obligations imposed on a person required to register under the SOIRA in sections 490.012 and 490.013.

2.3.2 Orders (Clause 7)

Clause 7 amends section 490.012, which requires a court to make an order requiring the offender to comply with the SOIRA using Form 52 (included in the Code) when imposing a sentence for designated offences, subject to certain provisions.

Under new section 490.012(1), the court is required to make an order if:

- the designated offence was prosecuted by indictment;
- the sentence for the designated offence is a term of imprisonment of two years or more; and
- the victim of the designated offence is under the age of 18 years.

Under new section 490.012(2), the court is required to make a SOIRA order if:

- the prosecutor establishes that the person[32] was previously convicted of a primary offence under the Code or the *National Defence Act*;[33] or
- the prosecutor establishes that the person was convicted of an offence that resulted in an order or obligation under the Code or another Act of Parliament to comply with the SOIRA.

Section 490.012(3) applies when neither section 490.012(1) nor 490.012(2) do. That is, when a court imposes a sentence for a person who has committed a designated offence, or if the person has been found not criminally responsible on account of mental disorder for such an offence, then this section requires that a court shall nonetheless make a SOIRA order unless the court has considered certain factors and is satisfied that the person has established that certain conditions are met. For instance, if the person was prosecuted on summary conviction, the victim is over 18 years of age, and is sentenced to a term of less than two years, this section will apply to determine if they must register under the SOIRA.

Under new section 490.012(3), a court is not required to make an order to register and comply under the SOIRA if:

- there is "no connection between continuing an order or obligation and the purpose of helping police services prevent or investigate crimes of a sexual nature"; or
- the "impact on the person of continuing an order or obligation, including on their privacy or liberty, would be grossly disproportionate to the public interest in protecting society through the effective prevention or investigation of crimes of a sexual nature."

As the language used for these two conditions recurs in several of the revised sections between 490.011 and 490.032, they will be referred to as the "no connection" provision and the "impact on the person" provision in this document.

In determining whether to make a SOIRA order under section 490.012(3), the court is also required to consider several factors. These are set out in section 490.012(4) and include:

- the nature and seriousness of the offence;
- the victim's age and other personal characteristics;
- the nature and circumstances of the relationship between the person and the victim;
- the person's characteristics, circumstances, and criminal history;[34]
- any opinions of experts who have examined the person; and
- any other factors that the court considers relevant.

As these factors are repeated in several of the revised sections between 490.011 and 490.032, they will be referred to as the "list of key factors."

The effect of new sections 490.012(3) and (4) is that, depending on the conclusions drawn by the court after applying these considerations and factors, there are circumstances where an offender may not be ordered to comply with the SOIRA. This being said, as the onus is on the person to establish these considerations have been met, there is a presumption that the person will otherwise be required to register.

For any of the circumstances outlined in sections 490.012(1) to (3), a court is only required to make an order for a person to be registered under the NSOR for a secondary offence if the prosecutor applies for it and establishes beyond a reasonable doubt that the secondary offence was committed with an intention to commit a primary offence (new section 490.012(5)).

2.3.3 Duration of Orders (Clause 8)

Section 490.013 is amended to provide rules for the duration of SOIRA orders made under section 490.012. These orders take effect on the day they are made, and their length depends on the factors set out in this section.

Unless the order is varied or terminated, the person will be registered for life under SOIRA if the order:

- is made under new section 490.012(2) (new section 490.013(5));

- is made under new sections 490.012(1) or (3); and
  - the person was convicted of, or not criminally responsible on account of mental disorder, for two or more designated offences in connection with which the order was made (new section 490.013(3)(a)), and
  - the court is satisfied that these offences are part of a pattern of behaviour that shows there is an increased risk that the person will reoffend (and commit a crime of a sexual nature) (new section 490.013(3)(b)).

If there were two or more designated offences involved, but the court is not satisfied that this demonstrates a pattern of behaviour and increased risk, the duration of the order is the longer of the lengths of any of the offences that would apply (new section 490.013(4)).

An order will apply for 10 years if it is made under new sections 490.012(1) or (3) and in connection with an offence that was prosecuted summarily[35] or had a maximum term of imprisonment of two to five years (new section 490.013(2)(a)).

An order will apply for 20 years if the offence was punishable for a maximum term of 10 to 14 years' imprisonment (new section 490.013(2)(b)).

Table 1 – Sections 490.12 and 490.013 – Obligations to Register Under the SOIRA

An Order for a Person to Register Under the SOIRA Is Required in the Following Circumstances	An Order to Register Under the SOIRA May or May Not Be Required in the Following Circumstances	The Duration of an Obligation to Be Registered Under the SOIRA Is for Life in the Following Circumstances	The Duration of an Obligation Is Other than for Life in the Following Circumstances
490.012(1) (a) the designated offence was prosecuted by indictment; (b) the sentence for the designated offence is a term of imprisonment of two years or more; and (c) the victim of the designated offence is under the age of 18 years.	490.012(5) For secondary offences only: the order is required only if the prosecutor applies for the order and establishes beyond a reasonable doubt that the person committed the secondary offence with the intent to commit a primary offence.	490.013(3) If the person was convicted of (or found not criminally responsible) for two or more designated offences and offences demonstrate a pattern of behaviour. If the maximum term of imprisonment for the offence is life.	490.013(2) 10 years: if the offence proceeded by summary conviction or term of imprisonment was for 2 to 5 years. 20 years: if the maximum penalty for the offence was for 10 or 14 years. 490.013(4) Longest maximum term of multiple offences: If the court is not satisfied that in situations involving more than one designated offence a pattern of behaviour is demonstrated.

An Order for a Person to Register Under the SOIRA Is Required in the Following Circumstances	An Order to Register Under the SOIRA May or May Not Be Required in the Following Circumstances	The Duration of an Obligation to Be Registered Under the SOIRA Is for Life in the Following Circumstances	The Duration of an Obligation Is Other than for Life in the Following Circumstances
490.012(2) (a) was previously convicted of a primary offence or previously convicted under section 130 of the *National Defence Act* in respect of a primary offence; or (b) is or was, as a result of a conviction, subject to an order or obligation under this or another Act of Parliament to comply with the *Sex Offender Information Registration Act*.	490.012(5) For secondary offences only: the order is required only if the prosecutor applies for the order and establishes beyond a reasonable doubt that the person committed the secondary offence with the intent to commit a primary offence.	490.013(6) Applies for life.	
490.012(3) For a designated offence in circumstances in which neither subsection (1) nor (2) applies.	If the person has established that the criteria in sections 490.012(3)(a) and (b) are met regarding the lack of connection between the order and the SOIRA's purpose and the disproportionate impact of the order. The court must also apply the factors in section 490.012(4) when making its decision.	490.013(3) If the person was convicted of (or found not criminally responsible) for two or more designated offences and offences demonstrate a pattern of behaviour. If the maximum term of imprisonment for the offence is life.	490.013(2) 10 years: if the offence proceeded by summary conviction or term of imprisonment was for 2 to 5 years. 20 years: if the maximum penalty for the offence was for 10 or 14 years. 490.013(4) Longest maximum term of multiple offences: If the court is not satisfied that in situations involving more than one designated offence a pattern of behaviour is demonstrated.

Source: Table prepared by the Library of Parliament.

2.3.4 Sexual Exploitation of a Person with Disability (Clause 1)

Section 153.1 of the Code establishes the hybrid offence of sexual exploitation of a person with a disability. Clause 1 of Bill S-12 amends this section to change the maximum punishment for an indictable offence from five to 10 years.

Section 153.1 is a designated offence under section 490.011. As a result, this amendment increases the period of time that a person would have an obligation to be registered under the ITOA.

2.3.5 Reasons, Making an Order and a Right of Appeal (Clauses 9 and 12)

Clause 9 amends section 490.0131 of the Code to add that a court making a mandatory SOIRA order under section 490.012(1) must state the designated offence and the term of imprisonment for it. Also, when a court makes a decision under sections 490.012(3) or 490.013(3)(b), it must provide reasons.

This clause also adds that if the court has not decided whether to impose a SOIRA order at sentencing, the court has 90 days after sentencing to hold a hearing to do so.

Section 490.018 sets out the parties that are to be given notice of a SOIRA order under section 490.012, including the RCMP commissioner and the Review Board established or designated by a province for making and reviewing dispositions concerning accused persons that have been found not criminally responsible on account of mental disorder or unfit to stand trial.[36] Clause 12 amends this section to include provincial police services that are responsible for registering persons under the SOIRA.

Section 490.014 grants a right of appeal for the person or the prosecutor on grounds that raise questions of law or mixed fact and law regarding a SOIRA order. Clause 9 updates this section to reflect the amendments in sections 490.012 and 490.013. An appeal court may dismiss the appeal or allow the appeal and then order a new hearing, quash or amend the order, or make a new order under section 490.012.

2.3.6 Termination Orders (Clauses 10 and 11)

Sections 490.015 and 490.016 set out the rules whereby a person subject to an order to comply with the SOIRA registration requirements under section 490.012 may apply for a termination order. These are updated by clauses 10 and 11. In brief, a termination order is permitted after a period of time has elapsed, depending on the duration of the original order (section 490.015(1)) or after a pardon, record

suspension, or absolute discharge. The court may make the order if it is satisfied that the person has demonstrated that the no connection and impact on the person principles apply and if it has considered the list of key factors. The court must give reasons and ensure that the Attorney General of a province or the Minister of Justice of the territory and the Commissioner of the RCMP are notified.

Note that section 490.017 is not amended, which allows a prosecutor or person who applied for a termination order to appeal a termination order decision made under section 490.016 on the grounds of mixed law or fact.

2.3.7 Convictions Prior to 2004 (Clauses 13 to 16)

Sections 490.019 to 490.029 of the Code create a framework for offenders who must comply with the SOIRA, but who were sentenced for a designated offence committed before the SOIRA came into force on 15 December 2004 or who were registered under Ontario's sex offender registration legislation before that date. These sections detail the timing and method of service of a notice to register (section 490.021) and how the obligation to comply begins when it is served (section 490.022). They also permit an application for an exemption order (section 490.023) or a termination order (section 490.027) and for an appeal of such decisions (sections 490.024 and 490.029).

Several amendments to these sections ensure that the sections and terms referenced are understood to be those that were used prior to Bill S-12 coming into force or prior to 2004, given that the Code has been amended since then. Others ensure that when considering an application for a termination order, the court must be satisfied that the no connection and impact on the person criteria are met and the key factors are considered (clause 16, section 490.027).

2.3.8 Convictions Outside Canada (Clauses 17 to 24)

Sections 490.02901 to 490.02911 of the Code create a framework for offenders who must comply with the SOIRA because they have been convicted or found not criminally responsible on account of mental disorder of the equivalent of a designated offence outside Canada (in the opinion of the Attorney General of a province or the Minister of Justice of the territory). Section 490.02902 states that a person can only be served with a notice to comply with the SOIRA under this section if they entered Canada after it came into force on 15 April 2011.

The amendments in clauses 17 to 24 largely serve to update these sections in keeping with other amendments made in Bill S-12, such as adding the no connection and impact on the person criteria and the key factors considerations for exemption orders

(clause 19) and termination orders (clause 23) or ensuring that the correct new section numbers are referenced in, for instance, the section setting up the right to appeal a decision regarding an exemption or variation order (clause 21).

Clause 20 adds new section 490.029051 to permit a person to apply for a variation order if, under amended section 490.02904(3)(d) (clause 18), the obligation applies for life and none of the offences in the notice to register have an equivalent offence with a maximum term of imprisonment for life provided for in Canadian law. If the court is satisfied that the offences listed in the notice do not demonstrate a pattern of behaviour showing an increased risk of reoffending by committing a crime of a sexual nature, then a court may vary the duration of the obligation in the order using the duration of the equivalent Canadian offence with the longest maximum term of imprisonment.

2.3.9 International Transfer of Offenders (Clauses 25 to 27)

As explained in section 1.3 of this paper, some Canadians who commit a crime in another country may be transferred to Canada to serve out their sentence. In the same way that clauses 17 to 24 update the rules, procedures and obligations for persons who have committed crimes abroad, clauses 25 to 27 amend the relevant sections of the Code for persons who are subject to an obligation under section 36.1 of the ITOA (the section that links the ITOA and the obligations under the SOIRA). They establish, among other things, the procedures for a court in considering an exemption order (clause 25, section 490.029111), a variation order (clause 25, section 490.029112), a termination order (clauses 26 and 27, sections 490.02912 and 490.02913), all subject to the no connection and impact on the person criteria and the key factors.

2.3.10 Disclosure of Information (Clause 28)

Section 490.03 sets out the circumstances in which information in the NSOR may be disclosed by the RCMP commissioner, or a person authorized by them. These already include proceedings under section 490.012 and other relevant procedures relating to the SOIRA, such as for terminating an order, obligation or exemption or for an appeal. Clause 28 adds some of the new or updated provisions to the list of permitted proceedings for which the information may be disclosed.

2.3.11 Additional Orders (Clauses 31 and 32)

Clause 31 adds procedures whereby a justice may issue a warrant authorizing a peace officer to arrest a person who has contravened any of sections 4 to 5.1 of the SOIRA and bring them to any registration centre to remedy the contravention. It also adds that no charge can be laid against the person in respect of any contravention these sections if it has been "remedied by the person after the warrant is issued."

Clause 32 adds four new sections under the heading "Additional Orders." Clause 32 allows for persons to apply to the court for:

- an exemption order regarding an order made under section 490.012 on or after 15 April 2015, but before Bill S-12 comes into force (new section 490.04(a));
- an exemption order regarding an obligation under section 490.02901, or under section 36.1 of the ITOA that began before Bill S-12 comes into force (clause 32, new section 490.04(b)); or
- a variation order for various other orders and obligations that apply for life (new section 490.05(1)).

The new sections in these clauses set out various procedural rules and expectations regarding these orders, including when reasons are required, when the no connection and impact on the person criteria and key factors should be applied, who should be notified of any order and when, as well as appeal procedures.

2.3.12 Forms (Clauses 36 to 40)

Clauses 36 to 40 update the various forms that are relevant to the SOIRA and Code proceedings that are impacted by Bill S-12, including Forms 52 and 54, which are used to advise the recipient of their obligations to comply with the SOIRA. These amendments are largely consequential to the other changes proposed by the bill. For instance, changes to Forms 34.2 and 48.2, which are used for Victim Impact Statements, allow for a victim to indicate that they wish to receive further information about an offender's sentence and its administration.

2.3.13 Changes to the *Sex Offender Information Registration Act* and the *International Transfer of Offenders Act* (Clauses 41 to 44)

Bill S-12 makes several changes to the SOIRA and the ITOA, most of which ensure that references to the Code in these laws are updated along with the other amendments.

One change that will impact individuals is in clause 41, which amends section 6 of the SOIRA. This section requires registered sex offenders to notify the relevant registration centre[37] when they travel. The amendment modifies sections 6(1) and 6(1.1) so that the notification must be made 14 days prior to departure. New section 6(1.02) allows for a "reasonable excuse" to be provided for not complying with this time limit.

Clause 43 amends section 15(1) of the SOIRA, which concerns the retention of information in the database. Instead of a person's information being kept in the database indefinitely, it will now only be retained for 50 years after the death of that person.

Clause 47 amends Form 1 of the ITOA, which is used to inform an individual who is being transferred and was convicted of or found not criminally responsible on account of mental disorder of a designated offence (or designated offences) that they must comply with the SOIRA. In addition to the aforementioned updating of the language to reflect the changes to the Code in Bill S-12 (i.e., such as including "primary offence"), it also adds references to new sections 5.1 and 5.2 of the SOIRA, which note the right for an individual to apply to the court for an exemption from having to comply with the SOIRA or, if the obligation applies for life, to apply for an order to vary the duration of an order. Both sections establish a right of appeal for such decisions.

NOTES

1. Bill S-12, An Act to amend the Criminal Code, the Sex Offender Information Registration Act and the International Transfer of Offenders Act, 44th Parliament, 1st Session.
2. Department of Justice, *Strengthening the National Sex Offender Registry and empowering victims of crime – Government of Canada introduces legislation*, News release, 26 April 2023.
3. *Criminal Code* (Code), R.S.C. 1985, c. C-46.
4. *R. v. Ndhlovu*, 2022 SCC 38.
5. *Sex Offender Information Registration Act* (SOIRA), S.C. 2004, c. 10.
6. *Victims Bill of Rights Act*, S.C. 2015, c. 13, s. 12.
7. Bill C-32, An Act to enact the Canadian Victims Bill of Rights and to amend certain Acts, 41st Parliament, 2nd Session.
8. *Corrections and Conditional Release Act*, S.C. 1992, c. 20.
9. A conviction for violating a publication ban can result in a maximum sentence of up to two years in jail and a $5,000 fine.
10. House of Commons, Standing Committee on Justice and Human Rights, *Improving Support for Victims of Crime*, Seventh report, December 2022.
11. Ibid., p. 44.

12. Bill C-16, An Act respecting the registration of information relating to sex offenders, to amend the Criminal Code and to make consequential amendments to other Acts, 37th Parliament, 3rd Session.

13. Royal Canadian Mounted Police, *Sex offender management*.

14. See section 5 of the SOIRA.

15. *International Transfer of Offenders Act*, S.C. 2004, c. 21.

16. *National Defence Act*, R.S.C. 1985, c. N-5.

17. See section 119.1 and sections 227 to 227.21 of the *National Defence Act*.

18. Canada does not currently notify other countries when offenders on the National Sex Offender Registry travel to other countries. See, for example, Robert Fife and Steven Chase, "U.S. wants Canada to share travel information on convicted child sex offenders," *The Globe and Mail*, 2 February 2022.

19. Ontario, *Christopher's Law (Sex Offender Registry), 2000)*, S.O. 2000, c. 1; see also *Ontario (Attorney General) v. G*, 2020 SCC 38.

20. Government of Canada, *About the Canadian Police Information Centre*.

21. See United Kingdom, *Sexual Offences Act 2003*, c. 42; the *Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act* is Title XVII, Sec. 170101 of the *Violent Crime Control and Law Enforcement Act of 1994* (P.L. 103-322 Sec. 170101; 108 Stat. 2038, 42 U.S.C. 14071); California Department of Justice, *About Megan's Law*; and California Legislative information, *Penal Code § 290.46*.

22. Bill C-26, An Act to amend the Criminal Code, the Canada Evidence Act and the Sex Offender Information Registration Act, to enact the High Risk Child Sex Offender Database Act and to make consequential amendments to other Acts, 41st Parliament, 2nd Session.

23. Bill S-2, An Act to amend the Criminal Code and other Acts, 40th Parliament, 3rd Session.

24. Robin MacKay, *Legislative Summary of Bill C-16: Sex Offender Information Registration Act*, Publication no. 37-3-LS-470-E, Library of Parliament, 16 February 2004; Robin MacKay, *Legislative Summary of Bill C-26: An Act to amend the Criminal Code, the Canada Evidence Act and the Sex Offender Information Registration Act, to enact the High Risk Child Sex Offender Database Act and to make consequential amendments to other Acts*, Publication no. 41-2-C26-E, Library of Parliament, 14 March 2014; and Tanya Dupuis, *Legislative Summary of Bill S-2: Protecting Victims from Sex Offenders Act*, Publication no. 40-3-S2-E, Library of Parliament, 19 March 2010.

25. Section 490.011(1)(a), (c), (c.1), (d) or (e) of the Code were amended to require automatic registration.

26. *Canadian Charter of Rights and Freedoms* (Charter), Part I of the *Constitution Act*, *1982*, being Schedule B to the *Canada Act 1982*, 1982, c. 11 (U.K.).

27. The Court of Appeal of Alberta had previously concluded that the sentencing judge erred in finding that Ndholovu had established that sections 490.012 and 490.013(2.1) caused a deprivation of section 7 rights. It held that these sections were constitutionally valid. See *R. v. Ndhlovu*, 2020 ABCA 307 (CanLII).

28. *R. v. Ndhlovu* (SCC), para. 7.

29. Ibid., paras. 77 and 78. In summarizing these principles, the Supreme Court of Canada cited *Canada (Attorney General) v. Bedford*, 2013 SCC 72.

30. *International Transfer of Offenders Act*, s. 3.

31. Section 726.2 of the Code requires court to give reasons for the sentence imposed and enter the terms and reasons into record of proceedings.

32. Throughout sections 490.11 to 490.032 the person who committed a designated offence or who was found not criminally responsible on account of mental disorder for having committed one, is referred to simply as "the person."

33. Specifically, it states that the person must have been "previously convicted under section 130 of the *National Defence Act* in respect of a primary offence." Section 130 ensures that persons subject to the *National Defence Act* are liable to be punishment for offences under other acts, including the Code. Offences under the *National Defence Act* include offences relating to the defence of Canada, and can be committed by members of the Canadian military or civilians.

34. Section 490.012(4)(e) adds that this criminal history includes “the age at which they previously committed any offence and the length of time for which they have been at liberty without committing an offence.”

35. Section 787(1) of the Code sets out the general penalty for offences that are punishable on summary conviction: “a fine of not more than $5,000 or to a term of imprisonment of not more than two years less a day, or to both.”

36. Section 672.38(1) of the Code.

37. See section 7.1 of the SOIRA.