

Branding Children as "Sex Offenders"



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THE NEED FOR DISCRETION UNDER THE WESTERN AUSTRALIAN SEX OFFENDER REGISTRATION SCHEME

The Law Reform Commission of Western Australia (the Commission) has recently completed its reference examining the *Community Protection (Offender Reporting) Act 2004 (WA)* (the CPOR Act). This legislation establishes a sex offender registration scheme. A discussion paper was published in February 2011 and the final report was released in May 2012 – it contains 20 recommendations for reform. The main catalyst for the reference was concern about the impact of the scheme on juvenile offenders – children were being automatically placed on the sex offender register and required to comply with reporting obligations without any consideration of their individual circumstances and the risk they posed to the community. The key issue identified by the Commission was the need for discretion; it found that mandatory registration is inappropriate. While the Commission was also tasked to consider the impact of the CPOR Act on adult offenders,² the focus of this article is the negative impact of mandatory registration on, and the need to provide flexibility for, juvenile offenders.

BACKGROUND

In 2003 a national working party reported to the Australasian Police Ministers' Council recommending the establishment of a nationally consistent child sex offender registration scheme. By 2007 every Australian state and territory had enacted legislation dealing with the registration of child sex offenders. The information reported by registered offenders is contained on a national database, the Australian National Child Offender Register (ANCOR), and this information is shared among jurisdictions for law enforcement purposes. Despite the objective of national consistency, it is important to emphasise at the outset that there are significant differences between jurisdictions in terms of who is and who is not subject to registration.

In Western Australia a person is automatically subject to registration and reporting obligations if he or she is found guilty of and sentenced³ for a reportable offence. A reportable offence is defined to include a Class 1 or a Class 2 offence, and these offences are, for the most part, sexual offences committed against or involving children. The reporting obligations include the requirement to make an initial report to police within seven days of sentence or release from custody;⁴ the requirement to notify police of any changes to the offender's personal details including any travel plans;⁵ and the requirement to report to police on an ongoing basis (at least once a year with the potential for more frequent periodic reporting to be determined by the Western Australia Police⁶). Moreover, reporting obligations continue long after the sentence for the offence has been completed. Juvenile reportable offenders will either be subject to reporting obligations for four years or seven and a half years.

The CPOR Act makes some limited allowances for juvenile offenders,⁷ the most significant being the provision for the Commissioner of Police to suspend the reporting obligations of specified juvenile reportable offenders. However, this power is not exercised in an open and transparent way and is not available for offences involving child complainants under the age of 13 years. Further, even if the Commissioner of Police exercises his or her discretion to suspend reporting obligations, the juvenile offender remains listed on the register.⁸

Notably, the mandatory determination of reportable offender status applies equally to children as it does to adults. Information provided to the Commission by the Western Australia Police indicates that the majority of reportable offenders are adults; however, approximately 12% of reportable offenders are subject to registration and reporting obligations under the CPOR Act as a consequence of offending that occurred when they were under the age of 18 years.⁹ Moreover, the Commission found that children as young as 13 were subject to registration and reporting obligations (and in one case, an adult was included on the register as a result of offences committed when he was only 11 years of age).

TREATING CHILDREN DIFFERENTLY FROM ADULTS

In approaching this reference the Commission took into account that the law generally treats children differently from adults and that the primary focus in the juvenile justice system is on rehabilitation and reintegration.¹⁰ Likewise, it has recently been observed that policies that apply adult legal interventions such as sex offender registration to minors also run counter to traditional court philosophies that emphasise rehabilitation over retribution, and they cross the typical jurisdictional boundaries between adult and juvenile courts.¹¹

The Commission also recognised the importance of taking into account the principle that in actions concerning children the best interests of the child should be a primary consideration. This principle has special application in regard to sex offender registration and requires that the best interests of the individual offending child be taken into account along with the best interests of children generally (that is, the need to protect children from future sexual offending). In this context, it is important to bear in mind that, overall, research demonstrates that juvenile child sex offenders are less likely to reoffend than their adult counterparts and that juvenile offenders are more likely to benefit from a therapeutic, rather than a punitive, response to unlawful sexual behaviour.¹²

THE IMPACT ON JUVENILES

Branding Children as Sex Offenders

Many people consulted by the Commission expressed serious concerns about the stigma associated with being labelled a

"sex offender". For example, clinical psychologist Christabel Chamarette advised the Commission that for children "whose sense of identity is fragile and evolving" the label of "sex offender" may become a "self-fulfilling prophecy".¹³ The President of the Children's Court, Judge Reynolds, emphasised that registration can be "counterproductive" to rehabilitation. The Commission found these concerns to be widely corroborated by research. Indeed, a report published by the Australian Crime Commission in 2010 observed that:

"There is general consensus amongst researchers and clinicians that to refer to juveniles as 'sex offenders', 'perpetrators', or 'abusers' is stigmatising and likely to inhibit the young person's impetus to change ... Children and young people with sexualised behaviours are not young paedophiles with a pre-existing or pathological sexual predilection for children."¹⁴

Although it might be argued that any stigma occurs as a consequence of the person being charged and convicted of the offence there is a key additional factor associated with sex offender registration: the ongoing and regular requirement to report to police (and often long after the sentence for the offence has ended) is a constant reminder of the brand "sex offender".

Also, the Commission explained in its Discussion Paper that even though the details on the sex offender register in Western Australia are not currently publicly available,¹⁵ the negative impact of labelling remains very real; the label is known to the offender (and probably also to members of his or her family), and may be made known to those present in court at the time of sentencing, to police and to other government agencies (such as the Department of Corrective Services).¹⁶ Information that a particular person is a registered sex offender may also be revealed during subsequent court proceedings (for example, proceedings for non-compliance with reporting obligations under the CPOR Act or in Family Court proceedings). It is also possible that other people may become aware of a person's reportable offender status. The Commission was told of one case where a 14-year-old boy was forced to move to a different school after rumours circulated that he was a registered sex offender. In another case, an offender's sister posted a statement on Facebook that her brother was listed on the sex offender register.

Other Consequences

In addition to stigma and the negative impact on future rehabilitation, the Commission also found that registration and reporting obligations under the CPOR Act are particularly onerous for juvenile offenders (as well as for other vulnerable offenders such as those with an intellectual disability or mental illness). Juvenile reportable offenders from regional and remote areas of the state may be further disadvantaged as a result of geographical, language or cultural barriers. Another issue frequently raised during consultations was the difficulty for juvenile offenders who are subject to "overlapping obligations". A juvenile reportable offender may be required to report to police under the CPOR Act but also report to a youth justice officer while subject to a community-based sentence (and some might also be required to report to a different police officer as a condition of bail). The Commission was told of one instance where a youth justice officer advised a reportable offender that his reporting conditions had finished, but the offender did not appreciate the difference between reporting to police under the CPOR Act and reporting to his youth justice officer. After believing

that he was no longer required to report to anyone at all he was charged with breaching his reporting obligations under the CPOR Act – an offence which presently carries a maximum penalty of two years' imprisonment.¹⁷ Other problems included a lack of understanding of the nature of reporting obligations and the consequent belief among some reportable offenders that they were not entitled to move freely, change employment or engage in certain activities.¹⁸ For example, the Commission was told that the family of a 12-year-old reportable offender advised the police that they intended to take their son on a short trip to a regional town and they claimed that the police advised them that the offender was not allowed to go. In another case, a 16-year-old reportable offender from a remote community was informed by police that he was not permitted to attend a football trip in another community; ultimately, police acknowledged that he was able to attend, but only after legal intervention on his behalf. It was also suggested to the Commission that the potential for sex offender registration had discouraged some young people from accessing appropriate health services for contraception and possibly dissuaded families from seeking assistance to address inappropriate sexual behaviour between siblings.¹⁹

THE NEED FOR DISCRETION

It was clear from the Commission's consultations that most people were in favour of a discretionary registration system for juveniles rather than the current mandatory approach. An examination of case studies demonstrated the need for flexibility because children were being placed on the sex offender register as a result of engaging in underage consensual sexual activity with closely aged peers, for sexual experimentation and for behaviours such as "sexting". The Commission proposed in its Discussion Paper that a sentencing court should have discretion to determine whether a juvenile offender who is being sentenced for a reportable offence should be required to comply with the registration and reporting obligations under the CPOR Act. Submissions received in response to this proposal showed overwhelming support for the determination of reportable offender status to be made by a court. Those in favour of judicial discretion included the Chief Justice of Western Australia, the Chief Judge of the District Court, the President of the Children's Court, the Commissioner for Children and Young People, the Office of the Director of Public Prosecutions, Legal Aid WA, the Aboriginal Legal Service, the Department of the Attorney General, the Department for Corrective Services and the Department for Child Protection. Despite the almost universal acceptance that a degree of judicial decision-making must be incorporated into the scheme (especially for juveniles), the Western Australia Police remained opposed to any judicial discretion. Being the only respondent with this view, the Commission devoted a section of its final report to addressing the arguments raised in support of the Western Australia Police's position.²⁰

The Western Australia Police maintained that all Australian jurisdictions (other than Tasmania) impose registration and reporting obligations on a mandatory basis. However, as the Commission's report notes, this is not correct. In Victoria, South Australia and the Northern Territory the sentencing court has full discretion to determine reportable offender status for juveniles (and in Tasmania there is a more limited discretion). Further, unlike Western Australia, New South Wales, Queensland, the Australian Capital Territory and the Northern Territory include "minimum sentencing thresholds" so that low-level sentences (such as dismissals without a conviction) are excluded from the ambit of mandatory registration under the applicable legislation.

It was also argued by the Western Australia Police that mandatory registration provides uniformity, consistency and fairness. However, as the Commission points out, treating all reportable offenders in the same way is neither fair nor consistent because not all reportable offenders are the same. The reality of this observation is usefully illustrated by a hypothetical comparison: a 60-year-old man who sexually penetrates a five-year-old girl has the same reportable offender status as a 15-year-old boy who has "consensual" sex with his 15-year-old girlfriend.²¹

The Western Australia Police further contended that mandatory registration saves police and court resources. The Commission accepted that the introduction of judicial discretion under the CPOR Act will have an impact on judicial and police resources, but it formed the view that the saving of resources on its own is not a valid reason for imposing sex offender registration and onerous reporting obligations on low-risk juvenile offenders or in relation to less-serious offences. In addition, the Commission observed that the monitoring and management of low-risk offenders has its own resource implications. Police are required, at the very least, to record all of the personal details reported by the offender in compliance with the CPOR Act; all reported changes to those personal details and all travel plans (both inside and outside Western Australia). Because of the vast geographical distances in this state, police also visit reportable offenders in remote locations to enable them to provide the required information.

The final significant matter raised by the Western Australia Police (and one which may understandably gain some support) is the need for mandatory registration to guarantee the protection of the community. It is apparent that there is a concern that with the introduction of judicial discretion mistakes will be made and offenders who escape registration will reoffend. However, this argument is flawed: registration does not guarantee that those subject to the scheme will remain offence free. Furthermore, as the Commission observed:

"Just as discretion may result in some high-risk offenders avoiding registration, mandatory registration may result in low-risk offenders being subject to registration."²²

Interestingly, in Tasmania (where the court has a degree of discretion for both adult and juvenile offenders) an examination of relevant cases over a seven-month period showed that judicial officers did not overuse the discretionary power – a registration order was made in approximately 80% of cases and the cases where no registration order was made were, overall, of a similar nature to the types of cases identified by the Commission in its reports as appropriate for a discretionary approach.

It is also important to highlight that the number of registered offenders continues to increase. As the Director of the Office of Police Integrity in Victoria has argued, "if we are to have tens of thousands of registered offenders in the future, the truly dangerous offenders may be overlooked in the vast sea of registrants."²³ The Director estimated that, on the basis of the number of registered offenders since the scheme commenced, in the first 30 years there will have been more than 20,000 people registered in Victoria alone. In response to the growing number of reportable offenders, the Commission observed that if the sex offender registration scheme is to achieve its goal of community protection it is vital that it does not become "overwhelmed".²⁴

THE COMMISSION'S RECOMMENDATIONS

In its final report, the Commission revisited the types of cases that may unfairly lead to sex offender registration including some new cases that had emerged since the publication of its Discussion Paper. It was also observed that "the case for flexibility or discretion in sex offender registration schemes appears to be gaining momentum".²⁵ For example, the Victorian Parliamentary Law Reform Committee has recently commenced an inquiry into "sexting" with a specific requirement to consider, among other things, the "appropriateness and adequacy of existing laws, especially criminal offences and the application of the sex offenders register, that may apply to the practice of sexting".²⁶

Given the overwhelming case for discretion, the Commission recommended that the CPOR Act be amended to provide that for juvenile offenders a court *must* consider reportable offender status at the time of sentencing and that the court may only make a "juvenile offender reporting order" if satisfied that the offender poses a risk to the lives or the sexual safety of one or more persons, or persons generally.²⁷ This test is taken directly from the existing provisions of the CPOR Act, which provide for discretion in relation to offences that are not explicitly of a sexual nature (that is, non-Class 1 or non-Class 2 offences under the schedules to the Act). Various procedural issues such as the need for adjournments, the right to appeal and the provision of relevant information to the court were also the subject of recommendations.²⁸ Notably, the Commission also recommended that juvenile reportable offenders should be able to apply to a court for a review of their reportable offender status after being subject to the reporting obligations under the CPOR Act for half of the applicable reporting period or upon attaining the age of 18 years, so long as they have been subject to the reporting obligations for at least 24 months.²⁹ In light of the recommended inclusion of judicial discretion at the "front end", it was considered appropriate to limit this right of review to a once-only opportunity. On the basis that no juvenile will be subject to the reporting obligations under the CPOR Act unless a court has determined that he or she poses a risk to the lives or sexual safety of one or more persons or persons generally, there is little justification in terms of resources to provide for a more frequent right of review. This recommendation is designed to encourage rehabilitation (and hence community protection) by providing an incentive for juvenile reportable offenders to comply with the provisions of the CPOR Act and to engage in appropriate rehabilitative programs and activities.

Bearing in mind the number of real life cases examined by the Commission, it was further recommended that there should be a retrospective right of review for existing reportable offenders; the Commission's recommended discretionary approach for juveniles will not "alleviate any injustice or unfairness to those reportable offenders who have already been inappropriately caught under the mandatory provisions of the CPOR Act".³⁰ Again it is proposed that this retrospective right of review should only be available once; however, if unsuccessful the offender would retain the general right of review discussed above.

CONCLUSION

While the focus of this article has been the impact of sex offender registration on children and the Commission's key recommendations for reform in that regard, it is also important to note that a number of recommendations have been made in relation to adult reportable offenders. In particular, the Commission found that there were a number of cases involving

young adult offenders who had engaged in "consensual" sexual activity with an older, albeit underage, child that equally called for a discretionary approach. In addition, cases where the offender honestly and reasonably believed that the complainant was of or over the age of consent are appropriate cases for judicial consideration. Nonetheless, given the differences between children and adults, the Commission did not recommend full judicial discretion for adults. Instead a limited discretionary system is proposed whereby the sentencing court can consider whether to make an adult exemption order if satisfied that there are exceptional circumstances, and may make such an order only if satisfied that the offender does not pose the relevant risk.

While it is appreciated that "tough on crime" initiatives are particularly attractive in cases involving sexual offending against children, it is time to take stock. Subjecting children who engage in underage sex or who experiment sexually with their peers to the same sex offender label and reporting obligations as paedophiles is neither sensible nor fair. If implemented, the Commission's recommendations for reform will bring Western Australia into line with the four other Australian jurisdictions that enable judicial discretion for juveniles. But most importantly, it will provide a mechanism for ensuring that sex offender registration is not unfairly applied to children who do not pose a significant risk to the community while at the same time ensuring that sex offender registration remains a useful tool for law enforcement and community protection.

NOTES

1. Victoria Williams is the author of the Commission's Discussion Paper and Final Report. Parts of this article are reproduced from the author's work on this review.
2. The terms of reference in regard to adults were limited to adult reportable offenders who had committed a reportable offence in exceptional circumstances.
3. See *Community Protection (Offender Reporting) Act 2004* (WA) s9 and schedules 1 & 2. The definition of "sentence" under the CPOR Act includes the making of a pre-sentence order and a custody order under the *Criminal Law (Mentally Impaired Accused) Act 2006* (WA).
4. *Community Protection (Offender Reporting) Act 2004* (WA) s24. At the time of this initial report, the reportable offender is required to provide the police with an extensive amount of personal information. For the list of personal details which must be reported, see s26.
5. *Community Protection (Offender Reporting) Act 2004* (WA) ss29-33.
6. *Community Protection (Offender Reporting) Act 2004* (WA) s 28.
7. For example, juvenile reportable offenders are subject to shorter reporting periods than adults and there is a limited statutory exception to mandatory registration for a juvenile found guilty of single pornography-related child sexual offence, see Law Reform Commission of Western Australia (LRCWA), *Community Protection (Offender Reporting) Act 2004*, Discussion Paper (2011) 102-103.
8. In addition, there are plans to amend s62 of the CPOR Act to enable the Commissioner of Police to reinstate an offender's reporting obligations, see *Community Protection (Offender Reporting) Amendment Bill 2011* (WA) cl 20.
9. As at 31 December 2009, 212 out of a total of 1704 reportable offenders were subject to the reporting obligations under CPOR Act as a consequence of offences committed when they were under the age of 18 years.
10. LRCWA, *Community Protection (Offender Reporting) Act 2004*, Discussion Paper (2011) 26.
11. Day A, *Sex Offender Legislation for Sex Offender Registries in Australia: Implications for treatment and management* (paper presented at the 'Children: A resource most precious' conference, Perth, 30 November 2011) 12.
12. LRCWA, *Community Protection (Offender Reporting) Act 2004*, Discussion Paper (2011) 104. An opinion commissioned from Christabel Chamarette (a clinical psychologist) confirmed these findings.
13. *ibid.* 113.
14. O'Brien W, *Australia's Response to Sexualised or Sexually Abusive Behaviours in Children and Young People* (Canberra: Australian Crime Commission, 2010) 12.
15. During the preparation of the Commission's final report, the Western Australian government introduced the *Community Protection (Offender Reporting) Amendment Bill (No 2) 2011* (WA) which proposes to introduce three levels of public disclosure for certain information on the sex offender register. The first level applies to reportable offenders who fail to comply with their reporting obligations and whose whereabouts are unknown. For this group the Commissioner of Police may publish all or any of the offender's personal details (other than any details that would identify a child). The second level covers dangerous and serious offenders (that is, a person subject to a dangerous sex offender supervision order; a reportable offender who has reoffended by committing a Class 1 offence or an indecent assault or aggravated indecent assault against a child; or a person who has been found guilty of an offence punishable by imprisonment for five years or more and where the Minister of Police is satisfied that the person poses a risk to the lives or sexual safety of one or more persons or persons generally). The final level applies to particular individuals who have been the subject of a request for disclosure by a parent or guardian. In these cases if the Commissioner of Police is satisfied that the individual has unsupervised contact with a child or children of the person who made the request, the Commissioner may inform that parent or guardian that the individual is a reportable offender. This Bill was assented to on 15 March 2012 but is yet to be proclaimed. Although the provisions of the Bill preclude disclosure of information on the register in relation to a reportable offender who is a child, the provisions of the Bill do not prevent disclosure in relation to a person who is now an adult but who committed an offence when he or she was under the age of 18 years.
16. LRCWA, *Community Protection (Offender Reporting) Act 2004*, Discussion Paper (2011) 114.
17. Clauses 21 and 22 of the *Community Protection (Offender Reporting) Amendment Bill 2011* (WA) increase the penalty for non-compliance to a maximum of five years' imprisonment (although a summary conviction penalty of \$12,000 or two years' imprisonment is available).
18. The Commission has made recommendations to address some of these issues including the provision of appropriate information to juvenile reportable offenders and improved procedures for the notification of reporting obligations: see LRCWA, *Community Protection (Offender Reporting) Act 2004*, Final Report (2012) Recommendations 14 & 15.
19. LRCWA, *Community Protection (Offender Reporting) Act 2004*, Discussion Paper (2011) 112-121.
20. LRCWA, *Community Protection (Offender Reporting) Act 2004*, Final Report (2012) 34-37.
21. Assuming that in both cases the offender is found guilty and sentenced for the offence.
22. LRCWA, *Community Protection (Offender Reporting) Act 2004*, Final Report (2012) 36.
23. Victoria Ombudsman, *Whistleblowers Protection Act 2001: Investigation into the failure of agencies to manage registered offenders* (2011) 24.
24. LRCWA, *Community Protection (Offender Reporting) Act 2004*, Final Report (2012) 13.
25. LRCWA, *Community Protection (Offender Reporting) Act 2004*, Final Report (2012) 25.
26. See <http://www.parliament.vic.gov.au/lawreform/inquiries/article/947>.
27. LRCWA, *Community Protection (Offender Reporting) Act 2004*, Final Report (2012) Recommendation 1.
28. *ibid.* Recommendations 1 & 4-6
29. *ibid.* Recommendation 7.
30. *ibid.* 65 and Recommendation 9.