Community Protection (Offender Reporting) Act 2004

DISCUSSION PAPER

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Commission of
Western Australia

The Law Reform Commission of Western Australia

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Contents

Foreword v

Acknowledgements vi

Executive summary vii

Glossary xii

Introduction 1

Terms of Reference 3

Scope of the Reference 4

Methodology 8

Chapter One: The Commission's Approach 11

Introduction 13

Terminology 14

Characteristics of child sex offenders 17

Key issues impacting on reform 25

Chapter Two: The Operation of the Community Protection (Offender Reporting) Act 33

Introduction 35

Reportable offenders 36

Reporting 43

Access to register and confidentiality 57

Chapter Three: Sex Offender Registration in Context 59

Introduction 61

Sex offender registration schemes in other jurisdictions 62

Sex offender registration in Australia 72

Chapter Four: The Impact of the General Criminal Law on Registration Status 77

Introduction 79

Overview of child sexual offences in Western Australia 80

Underage consensual sexual activity 83

Mistaken belief about age 89

Prosecutorial policy 95

Chapter Five: The Impact of Sex Offender Registration on Juvenile Offenders 99

Introduction 101

Special provisions for juvenile offenders 102

The characteristics of juvenile reportable offenders 104

The impact of sex offender registration on juveniles 112

A discretionary approach 122

Chapter Six: The Impact of Sex Offender Registration on Adult Offenders 139

Introduction 141

Exceptional circumstances 142

The impact of sex offender registration on adult offenders 154

Dealing with exceptional circumstances 158

Appendix A: List of Proposals and Questions 167

Appendix B: List of People Consulted 177

Foreword

The Commission received this reference from the Attorney General after concerns were raised that the Western Australian sex offender registration scheme established by the *Community Protection (Offender Reporting) Act 2004* (WA) ('the CPOR Act') was unnecessarily capturing low-level offenders.

Registration operates after an individual is convicted and sentenced for certain types of sexual offences involving children. In these circumstances, an individual is automatically placed on a register and required to report to the police on a regular basis. Registration with the police as a 'sex offender' and the requirement to report to police (in many cases for a significant number of years) has a considerable impact and is, potentially, more stigmatising than the conviction itself.

The Commission considered the purpose and operation of the registration scheme and the types of offending behaviour that may lead to registration. Because the purpose of the CPOR Act is community protection, offender registration should, as far as practicable, be based on an individual assessment of risk. In this regard the Commission has found that the mandatory nature of the current registration scheme can be problematic. Mandatory rules mean that individual circumstances cannot be considered. The Commission has found a number of case examples that demonstrate serious concerns about the fairness of mandatory registration, particularly in the case of children. The Commission has also found examples where mandatory registration can unfairly impact upon adults in certain exceptional cases. To include low-level or low-risk offenders in the registration scheme may drain police resources and undermine the goal of community protection. Moreover, it is unfair that such offenders should be subject to onerous obligations that extend way beyond the sentence imposed for the original offence.

The Commission has made a number of proposals for reform. In doing so, the Commission has endeavoured to reach a balance between ensuring that the sex offender registration scheme is effective and efficient and ensuring that low-level or low-risk offenders are not unnecessarily subject to onerous registration and reporting requirements. The Commission's proposals appropriately establish two different regimes – one for child offenders and one for adult offenders.

It is appropriate the Law Reform Commission of Western Australia was given the task to investigate this problem. The subject matter is potentially controversial and the issues raised by the reference are sensitive. The Commission has been particularly careful to approach the reference objectively. Thorough research has been undertaken regarding the characteristics of sex offenders; the purpose and operation of registration schemes in Australia and overseas and the effect of registration. Importantly, the Commission consulted widely in both metropolitan and regional Western Australia and obtained clear case studies which are presented throughout this paper. In preparing the case studies the Commission has, wherever possible, endeavoured to access the transcript of the original sentencing proceedings in order to ensure that the most objective assessment of the circumstances of the case has been considered. Given the nature of the cases the Commission has removed all identifying information in order to ensure that the identity of the offenders or the complainants is not revealed. The case studies are an essential feature of this Paper and present a compelling case for reform.

My fellow Commissioners and I would like to especially acknowledge the lead researcher and writer of this Paper, Victoria Williams. Her thoroughness, commitment and hard work are evident throughout this excellent and comprehensive Paper.

The Commission would like to acknowledge and thank all those who voluntarily provided their time and expertise during the consultations for this Paper.

Executive Officer Heather Kay and Project Manager Sharne Cranston, who administered the project, both continue to provide excellent support to the Commissioners. We are also indebted to our technical editor Cheryl MacFarlane and to Dr Tatum Hands for lending her law reform acumen to the project. The Commission is privileged to continue to have such a highly qualified and talented group.

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Executive summary

Background

Terms of Reference

The Law Reform Commission of Western Australia ('the Commission') received this reference in April 2009. The terms of reference require the Commission to examine the application of the *Community Protection (Offender Reporting) Act 2004* (WA) ('the CPOR Act') to juvenile reportable offenders and to certain adult reportable offenders who are considered to have committed a reportable offence in exceptional circumstances. The CPOR Act, which commenced operation on 1 January 2005, establishes a sex offender register. In the overwhelming majority of cases this register applies to offenders who have committed sexual offences against children. In simple terms, persons found guilty and sentenced for a reportable offence are automatically required by law to register with and report their personal details to the police. It is an offence to fail to comply with these reporting obligations (without a reasonable excuse) and this offence carries with it the possibility of imprisonment.

Methodology

The Commission has consulted with over 80 individuals from numerous agencies including the Western Australia Police, Office of the Director of Public Prosecutions, State Solicitor's Office, Legal Aid WA, Aboriginal Legal Service, Mental Health Law Centre, Department for Child Protection, Department of Corrective Services, Commissioner for Children and Young People, Child Witness Services, Victim Support Services, Law Council of Australia, National Children's and Youth Law Centre, members of the judiciary, lawyers and psychologists. Critically, the Commission has examined a number of case examples in order to ensure that its proposals for reform are directed to practical, and not merely theoretical, issues with the current scheme.

Context

This reference was prompted by concerns that the Western Australian sex offender registration scheme was unnecessarily capturing juvenile and other low-risk or low-level offenders. Presently, the scheme applies automatically to any adult found guilty and sentenced for a relevant offence. Juvenile offenders are similarly subject to mandatory registration, except in a very narrow range of circumstances. For a limited cohort of juvenile reportable offenders the Commissioner of Police has discretion to waive the offender's reporting obligations; however, even if this discretion is exercised in favour of the offender he or she remains listed on the sex offender register.

The CPOR Act partly follows the 2003 recommendations of the Australasian Police Ministers' Council national working party. This working party reported on a proposed model for nationally consistent child sex offender registration laws and expressed a preference for a mandatory, rather than a discretionary, scheme. The working party acknowledged that there may be cases where registration is inappropriate and a blanket mandatory approach may, therefore, operate unfairly. To accommodate this concern it was recommended that certain low-level sentences should be excluded from the ambit of mandatory registration ('minimum sentencing thresholds').

The legislation across Australia varies in its approach to registration. Some jurisdictions have followed the national model and included 'minimum sentencing thresholds', while others have significantly diverted from the proposed national model by enabling court discretion for juvenile offenders or, in the case of Tasmania, all offenders. Having examined these different schemes, the Commission has formed the view that **the sex offender registration scheme established by the CPOR Act is relatively strict; it potentially applies to a broader range of child sex offenders than any other similar scheme in Australia.**

In this Discussion Paper, the Commission examines the impact of the CPOR Act on juvenile and adult reportable offenders to determine if compulsory registration remains appropriate or whether a discretionary approach is warranted. The Commission emphasises that in considering reform in this area it is not a stark choice between mandatory registration and no registration at all. Even if the CPOR Act enables discretion in certain cases, the relevant decision-maker can still decide to order registration if appropriate.

Key observations about child sex offenders and child sexual offending

As stated above, not all child sex offenders and not all child sexual offences are the same. In the Commission's view, this fact and the key observations summarised below must be taken into account when assessing the ambit of the current sex offender registration scheme in Western Australia.

- A 'typical' child sex offender is highly unlikely to be a stranger but rather someone known to the victim. Studies consistently show that at least 75% of child sexual offences are committed by persons known to the victim.

- Child sex offences are notoriously underreported and, for those offences which are reported to the police, the conviction rate is low. Furthermore, the majority of convicted sex offenders have never previously been convicted of a sexual offence or even come to the attention of authorities for such behaviour. Thus, there will always be a considerable number of undetected and, hence, unregistered sex offenders in the community. In other words, all persons who pose a danger to children are not necessarily included on the register and not all registered sex offenders necessarily pose a risk to children.

- Although measuring recidivism is inherently difficult, studies have consistently demonstrated that sexual offence recidivism among convicted sex offenders is much lower than the recidivism rate for other types of offending. Therefore, it should not be assumed that all or even most child sex offenders will reoffend. But, of course, some will, so it is prudent to ensure, as far as practicable, that police resources are directed to those child sex offenders who are most likely to reoffend. Excluding low-risk offenders from the registration scheme is one way to achieve this goal.

- A substantial proportion of child sex offenders are children themselves. However, juvenile child sex offenders appear to be different from adult child sex offenders in a number of ways. Most importantly, juvenile child sex offenders appear to be less likely to commit further sexual offences than adult child sex offenders and most do not become adult child sex offenders in later life. Further, juvenile child sex offenders are more likely to benefit from a treatment-focused approach to their offending behaviour.

- There is a range of behaviour that may result in sex offender registration under the CPOR Act. This behaviour includes both less serious offending, such as consensual sexual activity between two young people, and more serious offending such as the sexual abuse of a very young child by an adult.

- Child-specific sexual offences in Western Australia are defined differently than such offences in other jurisdictions. This is important because a person may be included on the Western Australian sex offender register as a consequence of certain prohibited sexual conduct while a person who engages in the same conduct in another jurisdiction may not even be charged with an offence. For example, in contrast to the position in Western Australia:

  – in many other jurisdictions, consensual sexual activity between two young people who are similarly aged is not an offence; and

  – in most other Australian jurisdictions it is a defence to a child-specific sexual offence for the accused to establish that he or she honestly and reasonably believed that the complainant was above the age of consent.

Key issues impacting on reform

As a result of its consultations and research the Commission has found that there are a number of key issues impacting on reform in this area:

- Whether sex offender registration laws should apply to children must necessarily involve a balancing exercise between the interests of the individual child offender and the interests of children generally.

- The law generally treats juvenile offenders differently than adult offenders; however, in many respects the CPOR Act treats adult and juvenile offenders in the same way and there are some instances where juvenile offenders appear to be treated more harshly (eg, a 13-year-old who pinches the bottom of another 13-year-old is liable to registration for four years, whereas a 20-year-old who pinches the bottom of another 20-year-old is not liable to registration at all).

- Sex offender registration schemes need resources; police are required to meet with reportable offenders, record their personal details, and sometimes actively monitor their behaviour. It is desirable that available resources are not drained by dealing with offenders who do not pose any appreciable risk to the community.

- In order to maximise community protection, sex offender registration should (as far as is practicable) be based on an assessment of risk. The Commission's proposals in this Paper facilitate an assessment of the offender's risk during the registration process.

- The obligations imposed upon reportable offenders (over and above any sentence imposed for the offence) and the potential adverse consequences of registration cannot be overlooked when assessing the ambit of the current scheme.

The Impact on Juvenile Reportable Offenders

While the CPOR Act is designed to protect children from sexual abuse, it is important to remember that its reach extends to offenders who are themselves children. Some of the case examples referred to in this Paper involve offenders as young as 13 years and the scheme can potentially apply to children aged as young as 10 years. The issue of child sexual offending by juveniles is complicated because it is not always easy to distinguish between age-appropriate behaviour or experimentation and inappropriate or abusive sexual behaviour. Moreover, children who are themselves legally incapable of consenting to sexual activity (because they are under the age of 16 years) can be charged with committing a sexual offence against another child.

Under the CPOR Act juvenile offenders are required to comply with the same reporting obligations as adult offenders (although they are not required to report for as long). Moreover, the rules that apply to adult offenders in determining who is and who is not a reportable offender under the CPOR Act are almost identical as the rules for juvenile offenders. The limited power under the CPOR Act for the Commissioner of Police to excuse some juvenile reportable offenders from the requirement to report is, in the Commission's view, problematic: the power does not extend to all possible reportable offences; any decision lacks the transparency and accountability of court proceedings; and, even if the offender is relieved of the obligation to report, the offender remains on the register and potentially suffers the stigma of being referred to or categorised as a 'child sex offender'.

Examples where registration is arguably unnecessary

The Commission's research and consultations have revealed many examples that demonstrate that the *mandatory* registration of juveniles is clearly inappropriate. Such examples include cases involving:

- 'Consensual' underage sexual activity where there is a relatively close age between the two parties.

- Offenders aged 13 years and under engaging sexual behaviour.

- Historical offences where the offender has not reoffended.

- Behaviour that is not necessarily sexually motivated or sexually deviant, such as pinching or slapping the buttocks of a person under the age of 18 years or sending explicit photos via mobile phones or the internet.

Problems for juvenile offenders

In addition, the Commission has found that **the impact of sex offender registration can be quite severe for juvenile offenders,** heightening the need to ensure that the CPOR Act does not unnecessarily apply to low-risk juvenile offenders. Sex offender registration can potentially:

- impact negatively on future rehabilitation as a result of being labelled a 'sex offender';

- cause further involvement in the criminal justice system as a result of being charged with failing to comply with the reporting obligations;

- interfere with socially beneficial activities because either the offender, their family or the police misunderstand the requirements of registration;

- dissuade young people from accessing health and support services in relation to their sexual activity because of the fear of possible future registration;

- deter young people and their families from reporting inappropriate sexual behaviour to authorities; and

- encourage young people to deny their offending behaviour in court in order to avoid registration.

The Commission's Approach

In this Discussion Paper the Commission has examined different options to ensure that low-risk and low-level juvenile offenders are not automatically subject to registration. Overall, **the Commission favours a discretionary approach whereby the sentencing court can take into account the circumstances of the offence and the offender**. During consultations, the Commission received overwhelming support for a discretionary approach for juvenile offenders.

For juvenile offenders, a reporting order should not be made unless the court is satisfied that the offender poses a risk to the lives or sexual safety of a person or persons generally and hence the responsibility will be on the state to provide sufficient evidence to justify its case for registration.

The Commission acknowledges that providing for court discretion will utilise additional resources (because police and other agencies will be required to provide evidence and/or information to demonstrate why registration is required). On the other hand, if low-risk offenders are excluded from the scheme, fewer resources will be required for ongoing monitoring and management of reportable offenders. In any event, whether an offender is to be subject to ongoing and onerous obligations over and above the sentence imposed for the original offence should not depend solely upon resourcing constraints. Fairness demands that sex offender registration is not imposed unnecessarily.

Also included in the proposals in this Paper is the provision for a review of reporting frequency, either before a court or a senior police officer, in order to overcome concerns about the difficulties for some juvenile offenders who are arguably subject to excessively frequent periodic reporting. Some offenders appear to be disadvantaged in this regard (eg, offenders living in remote locations, offenders who are subject to 'overlapping' obligations with other agencies, and offenders who may find it difficult to comply because of socio-economic disadvantages or language and cultural barriers).

The Commission has further proposed that juvenile reportable offenders should be entitled to apply for a review of their registration status after a qualifying period of time in order that there is some incentive for reportable offenders to comply with the scheme, address their offending behaviour and refrain from further offending. If an offender is able to satisfy a court that he or she no longer poses a risk to the community the justification for continuing registration and reporting disappears.

The Commission also queries the appropriateness of police-based registration for juvenile offenders and seeks submissions about whether an alternative therapeutic-focused approach would be a better option for those juveniles who are considered to be a risk of future sexual offending.

The Impact on Adult Reportable Offenders

The potential for mandatory sex offender registration to apply unfairly or unnecessarily for adult child sex offenders is, at first glance, less evident. By and large, sexual abuse of children by adults is abhorrent; however, the Commission's research and consultations have revealed a number of exceptional cases involving adult (in particular, young adult) offenders where there is a strong argument that sex offender registration is inappropriate.

Examples of 'exceptional circumstances' for adult offenders

The Commission has found from its examination of case examples that **a variety of circumstances may be considered 'exceptional'. In such cases *mandatory* registration is inappropriate**. Instead, the offender should have the right to argue against registration. Such examples may include cases involving:

- honest and reasonable mistake about the age of the complainant;
- ignorance of the law;
- young adult offenders (eg, 18–21 years) who have engaged in 'consensual' sexual activity with an older underage child (eg, 14–15 years); and
- intellectually disabled adult offenders who have engaged in 'consensual' sexual activity with an older underage child in circumstances where the intellectual and emotional maturity of both parties is similar, and who may lack the capacity to comply with reporting obligations.

Nonetheless, the Commission does not consider that the term 'exceptional circumstances' should be restricted to defined categories – there is the real potential for cases to arise that fall outside such categories but where sex offender registration is unnecessary.

Problems for adult offenders

The Commission has found that adult reportable offenders are not immune from many of the problems experienced by juvenile reportable offenders. For those adult offenders who have committed a reportable offence in exceptional circumstances, the impact of these problems must be taken into account in assessing whether automatic registration is justified. In particular,

the Commission highlights that sex offender registration for adult offenders may:

- impact negatively on community reintegration as a result of stigma (especially for very young adults);
- disproportionately impact on those offenders who are subject to 'overlapping' obligations to report to different agencies, especially in circumstances where the offender suffers socio-economic disadvantages or is disadvantaged by remoteness, or where the offender has difficulty in comprehending his or her reporting obligations due to language or cultural barriers and/or intellectual disability or mental impairment; and
- cause further involvement in the criminal justice system (including the possibility of imprisonment) for failing to comply with the reporting obligations.

The Commission's Approach

The Commission has formed the view that **there should be a mechanism to exclude some adult offenders from the mandatory sex offender registration scheme** because not all adult offenders found guilty of a child sexual offence necessarily constitute an ongoing risk to children. This view found extensive support during consultations. However, the Commission does not consider that its proposed discretionary system for juveniles should be replicated for adults. **There are sufficient differences between adult child sex offenders and juvenile child sex offenders to justify a more stringent approach to adult offenders.** Therefore, the Commission proposes that adult offenders should be subject to registration unless they initiate an application to the court and they can satisfy a strict two-stage test. This test requires the offender to establish that there are exceptional circumstances *and* that the offender does not pose a risk to the lives or sexual safety of any person.

There remains the possibility that an adult offender who is unable to satisfy this strict test becomes suitable for exclusion from the registration scheme at a later time. In order to enable such offenders to have their registration status reconsidered, the Commission has proposed that there should be a right of review after half of the reporting period has expired. In addition, the Commission proposes that there should be a right of review of reporting frequency (either before a court or a senior police officer).

Glossary

ABS	Australian Bureau of Statistics
Adult child sex offender	An offender who is over the age of 18 years at the time he or she committed a sexual offence against a child
Adult reportable offender	A reportable offender under the *Community Protection (Offender Reporting) Act 2004* (WA) who was 18 years or over at the time of committing the reportable offence
Adult offender	An offender who is over the age of 18 years at the time of committing an offence
Adult sex offender	An offender who has committed a sexual offence *against* a person over the age of 18 years
Age of consent	The age stipulated by the law under which any sexual activity is prohibited (irrespective of the willingness or otherwise of the underage person)
ANCOR	Australian National Child Offender Register
APMC	Australasian Police Ministers' Council
Child sex offender	An offender who has committed a sexual offence *against* a person under the age of 18 years
Child-specific sexual offences	Sexual offences that are legally defined by reference to the fact that the victim of the offence is a child (eg, sexual penetration of a child under the age of 13 years)
Community notification	Sex offender registration schemes that provide access to or require notification of information contained on the register to members of the public.
Complainant	The victim or alleged victim of an offence
Consensual underage sexual activity	Sexual activity that was factually (although not legally) consensual because one of the parties was under the age of consent
COPs Manual	Commissioner's Orders and Procedures Manual
CPOR Act	*Community Protection (Offender Reporting) Act 2004* (WA)
DPP	Office of the Director of Public Prosecutions
Juvenile child sex offender	An offender who has committed a sexual offence against a child while they were themselves under the age of 18 years
Juvenile reportable offender	A reportable offender under the *Community Protection (Offender Reporting) Act 2004* (WA) who was under the age of 18 years at the time of committing the reportable offence
MCCOC	Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General
Sex offender	An offender who has committed a sexual offence
Sex offender registration	Schemes whereby sex offenders are required to register and report their personal details to justice or law enforcement agencies for a specified period of time

Introduction

Contents

Terms of Reference 3

Background to the Reference 3

Scope of the Reference 4

Juvenile offenders 4

Adult offenders 4

Matters beyond the scope of the reference 4

Community notification 4

Expanding the register to include adult sex offenders 6

Methodology 8

Consultations 8

About this Paper 8

Terms of Reference

In April 2009 the Law Reform Commission of Western Australia ('the Commission') received a reference from the Attorney General, the Hon Christian C Porter, to examine and report upon the application of the *Community Protection (Offender Reporting) Act 2004* (WA) ('the CPOR Act') to:

(a) reportable offenders who are children when they commit the relevant reportable offence; and

(b) reportable offenders who are over the age of 18 years of age when they commit the reportable offence in circumstances which are exceptional (for example persons who committing a reportable offence involving consensual sexual activity with a person, not being under the care, supervision or authority of the offender who the offender honestly and reasonably, but mistakenly, believed to be of or over the age of 16 years at the time the relevant reportable offence was committed).

And to report on the adequacy of, and on any desirable changes to, the existing law, practices and procedures in relation thereto having due regard to the necessity to preserve the central aims and efficacy of the legislation.

Background to the Reference

In general terms, the CPOR Act establishes, among other things, a scheme whereby child sex offenders[1] are required to register with and report to police. The Western Australian scheme is mandatory – all juvenile and adult offenders who are sentenced for a child sexual offence[2] are registered on the Australian National Child Offender Register (ANCOR). In almost all cases, offenders who are registered on ANCOR are required to report periodically to police and notify any changes to their personal details on an ongoing basis.[3] The CPOR Act operates in conjunction with similar, although not identical, legislation in all other Australian jurisdictions. This means that child sex offenders cannot avoid registration and reporting obligations by moving from one state or territory to another.

In February 2009 the Commission was provided with a written submission from the Youth Law Section of Legal Aid WA. This submission raised a number of concerns in relation to the impact of the CPOR Act on juvenile offenders.[4] The submission also noted that the legislation may unnecessarily apply to some adult offenders who have committed an offence in exceptional circumstances. Following receipt of this submission and consultation with the Attorney General, the abovementioned terms of reference were settled.

1. The Commission uses the term 'child sex offender' to refer to an offender who has committed a sexual offence against or involving a child: see further Chapter One, 'Terminology'.
2. There are various child sexual offences included within the ambit of the mandatory scheme including sexual penetration, indecent dealing, child pornography and child prostitution offences: see Chapter Two, 'Reportable offenders'.
3. Pursuant to s 61 of the *Community Protection (Offender Reporting) Act* (WA) there is a limited discretion for the Commissioner of Police to suspend reporting requirements for specified juvenile offenders. The District Court also has power to suspend reporting requirements for registered offenders who are subject to lifetime reporting so long as they have been reporting for at least 15 years and no longer pose a risk to the community: see ss 51–53. For further discussion see Chapter Two, 'Suspension of reporting obligations'.
4. The Commission uses the term 'juvenile offenders' to refer to persons who have committed an offence when they were under the age of 18 years. The term 'adult offenders' is used to refer to persons who have committed an offence when they are 18 years or over: see further Chapter One, 'Terminology'.

Scope of the Reference

The Commission's terms of reference require it to take into account the 'necessity to preserve the central aims and efficacy of the legislation'. It is apparent from the preamble to the *Community Protection (Offender Reporting) Act 2004* (WA) ('the CPOR Act') that the primary aims of the legislation are to reduce reoffending and 'facilitate the investigation and prosecution of future offences' by ensuring that police are aware of the whereabouts and personal details of child sex offenders.[1] As a consequence of its terms of reference the Commission appreciates that the scope of this reference is limited; the Commission is not required to examine the overall effectiveness and continued viability of the sex offender registration scheme established by the CPOR Act. In this regard, it is noted that the Minister of Police is required to 'carry out a review of the operation and effectiveness' of the Act as soon as practicable after 1 February 2010.[2]

The Commission's reference is restricted to two categories: reportable offenders who were children when they committed the reportable offence and adult reportable offenders who committed the relevant reportable offence in exceptional circumstances.

Juvenile Offenders

As stated above, the terms of reference require the Commission to examine the impact of the legislation on *all* juvenile reportable offenders.[3] This includes reportable offenders who are currently over the age of 18 years but who committed the relevant reportable offence when they were under the age of 18 years. In order to properly address this aspect of the terms of reference it is necessary to consider the general operation of the CPOR Act and how it affects all juvenile reportable offenders in practice.

Adult Offenders

In contrast, the examination of the impact of the CPOR Act upon adult offenders is limited to those adult offenders who committed the relevant reportable offence in 'exceptional' circumstances. Only one example is provided under the terms of reference: persons who commit a reportable offence involving consensual sexual activity with a person believed to be of or over the age of 16 years at the time the relevant reportable offence was committed. The Commission's research and consultations undertaken so far have revealed other examples of offences which it believes are appropriately captured by the term 'exceptional circumstances'.[4] As in the case of juvenile offenders, this aspect of the reference requires an assessment of how the legislation might impact upon such adult offenders in practice. In other words, when considering if the CPOR Act is applied unfairly or inappropriately to particular types of offenders it is necessary to consider the nature of the obligations imposed on those offenders; the consequences for failing to comply with those obligations; and how those obligations may impact upon their everyday lives and future behaviour.

Matters Beyond the Scope of the Reference

Community notification

No Australian jurisdiction, including Western Australia, presently allows for public access to information on the Australian National Child Offender Register (ANCOR).[5] In contrast, sex offender registration schemes in a number of overseas jurisdictions allow for various

1. The *Community Protection (Offender Reporting) Act 2004* (WA) provides for the registration of offenders who commit sexual offences against adults but these provisions have not yet commenced. The legislation also provides for the registration of offenders who have been sentenced for the murder of a child irrespective of whether there was a sexual motive for the crime.
2. *Community Protection (Offender Reporting) Act 2004* (WA) s 115.
3. The Commission uses the terms 'juvenile reportable offenders' and 'juvenile child sex offenders' to refer to offenders who were children when they committed the relevant offence. The terms 'adult reportable offenders' and 'adult child sex offenders' are used to refer to offenders who committed the relevant offence when they were over the age of 18 years: see further Chapter One, 'Terminology'.
4. For example, an adult offender who was not aware at the time of committing the offence that it is against the law to engage in consensual sexual activity with a child under the age of 16 years, and 'consensual' sexual activities between very young adults and older 'underage' children: see Chapter Six, 'Consensual sexual activity'.
5. Although, as noted below, there have been calls for public registers in some Australian jurisdictions.

forms of community notification.[6] These community notification schemes have often been implemented in response to public outcry following highly publicised child abductions and murders.

In the United States federal community notification laws (commonly referred to as 'Megan's laws') were established after seven-year-old Megan Kanka was sexually assaulted and murdered in 1994 by her neighbour (who was a convicted child sex offender). Her parents successfully campaigned for public access to the existing sex offender register.[7] By 1996 the federal sex offender registration laws were amended to ensure that there was a minimum level of community notification but states were free to provide for greater public access if they so wished.[8]

Similarly, in the United Kingdom the abduction and murder of eight-year-old Sarah Payne in 2000 resulted in calls for public naming of sex offenders.[9] The media, in particular, strongly promoted open access to the existing sex offender register.[10] The government resisted these calls but continued to strengthen the sex offender registration laws.[11] In 2008 a limited form of public notification was piloted in the United Kingdom.[12] On 2 August 2010 the United Kingdom Home Office issued a media release stating that the 'Child Sex Offender Disclosure Scheme' would be rolled out nationally. Under this scheme members of the public (eg, parents, guardians, carers and family members) can ask the police if a particular individual (who has access to their children) has prior convictions for child sexual offences. If so, and if the person is considered to pose a risk to the child or children, the information can be disclosed.[13]

Recently, there have been calls for the establishment of public sex offender registers in Australia. In September 2009 the Hon Reverend Fred Nile introduced, as a private members Bill, the Child Protection (Nicole's Law) Bill 2009 (NSW). During the second reading speech he explained that the Bill was named in memory of five-year-old Nicole Hanns who was murdered in 1974.[14] It has been observed that since the perpetrator of this crime was released from custody there have been pleas for a 'Megan's Law' to be introduced in New South Wales.[15] This Bill provides that the New South Wales Commissioner of Police is to make certain information about registered sex offenders (including their name, photograph, physical description, details of reportable offences and the suburb and postcode of their current residential address) available on the police website and, further, that this information should be available to be viewed at each police station at no cost during office hours. The Bill has not progressed since 22 October 2009.[16] On 14 April 2010 the Child Protection (More Stringent Offender Reporting) Amendment Bill 2010 (Qld) (also a private members Bill) was introduced into the Queensland Parliament. In addition to strengthening the reporting requirements under the existing sex offender registration scheme, this private member's Bill provides that the Commissioner of Police is to publish on the police website the names and photographs of reportable

6. Varying levels of community notification apply in different United States jurisdictions. In many instances, the most liberal community notification arrangements apply to high-risk offenders while the most restrictive forms of notification apply to low-risk offenders. The different types of community notification range from very extensive notification via internet postings and media alerts to restricted notification to particular members of the public who may have a specific interest in an individual offender: Tewksbury R & Lees B, 'Perceptions of Punishment: How registered sex offenders view registries' (2007) 53 *Crime and Delinquency* 380, 382.
7. Law Reform Commission of Hong Kong, *Sexual Offences Records Checks for Child-related Work: Interim proposals*, Report (2010) [3.4]. See also United Kingdom, House of Commons Library, *Paedophiles*, Standard Note SN/HA/1692 (1 April 2009) 8; Swain M, 'Registration of Paedophiles' (1997) 12 *New South Wales Parliamentary Library Research Service Briefing Paper* 22.
8. Hinds L & Daly K, 'The War on Sex Offenders: Community notification in perspective' (2001) 34 *Australian and New Zealand Journal of Criminology* 256, 263. The first sex offender registration scheme in Canada (established in Ontario by the *Christopher's Law (Sex Offender Registry) Act 2000*) was also named in memory of a child victim (11-year-old Christopher Stephenson who was abducted, sexually abused and murdered in 1988): see Dupuis T, *Bill S-2: Protecting Victims from Sex Offenders Act: Legislative summary* (Canadian Parliamentary Information and Research Service, 2010) 4. A national sex offender register was subsequently established in 2004 by the *Sex Offender Information Registration Act 2004* (Canada). So far, Canada has resisted calls for a public register.
9. Thomas T, 'The Sex Offender Register, Community Notification and Some Reflections on Privacy' in Harrison K (ed), *Managing High-Risk Sex Offenders in the Community: Risk management, treatment and social responsibility* (Uffculme: Willan Publishing, 2010) 67.
10. Thomas T, 'When Public Protection Becomes Punishment? The UK Use of Civil Measures to Contain the Sex Offender (2005) 10 *European Journal on Criminal Policy and Research* 337, 341.
11. United Kingdom, House of Commons Library, *Paedophiles*, Standard Note SN/HA/1692 (1 April 2009) 9.
12. Under this pilot scheme an 'interested person' would register his or her interest in a named person and the police were required to consider disclosure if they believed that the named person posed a risk of harm to children: United Kingdom Home Office, *Review of the Protection of Children from Sex Offenders* (2007) 10–11.
13. United Kingdom Home Office, *National Rollout of Scheme to Protect Children*, Press Release (2 August 2010).
14. New South Wales, *Parliamentary Debates*, Legislative Council, 18128, 24 September 2009 (Hon Fred Nile).
15. Simpson R, '"Megan's Law" and Other Forms of Sex-Offender Registration' (1999) 22 *New South Wales Parliamentary Library Research Service Briefing* 1.
16. New South Wales, *Parliamentary Debates*, Legislative Council, 18128, 24 September 2009; 18526, 22 October 2009 (Hon Fred Nile).

offenders who have failed to comply with their reporting requirements for a period of at least three months.[17]

The Commission understands that the Western Australian government is currently planning the introduction of a public sex offender register in this state.[18] This proposal follows the murder in 2006 of an eight-year-old girl in a Perth shopping centre. A recent article in *The West Australian* noted that the girl's father continues to lobby for the introduction of a 'public register of convicted paedophiles'.[19] The details of the government's proposal are yet to be released; however, a media statement issued by the Attorney General in early 2009 stated that the 'model which is currently being considered would enable community members to type in their addresses and view photographs of sex offenders living in close proximity'.[20] It was also stated that the public sex offender register would be likely to include the most serious registered offenders as well as offenders who have breached their reporting requirements under the CPOR Act.

Underpinning community notification schemes is the view that if members of the public are aware of the identity and location of convicted child sex offenders they will be in a better position to protect their children from abuse. However, various commentators have warned that community notification schemes can have unintended consequences. Potential problems include that community notification may drive offenders 'underground'; reduce compliance with registration requirements; lead to vigilantism (including attacks on and harassment of innocent persons); provide a 'false sense of security' (because the public may believe that all people who are potentially dangerous to children are included on the register); and may discourage reintegration and rehabilitation.[21]

The Commission's terms of reference do not include an examination of the merits of establishing a public sex offender register in this state. However, the Commission is of the view that in conducting this reference it is necessary to keep in mind that information about certain Western Australian reportable child sex offenders may become publicly available in the near future.[22] In other words, community notification is a very real potential consequence of registration under the CPOR Act and this only serves to increase the need to ensure that the provisions of the CPOR Act do not apply too broadly.

Expanding the register to include adult sex offenders

The CPOR Act also provides for the registration and reporting of offenders who commit sexual offences against adults (adult sex offenders); however, these provisions have not yet commenced.[23] The Commission

17. Child Protection (More Stringent Offender Reporting) Amendment Bill 2010 (Qld) cl 8. Under this clause, the Commissioner of Police is also required to publish a statement that the reportable offender is alleged to have failed to comply with his or her reporting requirements and that the offender is wanted for questioning by the police.
18. A recent government 'Financial Projection Statement' states that $5.6 million will be spent over a four-year period to implement amendments to the *Community Protection (Offender Reporting) Act 2004* (WA) including the 'maintenance of a public register of information regarding reportable and dangerous sexual offenders' and $2.9 million will be spent in 2010–11 on ICT infrastructure to implement the register: Western Australian Government, *Government Mid-year Financial Projection Statement 2010–2011* (2010) 97–8.
19. Eliot L, 'Dad's Drive for Paedophile List', *The West Australian,* 26 June 2010, 21.
20. Attorney General, Christian Porter, *Young Offenders*, Media response (29 January 2009).
21. See, eg, New South Wales, *Parliamentary Debates*, Legislative Assembly, 1 June 2000, 6475 (Mr P Whelan, Minister for Police); Hinds L & Daly K, 'The War on Sex Offenders: Community notification in perspective' (2001) 34 *Australian and New Zealand Journal of Criminology* 256, 265–7; Ronken C & Lincoln R, 'Deborah's Law: The effects of naming and shaming on sex offenders in Australia' [2001] *Bond University Humanities and Social Sciences Papers* 7–12; Hunt D, *Child Protection Through Offender Registration* (2001) 13 *Judicial Officers' Bulletin* 65, 66. South African Law Commission, *Sexual Offences*, Project No 107, Report (2002) 268–9; New South Wales Ombudsman, *Review of the Child Protection Register: Report under s 25(1) of the Child Protection (Offenders Registration) Act 2000* (2005) 149; Warner K, 'Sentencing Review 2005–2006' (2006) 30 *Criminal Law Journal* 373, 389–90; South Australia, *Parliamentary Debates*, Legislative Council, 28 September 2006, 789 (P Holloway, Minister for Police); New South Wales Sentencing Council, *Penalties Relating to Sexual Assault Offences in New South Wales*, Vol 3 (2009) [7.42]; Victorian Department of Justice, *Sex Offender Programs: Increasing community safety* <http://www.vscn.org.au/pages/documents/conf2004/owen.pdf>; Law Reform Commission of Hong Kong, *Sexual Offences Records Checks for Child-related Work: Interim proposals*, Report (2010) [4.10]–[4.11]. The Australasian Police Ministers' Council working party (which developed the national model for the child sex offender registration laws in Australia) strongly opposed public access to the proposed national child sex offender register. It stated that 'available research suggests that public notification does not reduce recidivism amongst child sex offenders' and noted a number of concerns (such as those discussed above) with community notification schemes: Inter-jurisdictional Working Party, *Child Protection Offender Registration with Police: A national approach,* Report to the Australasian Police Ministers' Council (2003) 163.
22. It has been reported that the Attorney General does not plan to include cases involving consensual sexual activity between two young people on a public register: Banks A, 'Sex Register Laws for Review', *The West Australian*, 14 April 2009, 5.
23. See *Community Protection (Offender Reporting) Act 2004* (WA) s 12 & sch 3. Victoria and Tasmania presently enable registration of adult sex offenders but registration is not automatic: see *Sex Offenders Registration Act 2004* (Vic) sch 3 & 4; *Community Protection (Offender Reporting) Act 2005* (Tas) sch 1–3. The Commission notes that sch 1 of the *Community Protection (Offender Reporting) Act 2004* (WA)—which has commenced operation—includes two offences that could involve either an adult victim or a child victim (ie, sexual offences against

is not aware when (or if) these provisions will become operative. In April 2010, *The West Australian* reported that the Minister for Police intended to raise the issue of registration of adult sex offenders with the Commissioner of Police and the Attorney General.[24] This article also noted that the inclusion of adult sex offenders on ANCOR may require significant additional police resources.[25]

The Commission notes that at the time the CPOR Act was enacted the *Dangerous Sex Offenders Act 2006* (WA) (which provides for the continued detention or community supervision of dangerous sex offenders) had not yet commenced. Under this legislation, an application for a continuing detention or supervision order can be made against an offender 'who is under sentence of imprisonment wholly or in part for a serious sexual offence'.[26] During consultations with the Western Australia Police the Commission was told that the *Dangerous Sex Offenders Act* captures the most serious or high-risk adult sex offenders and therefore it was suggested that the relevant parts of the CPOR Act dealing with the registration of adult sex offenders should be repealed.[27] The Commission understands that the *Dangerous Sex Offenders Act* is currently being reviewed by the Department of the Attorney General.

The absence of reporting obligations for adult sex offenders is referred to in this Paper where relevant because, in some circumstances, it is apparent that the exclusion of adult sex offences creates anomalies.[28] However, consideration of whether the reporting requirements under the CPOR Act should be extended to adult sex offenders is beyond the Commission's terms of reference.[29]

relatives and sexual offences against incapable persons under ss 329 & 330 of the *Criminal Code*). The Commission has been told that there are presently a small number of offenders in Western Australia who are required to register on ANCOR because they have been convicted of committing sexual offences against an adult relative or an incapable person over the age of 18 years: Martyn Clancy-Lowe, State Coordinator, Sex Offenders Management Squad, Western Australia Police, email consultation (3 September 2010).

24. Banks A, 'Serial Rapists Escape Police Monitoring', *The West Australian,* 15 April 2010, 13.
25. In 2009 the New South Wales Sentencing Council recommended that the viability of extending the New South Wales sex offender registration laws to adult sex offenders should be investigated but it noted that an increase in the number of registered offenders may 'dilute the capacity of the NSW police to manage the scheme': New South Wales Sentencing Council, *Penalties Relating to Sexual Assault Offences in New South Wales*, Vol 3 (2009) [10.37].
26. *Dangerous Sexual Offenders Act 2006* (WA) s 8(1). A serious sexual offence is defined by reference to s 106A of the *Evidence Act 1906* (WA) and in general terms means a sexual offence that carries a maximum penalty of at least seven years' imprisonment.
27. Consultation with Detective Inspector Paul Steel (Sex Crime Division) and Martyn Clancy-Lowe (State Coordinator Sex Offender Management Squad), Western Australia Police (28 June 2010).
28. For example, an adult who is convicted for indecently assaulting another adult is not subject to registration but a juvenile convicted for indecently assaulting a child is subject to registration.
29. The national working party, which recommended the establishment of a nationally consistent sex offender registration scheme in Australia, noted that many international schemes include adult sex offenders. It also observed that there is research to suggest that for some sex offenders there is a degree of 'cross-over between adult and child victims'. Nonetheless, it was recommended that the scheme should be initially limited to child sex offences: Inter-jurisdictional Working Party, *Child Protection Offender Registration with Police: A national approach,* Report to the Australasian Police Ministers' Council (2003) 54–6.

Methodology

In preparing this Discussion Paper the Commission has undertaken research in relation to sex offender registration laws in all Australian states and territories as well as similar schemes in international jurisdictions. The Commission has found that legislation and policies concerning sex offender registration schemes are in constant flux. Accordingly, all references to Australian and overseas legislation in this Discussion Paper are current as at the end of October 2010.

Consultations

The Commission has consulted with a large number and variety of agencies in both the metropolitan area and regional areas[1] in order to properly assess the practical implications of the *Community Protection (Offender Reporting) Act 2004* (WA) ('the CPOR Act') for those reportable offenders who fit within the Commission's terms of reference. The Commission has also sought the provision of case examples to demonstrate any problems or concerns in regard to the impact of the legislation on both juvenile and adult reportable offenders. The Commission has, wherever possible, endeavoured to access the transcript of the original sentencing proceedings in order to ensure that the most objective assessment of the circumstances of the case has been considered. However, this has not always been possible and in some instances the Commission has been informed about the facts of a particular case by lawyers involved in the case or other sources.

Agencies and individuals consulted include the Western Australia Police, Office of the Director of Public Prosecutions, Legal Aid WA, Aboriginal Legal Service, Mental Health Law Centre, Department for Child Protection, Department of Corrective Services, Commissioner for Children and Young People, Child Witness Service, Victim Support Service, members of the judiciary and individual lawyers. A list of people consulted for this reference appears in Appendix B.

An opinion has also been commissioned from clinical psychologist, Christabel Chamarette in relation to the impact of sex offender registration on the rehabilitation of juvenile offenders and the consequences of 'labelling' children 'sex offenders'. In addition, the Commission has received written comments from the National Children's and Youth Law Centre and has been provided with the Law Council of Australia's 'Policy Statement on Registration and Reporting Obligations for Child Sex Offenders'. These materials have assisted the Commission in reaching its proposals for reform in this Paper.

1. In particular, the Commission visited Broome and Kununurra in July 2010.

About this Paper

This Paper is divided into six chapters. Chapter One clarifies the terminology used by the Commission in this Paper in order to ensure that various terms and phrases are clearly understood at the outset. This chapter also includes general background material concerning child sex offences and sex offender registration and provides a synopsis of the key issues impacting on reform in this area. Chapter Two provides an overview of the CPOR Act and explains how it works in practice. Chapter Three includes a description of different types of sex offender registration schemes and discusses the background to the development of a model for a national child sex offender register in Australia.

Chapter Four examines the impact of the general criminal law on a person's registration status. The substantive criminal law varies between Australian states and territories and therefore people who are included on the register in Western Australia may not have even been guilty of having committed an offence if the relevant conduct had occurred in another jurisdiction. Some case examples are included to illustrate this point. The problems and issues in relation to the application of the CPOR Act to juvenile offenders are examined in Chapter Five. In this chapter the Commission includes issues raised during consultations and various case examples. When discussing individual cases, the Commission has exercised great caution in regard to identifying details. No identifying information has been provided in order to protect the anonymity of those subject to registration. This applies even if the case has been reported and the name of the offender is publicly available. In addition, where information has been obtained from individuals consulted (eg, lawyers) the Commission has refrained from referencing the name of the lawyer in case it enables the offender to be identified. Chapter Five also contains the Commission's proposals for reform in relation to juvenile reportable offenders. Similarly, Chapter Six considers the impact of the CPOR Act on adult

reportable offenders and again refers to anonymised case examples to demonstrate the relevant issues. Proposals for reform in relation to adult reportable offenders are included in this chapter.

This Discussion Paper contains a total of 19 proposals for reform and eight specific questions (see Appendix A). The Commission encourages those involved in the criminal justice system and child protection, as well as any other interested person, to respond to the proposals and questions in this Paper. The Commission would also like to hear from reportable offenders who fit within the Commission's terms of reference (or their families) about the direct impact (whether positive or negative) of the legislation on their lives. The Commission appreciates the sensitive nature of many aspects of this reference and confirms that submissions can be made on a confidential or anonymous basis. If you would like your submission to remain confidential please indicate this clearly at the beginning of your submission.

The Commission will take into account submissions made in writing, by telephone, by fax, or by email. Those who wish to request a meeting with the Commission may telephone for an appointment.

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Submissions received by 31 May 2011 will be considered by the Commission in the preparation of its Final Report.

Chapter One

The Commission's Approach

Contents

Introduction 13

Terminology 14

Sex offender registration and community notification 14

Sex offenders 14

Consent 16

Characteristics of child sex offenders 17

Child sex offenders 17

Who are they? 17

Who do they offend against? 19

Have they previously been convicted of a sexual offence? 20

Are they likely to reoffend? 20

Sexual activity between young people 22

Key issues impacting on reform 25

Introduction

The Commission acknowledges at the outset that the subject matter of this reference is potentially confronting – the sexual abuse of children is disturbing to most members of the community. Some members of the public may believe that people who commit sexual offences against children should be subject to the toughest sentences and strictest regimes possible. However, the Commission's terms of reference require it to consider the ambit of the present Western Australian sex offender registration scheme in a dispassionate and reasoned manner. The reality is that not all child sexual offences and not all child sex offenders are the same. The central issue considered in this Discussion Paper is whether the registration scheme should automatically apply to *all* offenders convicted of committing a sexually based offence involving a child. In order to assess this question it is necessary to understand the purpose and operation of the scheme and the different types of offending behaviour that may lead to registration. It is also important to appreciate that the term 'child sex offender' may mean different things to different people. For example, the term 'child sex offender' is often closely associated with the term 'paedophile'; however, child sex offenders under the Western Australian sex offender registration scheme potentially include adolescents who have engaged in consensual sexual activity with another young person of a similar age. Therefore, views about whether child sex offenders should be subject to mandatory registration may possibly be misguided if they are not based upon accurate knowledge of how the system works in practice and who is (or may be) caught by the provisions of the *Community Protection (Offender Reporting) Act 2004* (WA).[1]

Accordingly, in this chapter the Commission discusses the terminology used in this Paper in order to ensure that people responding to the proposals and questions in this Paper do so in an informed manner. For the same reason this chapter provides some general background about the nature of sexual offending against children and the characteristics of child sex offenders (both juvenile and adult offenders). Following this, the key issues impacting on reform in this area are discussed.

1. Chapter Two examines in detail the operation and scope of the *Community Protection (Offender Reporting) Act 2004* (WA).

Terminology

Sex Offender Registration and Community Notification

The phrase **'sex offender registration'** is generally used to refer to the requirement for sex offenders to register and report their personal details to justice or law enforcement agencies for a specified period of time.[1] Some sex offender registration schemes (such as those available in the United States) also involve **'community notification'**; that is, information on the register is made available to members of the public. There are various forms of community notification. For example, 'active notification' which involves broad and unsolicited advice to members of the public such as internet postings and newspapers advertisements; 'limited disclosure' which involves notification to particular groups in the community such as schools; and 'passive notification' which requires members of the public to actively request information about specific offenders.[2]

Such public registers are officially sanctioned and should not be confused with unofficial lists of convicted sex offenders. For example, *The Australian Paedophile and Sex Offender Index* published by journalist Deborah Coddington is an unofficial list of convicted sex offenders collated from publicly available information such as media reports and court decisions.[3] These types of privately maintained lists are not comprehensive; they do not include information about all convicted child sex offenders. Usually, these lists focus on the more sensational crimes that have been reported in the media. Furthermore, unofficial schemes are more likely to contain errors because the published information is not always confirmed by official sources and the information may not be updated or corrected.[4]

The Commission adopts the term 'sex offender registration' to refer to officially sanctioned and non-public schemes that require sex offenders to register with law enforcement agencies. The phrase 'community notification' is used to refer to schemes that enable members of the public to access or be notified of information on the register.

Sex Offenders

Internationally, sex offender registration schemes vary. Some apply to all types of sex offenders while others are restricted to sex offenders who have committed offences against children. Some extend to other offences such as murder and kidnapping.[5] Hence, in the context of this reference, it is important to distinguish between sex offenders who commit offences against children and sex offenders who commit offences against adults. Currently, the *Community Protection (Offender Reporting) Act 2004* (WA) (the CPOR Act) applies, in virtually all cases, to offenders who have committed offences against children.[6] The legislation does provide for the scheme to be extended to sexual offences committed against adults

1. The report by the Australasian Police Ministers' Council working party in relation to the development of a nationally consistent child sex offender registration scheme used the phrase 'child protection registration' to refer to the requirement for child sex offenders, and other defined categories of serious offenders against children, to keep a government agency (usually police) informed of certain personal details for a period of time after they are released into the community: Inter-jurisdictional Working Party, *Child Protection Offender Registration with Police: A national approach,* Report to the Australasian Police Ministers' Council (2003) 34.
2. Tewksbury R & Lees B, 'Perceptions of Punishment: How registered sex offenders view registries' (2007) 53 *Crime and Delinquency* 380, 382.
3. Ronken C & Lincoln R, 'Deborah's Law: The effects of naming and shaming on sex offenders in Australia' [2001] *Bond University Humanities and Social Sciences Papers* 2. Another unofficial sex offender list is 'Movement against Kindred Offenders' (Mako): see <http://www.mako.org.au/home.html>.
4. See Swain M, 'Registration of Paedophiles' (1997) 12 *New South Wales Parliamentary Library Research Service Briefing Paper* 12; Wood JRT, *Royal Commission into the New South Wales Police Service*, Final Report (1997) vol V: The Paedophile Inquiry, [18.93].
5. The sex offender registration scheme in the United Kingdom applies to sexual offences committed against both adults and children: *Sexual Offences Act 2003* (UK) sch 3. Under the New South Wales legislation an offence of kidnapping a child (unless it was committed by a parent or guardian of the child) is a registrable offence: *Child Protection (Offenders Registration) Act 2000* (NSW) s 3. It has been observed that some sex offender registration schemes extend their application to violent and drug offences: Shallies B, 'Sex Offender Registration: Legislation impacting on Victoria Police [2005] *Victorian Police Association Journal* 20.
6. The *Community Protection (Offender Reporting) Act 2004* (WA) sch 1 applies to child sexual offences as well as murder committed against a child. In addition, it applies to sexual offences committed against relatives and sexual offences committed against an incapable person; these offences may involve either child or adult victims.

in the future; however, as discussed in the Introduction to this Paper, the Commission is not aware of if (and when) these provisions will commence.[7]

Further, it is vital to differentiate between those who were minors[8] and those who were adults at the time of the relevant offending behaviour. Accordingly, in order to make these distinctions clear, the Commission has adopted the following terms in this Paper:

Sex offender: an offender who has committed a sexual offence.

Child sex offender: an offender who has committed a sexual offence *against* a person under the age of 18 years.

Adult sex offender: an offender who has committed a sexual offence *against* a person over the age of 18 years.

Juvenile child sex offender: an offender who has committed a sexual offence against a child while the offender was under the age of 18 years.[9]

Adult child sex offender: an offender who is over the age of 18 years at the time he or she committed a sexual offence against a child.

Juvenile reportable offender: a reportable offender under the *Community Protection (Offender Reporting) Act 2004* who was under the age of 18 years at the time of committing the reportable offence.

Adult reportable offender: a reportable offender under the *Community Protection (Offender Reporting) Act 2004* who was 18 years or over at the time of committing the reportable offence.

7. See Introduction, 'Expanding the register to adult sex offenders'. See also *Community Protection (Offender Reporting) Act 2004* (WA) s 12 & sch 3.
8. That is, under the age of 18 years.
9. The Commission acknowledges that labelling a child as a 'sex offender' is problematic. In this regard, it has been observed in a recent study that 'the term "adolescents who engage in sexually inappropriate behaviour" is preferable to "adolescent sex offender" because of its emphasis on the behaviour rather than the criminality of the behaviour'. Nonetheless, in that study the term 'adolescent sex offender' was used in order to ensure consistency with the literature and for ease of reference: see Grant J et at, 'Intrafamilial Adolescent Sex Offenders: Psychological profile and treatment' (2009) 375 *Australian Institute of Criminology Trends and Issues in Crime and Criminal Justice* 1–2. For further discussion of labelling, see Chapter Five, 'Labelling and rehabilitation'. The Commission also notes that in general discussions, the term 'juvenile offender' is used to refer to a person who is a minor at the time of the relevant offending behaviour and the term 'adult offender' is used to refer to a person who is an adult at the time of the relevant offending behaviour.

As noted in the introduction to this chapter, the term 'paedophile' is sometimes used interchangeably with the term 'child sex offender'. It has been observed that the general public tend to use the term 'paedophile' to describe offenders who have sexually abused young children.[10] However, as a senior analyst from the former National Crime Authority commented 'the clinical definition of the term is very different from its application in law enforcement, which is different again to how the general public interprets it'.[11] It was reported that the National Crime Authority used the term to refer to 'adults who act on their sexual preference for children'.[12] In contrast, definitions for medical purposes appear to be focussed on sexual urges and/or behaviour in relation to pre-pubescent children (usually 13 years or younger).[13] Even within the medical fraternity, there are differences of opinion as to what should be included within the meaning of paedophilia.[14] In 2000 the American Psychiatric Association determined that to be included within the term 'paedophilia' an offender must, among other things, be at least 16 years old and at least five years older than the victim and the victim must not be more than 12 or 13 years of age.[15]

The term 'paedophile' is commonly used in the media and in political contexts.[16] As recently as September 2010, *The West Australian* reported that the Minister of Police, Rob Johnson 'revealed in the Legislative Council ... that 2179 WA paedophiles are listed on the Australian National Child (Sex) Offender Register'.[17] In fact, an

10. Swain M, 'Registration of Paedophiles' (1997) 12 *New South Wales Parliamentary Library Research Service Briefing Paper* 9.
11. Miller K, 'Detection and Reporting of Paedophilia: A law enforcement perspective' (Paper delivered at the Australian Institute of Criminology conference, *Paedophilia: Policy and Prevention*, Sydney, April 1997) 2. It was noted that the clinical definition usually refers to a person with a sexual preference for pre-pubescent children.
12. Ibid.
13. Australian Government, Parliamentary Joint Committee on the National Crime Authority, *Organised Criminal Paedophile Activity* (1995) [2.4]–[2.6].
14. Harrison, K et al, 'Paedophilia: Definitions and aetiology' in Harrison K (ed), *Managing High-Risk Sex Offenders in the Community: Risk management, treatment and social responsibility* (Uffculme: Willan Publishing, 2010) 5.
15. Ibid. See also Swain M, 'Registration of Paedophiles' (1997) 12 *New South Wales Parliamentary Library Research Service Briefing Paper* 7.
16. For example, on one day in Parliament during debate in relation to the Community Protection (Offender Reporting) Bill 2004 (WA), the terms 'paedophile' and 'paedophilia' were used no less than 28 times. In contrast, the terms 'sex offender' or 'child sex offender' were used a total of 25 times: Western Australia, *Parliamentary Debates*, Legislative Assembly, 19 October 2004, 6819c-6827a. In 2009 a newspaper article reported that there were more than 1500 paedophiles on the Western Australian sex offender register: Phillips Y, 'Pressure Increases to Name Paedophiles', *The West Australian*, 6 July 2009, 17.
17. O'Connell R, 'Paedophiles' Details Could Be Published', *The West Australian*, 24 September 2010, 17.

examination of Hansard shows that no such statement was made. On 16 September 2010, Peter Collier (representing the Minister of Police) said that 'there were 2173 reportable offenders supervised by WA Police under ANCOR'.[18] As will become very clear throughout this Discussion Paper, there are a significant number of Western Australian registered offenders who would not ordinarily be regarded as paedophiles by members of the community. The Commission has chosen to avoid using this term (unless necessary given the context of the discussion). The CPOR Act does not create a paedophile register – it is register of offenders (both juvenile and adults) who have committed a variety of sexual offences against children.

Consent

A number of sexual offences are listed in the *Criminal Code* (WA).[19] Some have general application and, therefore, can involve either an adult or a child victim (eg, sexual penetration without consent).[20] On the other hand, there are a number of sexual offences that are child-specific. These offences can be separated into three general categories: sexual offences against a child under the age of 13 years;[21] sexual offences against a child of or over the age of 13 years but under the age of 16 years;[22] and sexual offences against a child under the age of 18 years by a person in authority.[23] For these child-specific offences, the issue of consent is irrelevant for determining criminal responsibility. A person is guilty simply by engaging in the proscribed sexual conduct with a child under the relevant age – it does not matter if the victim instigated the sexual activity or willingly participated in it.[24] This rule applies as equally to a mature adult who engages in sexual activity with a young child as it does to an adolescent who engages in sexual activity with a person of a similar age.[25]

Nevertheless, the fact that a child victim willingly participated in the sexual activity may be relevant when assessing the seriousness of the offence and the culpability of the offender.[26] Certainly, in the context of this reference, cases involving 'consensual' sexual activity between two young people have been highlighted as one example where sex offender registration may not be appropriate. In order to avoid confusion between the legal concept of consent (as discussed above) and its ordinary factual meaning, the Commission will endeavour as far as possible to adopt phrases such as 'the victim of the offence was a willing participant' rather than using the term 'consent'.[27] However, the phrase 'consensual sexual activity' has been used in this Paper for ease of reference to indicate sexual activity that was factually (although not legally) consensual.

18. Western Australia, *Parliamentary Debates,* Legislative Council, 16 September 2010, 6774 (Mr P Collier).
19. See *Criminal Code* (WA) ch XXXI.
20. *Criminal Code* (WA) s 325.
21. *Criminal Code* (WA) s 320.
22. *Criminal Code* (WA) s 321.
23. *Criminal Code* (WA) s 322.
24. Age of consent laws vary throughout Australia. In most Australian jurisdictions the age of consent is 16 years. However, in South Australia and Tasmania the age of consent is 17 years. In Queensland, the age of consent for vaginal sex is 16 years; however, to legally engage in sodomy a person must be over the age of 18 years.
25. However, as discussed later, some jurisdictions vary in this regard: see Chapter Four, 'Similarity of age defence'.
26. See, eg, *The State of Western Australia v SJH* [2010] WASCA 40, [69] (Wheeler JA).
27. In this regard, the Commission notes that the Victorian Sentencing Advisory Council used the phrases 'legal consent' and 'factual consent' in its report on penalties for sexual offences committed against a child under the age of 16 years: Victorian Sentencing Advisory Council, *Maximum Penalties for Sexual Penetration with a Child under 16*, Report (2009) 56.

Characteristics of child sex offenders

This section provides general background material about the characteristics of sex offenders and, more specifically, child sex offenders. Child sex offenders are at times depicted as dangerous predators and, as one commentator has observed, they are often portrayed as 'strangers, lurking in areas where children are present such as playgrounds and parks'.[1] While it is understandable that shocking and brutal crimes committed against children are reported in the media, there is a risk that a focus on these types of crimes may cause some members of the public to believe that the perpetrators represent the typical child sex offender.[2] In turn, this perception may influence community opinion about sex offender registration. The reality is the 'typical' child sex offender is highly unlikely to be a 'predatory' stranger but rather someone well known to the victim.

It has also been asserted that some members of the public believe that sex offenders are 'sick', that they cannot be treated and that they will 'inevitably reoffend'.[3] It is also sometimes thought that sex offenders are more likely to reoffend than any other type of criminal.[4] Assessing the accuracy of such perceptions is not simple because sexual offences (including sexual offences committed against children) are significantly underreported.[5] Furthermore, allegations of sexual offending are notoriously difficult to prove. For example, in Australia in 2005 there were 143 900 incidents of sexual assault reported to the police and of these, only 1383 (0.9%) resulted in a conviction.[6] Hence, it is difficult to gauge the true level of child sexual offending in the community[7] and to accurately describe the characteristics of people who commit these offences.[8] However, it is possible to study the characteristics of *convicted* child sex offenders and, because the Western Australian sex offender registration scheme only applies to child sex offenders who have been found guilty, some insight can be gained into the characteristics of offenders who are likely to be subject to registration and reporting requirements.

Child Sex Offenders

Who are they?

As noted above, the vast majority of child sex offenders are well known to their victim. A brochure published by the Western Australian Department for Community Development observes that '[c]hildren are usually sexually abused by someone they know' and only in 'a few cases children are sexually abused by strangers'.[9] Similarly, the Victorian Parliamentary Crime Prevention Committee stated in 1995 that:

> Child sexual assaults are predominantly crimes between people known to one another, and are crimes most often committed in the offender's or victim's home.[10]

1. Swain M, 'Registration of Paedophiles' (1997) 12 *New South Wales Parliamentary Library Research Service Briefing Paper* 9. See also Tomison A, 'Update on Child Sexual Abuse' (1995) 5 *National Child Protection Clearinghouse Issues in Child Abuse Prevention* 5 <http://www.aifs.gov.au/nch/pubs/issues/issues5/issues5.html>.
2. See Olver M & Barlow A, 'Public Attitudes toward Sex Offenders and Their Relationship to Personality Traits and Demographic Characteristics' (2010) 28 *Behavioural Sciences and the Law* 832. A study of community attitudes about child abuse in Australia found that 17% of those surveyed 'believed that children were unlikely to know the person who abused them': Tucci J et al, *Doing Nothing Hurts Children: Community attitudes about child abuse and child protection in Australia* (Ringwood: Australian Childhood Foundation, 2010) 18.
3. See Gelb K, *Recidivism of Sex Offenders*, Research Paper (Melbourne: Victorian Sentencing Advisory Council, 2007) 10.
4. See further below, 'Are they likely to reoffend?'
5. In Western Australia it has been observed that only about 10% of sexual assaults are reported to police: Community Development and Justice Standing Committee, Legislative Assembly, *Inquiry into the Prosecution of Assaults and Sexual Offences*, Report No 6 (2008) 54. It has also been commented that '[p]revalence studies suggest that about half of the victims of child sexual abuse never report the abuse to another person': Queensland Crime Commission & Queensland Police Service, *Child Sexual Abuse in Queensland: The nature and extent*, Project AXIS (2000) 12. See also Gelb K, *Recidivism of Sex Offenders*, Research Paper (Melbourne: Victorian Sentencing Advisory Council, 2007) 3 where it was stated that the ABS Personal Safety Survey for 2006 showed that 18.9% of people who said that they had experienced sexual assault in the previous 12 months reported the incident to police.
6. Gelb, ibid 4.
7. Queensland Crime Commission & Queensland Police Service, *Child Sexual Abuse in Queensland: The nature and extent*, Project AXIS (2000) 19.
8. Finkelhor D, 'The Prevention of Childhood Sexual Abuse' (2009) 19 *The Future of Children* 169, 172.
9. Western Australia Department for Community Development, *Protecting Children: Information for parents, families and friends* (undated).
10. Victorian Parliament Crime Prevention Committee, *Combating Child Sexual Assault: An integrated model,* Inquiry into Sexual Offences against Children and Adults, First Report (1995) 119. See also National Child Protection Clearinghouse, *Child Abuse*

These observations are consistent with both Australian and overseas research. A number of international studies consistently show that at least three-quarters of child sexual offences are committed by people known to the victim.[11] A study conducted with imprisoned child sex offenders in Queensland (which relied on self-reported data) reported that:

> [Its] findings reinforce what researchers have known for some time—but what is frequently ignored in public debates—that child sexual abuse overwhelmingly involves perpetrators who are related to or known to the victim.[12]

A total of 182 offenders agreed to participate in the study, of which 169 acknowledged their offending behaviour. These 169 offenders were categorised as follows: 79 committed their offences exclusively within a family setting, 60 committed their offences exclusively outside a family setting and 30 were described as mixed offenders (ie, committed offences both within and outside the family). Over half of these 169 offenders reported that they had known their child victim(s) for more than a year before commencing the sexual activity.[13]

Thus, the available evidence clearly suggests that a considerable proportion of child sex offenders do not fit within the stereotypical view of child sex offenders as predatory strangers. As Dr Karen Gelb emphasised, '[w]hile community concern and public fear are typically concentrated on the "stranger danger" that lies at the heart of many legislative changes seen in various countries in recent years, the reality of sexual offending is very different'.[14] In terms of this reference, a large number of convicted—and hence registrable—child sex offenders will be known to their victims (and their families). In some cases, they will be a parent or another family member. As the Chief Justice of Western Australia has observed, sex offender registration schemes have been introduced on the basis of the 'need to protect the community from predatory sexual offenders'; however, the majority of those required to register are people who are

> unlikely to be a danger to the public at large. Their offences have been committed against family members and friends, who will very likely be aware of their conviction and their propensities.[15]

In considering the likely characteristics of convicted child sex offenders it is reasonably well known that the vast majority are male.[16] However, it is less recognised that a substantial proportion of child sex offenders are children themselves.[17] In 1995 the National Child Protection Clearinghouse commented that the 'acknowledgment that children and adolescents may commit acts of sexual abuse has only occurred relatively recently'.[18] In the United Kingdom it has been reported that approximately 30% of child sex offenders are under the age of 18 years.[19] Likewise, a study in the United States found that juvenile offenders account for over one-third of sexual offences against children.[20] A very recent report published by the

Prevention Resource Sheet No 7 (2005) 1. It has been observed that 80% of child sex offences take place in either the home of the offender or the victim: Queensland Crime Commission & Queensland Police Service, *Child Sexual Abuse in Queensland: The nature and extent*, Project AXIS (2000) 60.

11. One researcher has reported that only 14% of child sexual offences involve stranger abuse: Finkelhor D, 'The Prevention of Childhood Sexual Abuse' (2009) 19 *The Future of Children* 169, 172. See also Power H, 'The Crime and Disorder Act 1998: (1) Sex Offenders, privacy and the police' [1999] *Criminal Law Journal* 3, 3; Queensland Crime Commission & Queensland Police Service, *Child Sexual Abuse in Queensland: The nature and extent*, Project AXIS (2000) 55. In Canada it has been reported that 84% of child sexual offences are committed by people known to the victim: Auditor General of Ontario, *Annual Report* (2007) 272. A review in the United Kingdom noted that at least 75% of child sex offenders are known to their victim: United Kingdom Home Office, *Review of the Protection of Children from Sex Offenders* (2007) 5. It has been observed that a study in the United States found that between 10% and 30% of child abuse had been committed by strangers: National Child Protection Clearinghouse, *Child Abuse Prevention Resource Sheet No 7* (2005) 4.
12. Smallbone S & Wortley R, 'Child Sexual Abuse: Offender characteristics and modus operandi' (2001) 193 *Australian Institute of Criminology Trends and Issues* 5.
13. Ibid. (76% of intrafamilial offenders, 27.8% of extrafamilial offenders and 39.1% of mixed offenders reported knowing their victim for more than a year). See also Gelb K, *Recidivism of Sex Offenders*, Research Paper (Melbourne: Victorian Sentencing Advisory Council, 2007) 3.
14. Gelb, ibid 7.
15. Martin W, 'Popular Punitivism: The role of the courts in the development of criminal justice policies' (Paper delivered at the Australian and New Zealand Society of Criminology Conference, Perth, 23 November 2009) 6–8.
16. See, eg, Queensland Crime Commission & Queensland Police Service, *Child Sexual Abuse in Queensland: The nature and extent*, Project AXIS (2000) 51. In the United Kingdom it has been noted that 99% of child sex offenders are male: United Kingdom Home Office, *Review of the Protection of Children from Sex Offenders* (2007) 5. In Western Australia from 1 January 1996 to 31 December 2000, males constituted 97.8% of recorded child sex offenders: Ferrante A & Fernandez J, *Sex Offences Against Children: An overview of statistics from the Western Australian criminal justice system* (Perth: UWA Crime Research Centre, 2002) 8.
17. Grant et al, 'Intrafamilial Adolescent Sex Offenders: Psychological profile and treatment' (2009) 375 *Australian Institute of Criminology Trends and Issues* 1.
18. National Child Protection Clearinghouse, '*Who Abuses Children?*', Child Abuse Prevention Resource Sheet No 7 (2005) 4.
19. United Kingdom Home Office, *Review of the Protection of Children from Sex Offenders* (2007) 5. See also Finkelhor D, 'The Prevention of Childhood Sexual Abuse' (2009) 19 *The Future of Children* 169, 172.
20. Finkelhor D et al, *Juveniles Who Commit Sexual Offenses against Minors* (Washington: Office of Juvenile and Delinquency Prevention, 2009) 1–2.

Australian Crime Commission observed that 'young people are responsible for a significant proportion of sex offences against children'.[21]

Australian Bureau of Statistics (ABS) data shows that for the period 2008–2009 in Western Australia approximately 18% of alleged offenders whose most serious recorded offence was sexual assault were under the age of 18 years.[22] However, this figure relates to all types of sexual offences and is therefore not specific to offences committed against children. It is expected that the proportion of juvenile offenders who commit sexual offences against children could be higher than the proportion of juveniles who commit sexual offences against adults because young people are more likely to commit sexual offences within their own peer group. In this regard, it is important to note that juvenile child sex offenders do not necessarily target younger children.[23]

Another characteristic of child sex offenders is that many have themselves been victims of child sexual abuse. In the Queensland study of imprisoned sex offenders discussed above, over 55% reported that they had been sexually abused as a child.[24] However, the link between child sexual abuse and subsequent sex offending is far from conclusive (especially bearing in mind that the overwhelming majority of recorded child victims are female whereas most child sex offenders are male).[25] Nevertheless, it has been observed that child sex offenders are twice as likely to report having been a victim of childhood sexual abuse than sex offenders who have sexually assaulted adults.[26] It has also been stated that juvenile child sex offenders who have offended against siblings have a higher reported rate of prior sexual (and physical) abuse than juvenile offenders who have offended against non-family members.[27] The possibility that a significant number of child sex offenders have experienced past sexual abuse suggests that early intervention and counselling for child abuse victims is necessary to minimise the risk of these children later becoming sex offenders.[28] As recently observed by Dr Wendy O'Brien, a 'full understanding of the intergenerational cycle of sexual abuse means acknowledging that children and young people with sexualised behaviours are very often children who have experienced harm of some kind, and who then go on to cause harm themselves'.[29]

Who do they offend against?

Overall, girls appear far more likely to be targeted by child sex offenders than boys.[30] During the five-year period from 1 January 1996 to 31 December 2000, girls were victims in approximately 80% of reported child sexual offences in Western Australia.[31] A similar trend appears from recent statistics: for recorded victims of sexual assault in Western Australia in 2009, there were a total of 161 male victims aged between 0 to 19 years compared to 836 female victims in the same age group.[32]

Although some people may believe that the stereotypical child sex offender is an adult male who is 'sexually orientated to pre-pubescent children',[33] the reality is that many child sexual offences are committed against post-pubescent children. ABS data shows that during 2009 there were 18 800 victims of sexual assault recorded by the police in Australia – the most victimised group being 10- to 14-year-olds (representing 25% of all recorded

21. O'Brien W, *Australia's Response to Sexualised or Sexually Abusive Behaviours in Children and Young People* (Canberra: Australian Crime Commission, 2010) 3.
22. ABS, *Recorded Crime – Offenders, 2008–2009,* Table 2: Offenders, age by selected principal offence – Western Australia: 2008–2009.
23. Grubin D, 'Sex Offending against Children: Understanding the risk (1998) 99 *Home Office Police Research Series Paper* v.
24. Smallbone S & Wortley R, 'Child Sexual Abuse: Offender characteristics and modus operandi' (2001) 193 *Australian Institute of Criminology Trends and Issues* 3. However, it has been suggested that sex offenders may falsely claim to have been victimised in order to 'diminish responsibility for their offending behaviour': Queensland Crime Commission & Queensland Police Service, *Child Sexual Abuse in Queensland: The nature and extent*, Project AXIS (2000) 63. See also Gelb K, *Recidivism of Sex Offenders*, Research Paper (Melbourne: Victorian Sentencing Advisory Council, 2007) 18.
25. O'Brien W, *Australia's Response to Sexualised or Sexually Abusive Behaviours in Children and Young People* (Canberra: Australian Crime Commission, 2010) 21.
26. Gelb K, *Recidivism of Sex Offenders*, Research Paper (Melbourne: Victorian Sentencing Advisory Council, 2007) 17.
27. Grant J et al, 'Intrafamilial Adolescent Sex Offenders: Psychological profile and treatment (2009) 375 *Australian Institute of Criminology Trends & Issues in Crime and Criminal Justice* 2.
28. Gelb K, *Recidivism of Sex Offenders*, Research Paper (Melbourne: Victorian Sentencing Advisory Council, 2007) 18.
29. O'Brien W, *Australia's Response to Sexualised or Sexually Abusive Behaviours in Children and Young People* (Canberra: Australian Crime Commission, 2010) 5.
30. See, eg, Queensland Crime Commission & Queensland Police Service, Project AXIS, *Child Sexual Abuse in Queensland: The nature and extent* (2000) 37; Price-Robertson R, 'The Prevalence of Child Abuse and Neglect' (2010) *National Child Protection Clearinghouse* 5. Although the Wood Royal Commission observed that sexual abuse of boys may be significantly underreported because of shame or embarrassment about possible perceptions of homosexual tendencies: Wood JRT, *Royal Commission into the New South Wales Police Service*, Final Report (1997) vol V: The Paedophile Inquiry, [3.9].
31. Ferrante A & Fernandez J, *Sex Offences against Children: An overview of statistics from the Western Australian criminal justice system* (Perth: UWA Crime Research Centre, 2002) 4.
32. ABS, *Recorded Crime – Victims Australia* (2009) Table 5: Victims, sex and age group by selected offences – Western Australia.
33. Finkelhor D, 'The Prevention of Childhood Sexual Abuse' (2009) 19 *The Future of Children* 169, 172.

sexual assaults).[34] According to the ABS, in Western Australia in 2009 there were 243 recorded victims of sexual assault who were aged up to 9 years, 364 victims aged between 10 and 14 years, and 392 victims aged between 15 and 19 years.[35]

Have they previously been convicted of a sexual offence?

When assessing the benefits of criminal justice policies that target sex offenders (such as sex offender registration) it is important to acknowledge that the majority of sex offenders have never previously come to the attention of authorities. While some sex offenders will be 'truly' first time offenders, there will be many who have not previously been convicted because many sexual offences are not reported to authorities and because there is a relatively low conviction rate for those offences that are reported.[36]

It has been observed in relation to sex offender registration and community notification laws in the United States that the 'vast majority of new sexual assaults are not committed by [registered sex offenders], but by first-time sex offenders'.[37] Similarly, a report by Human Rights Watch contends that in the United States 87% of people arrested for sexual offences were people who did not have any prior sexual offence convictions.[38] In 2009, the Victorian Sentencing Advisory Council examined higher court sentencing cases over a two-year period involving sexual penetration offences committed against children. It found that in over 76% of cases involving victims aged less than 10 years, the offender had no prior sexual offence history. For offences involving victims between the ages of 10 and 16, just over 93% of offenders had no prior sexual offence convictions.[39] When commenting on these findings, the Chair of the Sentencing Advisory Council, Professor Arie Freiberg, reportedly stated that for the vast majority of convicted offenders, 'no amount of monitoring or registration would have caught these people'.[40]

Therefore, even if the registration of convicted child sex offenders could be proven to reduce or eliminate reoffending for those who are subject to the laws, there would remain a significant number of previously undetected—and therefore unregistered—child sex offenders in the community.[41] For this reason it is often argued that sex offender registration schemes provide a false sense of security because members of the public mistakenly believe that all who pose a risk to their children are subject to registration and are being monitored by the police.

Are they likely to reoffend?

Any discussion of recidivism rates for sex offenders should begin with an acknowledgement that it is difficult to gauge the true rate of reoffending by sex offenders because sexual offences are considerably underreported; hence, any recidivism data based on reconviction rates or rearrest rates are likely to underestimate actual recidivism rates.

Policy-makers often claim that sex offenders are highly likely to reoffend and more likely to reoffend than any other type of offender – an assertion frequently used to justify sex offender registration and community notification schemes overseas.[42] In Australia, legislators have similarly relied on this argument in support of sex offender registration laws. For example, during parliamentary debates in Queensland it was stated that:

> It should be noted that there is a high rate of recidivism amongst child sex offenders. So it is for this reason that I firmly believe those who commit offences of a sexual or other serious nature against children should automatically lose some of the rights that other citizens enjoy.[43]

In New South Wales it was argued that '[s]tudies of child sex offender behaviour show a high rate of recidivism, which is even more alarming given the low rate of

34. ABS, *Recorded Crime – Victims, Australia*, Media Release (3 June 2010).
35. Because ABS records data for 15- to 19-year-olds some of these young people would have been adults at the time of the offence: ABS, *Recorded Crime – Victims Australia* (2009) Table 5: Victims, sex and age group by selected offences – Western Australia.
36. In 2005, there were 143 900 reported victims of sexual assault but only 1383 (9%) were found guilty: Gelb K, *Recidivism of Sex Offenders*, Research Paper (Melbourne: Victorian Sentencing Advisory Council, 2007) 4.
37. Levenson J et al, 'Failure to Register as a Sex Offender: Is it associated with recidivism?' [2009] *Justice Quarterly* 1, 3 & 24.
38. Human Rights Watch, *No Easy Answers: Sex offender laws in the US* (2007) 25. See also Lincoln R & Ronken C, 'Civil Liberties and Sex Offender Notification Laws' (2001) 7(2) *National Legal Eagle* 6, 7 where it is observed that approximately 80% of sex offenders do not have prior convictions for sexual offending.
39. Victorian Sentencing Advisory Council, *Sentencing for Sexual Penetration Offences: A statistical report* (2009) 27.
40. Milovanovic S, 'Most Child Sex Offenders First-timers', *The Age* (20 March 2009) <http://www.theage.com.au/national/most-child-sex-offenders-firsttimers>.
41. Finkelhor D, 'The Prevention of Childhood Sexual Abuse' (2009) 19 *The Future of Children* 169, 178.
42. Garfinkle E, 'Coming of Age in America: The misapplication of sex-offender registration and community-notification laws to juveniles' (2003) 91 *California Law Review* 163, 172.
43. Queensland, *Parliamentary Debates*, Legislative Assembly, 9 November 2004, 3267 (JC Spence, Minister for Police and Corrective Services).

reporting of child sex offences'.[44] In Western Australia, the former Minister for Police stated:

> What is common to too many sex offenders is that they continue to offend throughout their lifetime. Paedophiles, in particular, are notoriously compulsive and recidivist.[45]

However, it has been argued that 'sex offender recidivism rates are far below what legislators cite and what the public believes'.[46] The New South Wales Sentencing Council observed in 2009 that:

> Sex offenders are often regarded by the community as being amongst the most dangerous class of offenders. The seriousness of sexual offences and the impact of these crimes on victims is irrefutable. However much of the community concern is based on misconceptions about the rates of recidivism for convicted sex offenders.[47]

A meta-analysis of recidivism studies in various countries (including the United States, Canada, United Kingdom and Australia) found that the average sexual offence recidivism rate for sex offenders was approximately 13% after a follow-up period of 4–5 years. Even for those studies that had a follow-up period of 15–20 years, the recidivism rate rarely exceeded 40%.[48]

44. New South Wales, *Parliamentary Debates*, Legislative Assembly, 1 June 2000, 6475 (Mr P Whelan, Minister for Police). See also Tasmania, *Parliamentary Debates*, House of Assembly, 24 November 2005, 28 (Mr M Hodgman).
45. Western Australia, *Parliamentary Debates*, Legislative Assembly, 22 September 2004, 6279b–6282a (Mrs MH Roberts, Minister for Police and Emergency Services).
46. Human Rights Watch, *No Easy Answers: Sex offender laws in the US* (2007) 26. See also Smallbone S & Ransley J 'Legal and Psychological Controversies in the Preventive Incapacitation of Sexual Offenders' [2005] *University of New South Wales Law Journal* 19.
47. New South Wales Sentencing Council, *Penalties Relating to Sexual Assault Offences in New South Wales* (2009) vol 3, [4.3]. See also New South Wales Legislative Council Standing Committee on Law and Justice, *Spent Convictions for Juvenile Offenders* (2010) 48. A study in Florida, United States found that members of the public who responded to the survey believed, on average, that approximately 75% of sex offenders reoffend: Levenson J et al, 'Public Perceptions About Sex Offenders and Community Protection Policies' (2007) 7 *Analyses of Social Issues and Public Policy* 1, 17. As discussed below, various studies show much lower rates of recidivism.
48. Hanson R & Bussiere, 'Predicting Relapse: A meta-analysis of sexual offender recidivism studies' (1998) 66 *Journal of Consulting and Clinical Psychology* 348, 351 & 357. See also Gelb K, *Recidivism of Sex Offenders*, Research Paper (Melbourne: Victorian Sentencing Advisory Council, 2007) 21. Although, it has been observed that 'some assessments of sex offender recidivism indicated that, without treatment, approximately 60–70% of sex offenders will re-offend, while less than half of sex offenders who undergo a treatment program are reported to reoffend': Tomison A & Poole L, *Preventing Child Abuse and Neglect: Findings from an Australian audit of prevention programs* (Melbourne: Australian Institute of Family Studies, 2000) 81.

It has also been contended that recorded recidivism rates for sex offenders are lower than for many other types of criminals such as drug, property and burglary offenders.[49] In the United Kingdom it was observed that:

> About 20% of those who are convicted of sexual offences against children are reconvicted for similar offences; this is much lower than recidivism for offenders generally.[50]

A recent ABS study has examined reimprisonment rates for prisoners released from prison between 1994 and 1997. These prisoners were tracked up until 2007, providing a minimum period of 10 years following release. It is noted that reimprisonment is not the same as recidivism because not all offenders are sent to prison (and not all offenders are arrested and convicted). However, it was found that the rate of reimprisonment for prisoners who had been sentenced to imprisonment for sexual offences was much lower than the reimprisonment rate for prisoners who had been sentenced for other types of offences. It was reported that 21% of prisoners who had been imprisoned for sexual offences and released from prison between 1994 and 1997 had subsequently been returned to prison (at least once) by 2007.

In contrast, between 53% and 58% of prisoners who had been imprisoned for burglary and theft, 44% of prisoners who had been imprisoned for acts causing injury and 24% of prisoners who had been imprisoned for drug offences were reimprisoned during the same period.[51] However, it was also found that of those prisoners who had originally been imprisoned for sexual offences and were reimprisoned, 50% were reimprisoned for another sexual offence. This 'specialisation' figure was only slightly less than the figure for burglary (54%).[52] In other words, imprisoned sex offenders were far less likely to be subsequently imprisoned than all other groups of offenders considered in the study but, if they were, they were likely to be reimprisoned for another sexual offence.

Importantly, in the context of this reference, the recidivism rate for juvenile offenders who commit sexual offences appears to be lower than it is for adult offenders. In Western Australia, a study of 326 male juvenile sex offenders from 1990 to 1998 found that during the follow-up period almost 70% were reconvicted for other offences; however, only 10% were reconvicted for

49. Warner K, 'Sentencing Review 2005–2006' (2006) 30 *Criminal Law Journal* 373, 389.
50. Grubin D, 'Sex Offending Against Children: Understanding the risk (1998) 99 *Home Office Police Research Series Paper* vi.
51. Zhang J & Webster A, 'An Analysis of Repeat Imprisonment Trends in Australia Using Prisoner Census Data from 1994 to 2007 (Canberra: Australian Bureau of Statistics, 2010) 29–30.
52. Ibid 31.

a new sexual offence.[53] Similar results were observed in a 2004 study in New South Wales involving 303 male juveniles[54] who had been convicted of a sexual offence (including offences committed against children and adults). Over a follow-up period (which ranged from 4.6 to 12.8 years) it was found that 25% of the study group were reconvicted of a sexual offence while they were still under the age of 18 years. What is noteworthy is that only 9% of the group were either reconvicted of or charged with a sexual offence committed as an adult.[55] The authors commented that:

> The results of this study add to a growing evidence base that transition from adolescent to adult sexual offending is the exception rather than the rule.[56]

In the United States it has been reported that 85–95% of juvenile sex offenders 'have no arrests or reports for future sex crimes'.[57] It has also been observed that juvenile sex offenders are 'generally treatment responsive' and have 'a lower recidivism rate than their untreated counterparts'.[58] Likewise, it has been maintained that 'the majority of juvenile sex offenders do not continue as career sex offenders'.[59]

The Commission acknowledges that there are some juvenile child sex offenders who are likely to continue to reoffend sexually into adulthood[60] and also that many adult child sex offenders commenced their sexual offending behaviour during adolescence.[61] However, the majority of juvenile child sex offenders are unlikely to become adult child sex offenders. As observed by the New South Wales Ombudsman:

> While some research shows that many child sex offenders commenced their offending behaviours while they were children, other studies suggest that although the sex offending of many adult offenders can be traced to their adolescence, only a minority of adolescent sex offenders continue to sexually offend as adults.[62]

In her opinion commissioned for this reference, Christabel Chamarette confirmed that although 'a very high proportion (30–50%) of child sexual offending is perpetrated by adolescent males, only a small proportion go on to offend in later life'.[63]

In conclusion, the Commission reiterates that officially recorded recidivism rates should be viewed cautiously because child sexual offences are significantly underreported and have relatively low conviction rates; hence available data will underestimate true recidivism levels. Even so, the available evidence refutes the contention that most child sex offenders will inevitably reoffend.

Sexual Activity Between Young People

Some members of the public may not be aware that Western Australia's sex offender registration laws apply to juvenile child sex offenders and to a wide range of sexual offending behaviour. For instance, reportable offences can potentially include underage consensual sexual activity between two young people (eg, two 14-year-olds or a 17-year-old and a 15-year-old) and

53. Allan A et al, 'Recidivism Among Male Juvenile Sexual Offenders in Western Australia' (2003) 10 *Psychiatry, Psychology and Law* 359, 372. The mean follow-up period in this study was just over four years.
54. A total of 303 juveniles were included in the study; however, 11 were subsequently excluded for various reasons: Nisbet I et al, 'A Prospective Longitudinal Study of Sexual Recidivism Among Adolescent Sex Offenders' (2004) 16 *Sexual Abuse: A Journal of Research and Treatment* 223, 225 & 227.
55. Ibid 228. Five percent were reconvicted and 4% were charged with a sexual offence committed as an adult. A far greater number were reconvicted for non-sexual offences committed as adults (61%).
56. Ibid 232. It was also acknowledged that there is a small number of adolescent sexual offenders who do continue to sexually offend as adults.
57. Finkelhor D et al, *Juveniles Who Commit Sexual Offenses against Minors* (Washington: Office of Juvenile and Delinquency Prevention, 2009) 3.
58. Florida Task Force on Juvenile Sex Offenders and Their Victims, *Juvenile Sexual Offenders and Their Victims,* Final Report (2006) 6.
59. Letourneau E & Minder M, 'Juvenile Sex Offenders: A case against the legal and clinical status quo' (2005) 17 *Sexual Abuse: A Journal of Research and Treatment* 293, 300. See also Stone N, 'Children on the Sex Offenders Register: Proportionality, prospect of change and Article 8 rights' (2009) 9 *Youth Justice* 286, 288; National Centre of Sexual Behaviour of Youth, *What Research Shows About Adolescent Sex Offenders*, Fact Sheet No 1 (2003) 1; New South Wales Ombudsman, *Review of the Child Protection Register: Report under s 25(1) of the Child Protection (Offenders Registration) Act 2000* (2005) 35; New South Wales Legislative Council Standing Committee on Law and Justice, *Spent Convictions for Juvenile Offenders* (2010) 54.
60. Finkelhor D et al, *Juveniles Who Commit Sexual Offenses against Minors* (Washington: Office of Juvenile and Delinquency Prevention, 2009) 3. See also Letourneau E & Minder M, 'Juvenile Sex Offenders: A case against the legal and clinical status quo' (2005) 17 *Sexual Abuse: A Journal of Research and Treatment* 293, 300.
61. See Inter-jurisdictional Working Party, *Child Protection Offender Registration with Police: A national approach,* Report to the Australasian Police Ministers Council (2003) 84 where it was observed that some studies in the United States have found that approximately 70% of adult offenders began their sexual offending when they were children.
62. New South Wales Ombudsman, *Review of the Child Protection Register: Report under s 25(1) of the Child Protection (Offenders Registration) Act 2000* (2005) 35.
63. Chamarette C, 'Opinion provided to the Law Reform Commission of Western Australia' (10 October 2010).

sexual experimentation by very young children. Thus it is important to have some understanding of the nature and extent of sexual activity between young people and to attempt to distinguish what may be regarded as 'normal' sexual behaviour from child sexual abuse.

The Australian Institute of Health and Welfare defines child sexual abuse as 'any act which exposes a child to, or involves a child in, sexual processes beyond his or her understanding or contrary to accepted community standards'.[64] It has been contended that when assessing whether behaviour constitutes child abuse, it is important to consider the nature of the relationship between the perpetrator and the child. For example, any 'sexual activity between a child and an adult family member is abusive' irrespective of whether there is any coercion or force used.[65] In relation to juvenile offenders, it is argued that non-consensual sexual activity or sexual relationships where there is a power imbalance (eg, because of a large age disparity) should be considered abusive. However, '[n]ormal sexual exploration between consenting adolescents at a similar developmental level is not considered abusive'.[66] Similarly, it has been observed that three factors (equality, consent and coercion) should be taken into account when assessing if sexual behaviour between children is abusive and that an 'age difference of more than two years is generally considered unequal'.[67]

During parliamentary debates for the sex offender registration laws in the United Kingdom it was mentioned that a 2001 study, involving more than 11 000 men and women, found that 30% of men and 26% of women reported and that the 'average age of first sexual experience is 14 for girls and 13 for boys'.[68] A survey of 3000 Australian secondary school students in 2008 found that 27% of Year 10 students and 56% of Year 12 students had engaged in sexual intercourse.[69]

64. Tomison A, 'Update on Child Sexual Abuse' (1995) 5 *National Child Protection Clearinghouse Issues in Child Abuse Prevention* <http://www.aifs.gov.au/nch/pubs/issues/issues5/issues5.html>.
65. Price-Robertson R & Bromfield L, *What is Child Abuse and Neglect?,* National Child Protection Clearinghouse Resource Sheet No 6 (2009) 3.
66. Ibid 3–4. It was also noted that while 'non-coercive sexual behaviour between two developmentally similar family members is not considered child sexual abuse, it is considered incest, and is strongly proscribed both socially and legally in Australia' (at 4).
67. Boyd C, 'Young People Who Sexually Abuse: Key issues' (2006) 3 *Australian Centre for the Study of Sexual Assault Wrap* 1.
68. United Kingdom, *Parliamentary Debates*, House of Lords, 13 February 2003, vol 644, cols 771–810 (Baroness Gould of Potternewton).
69. Smith A et al, *Secondary Students and Sexual Health 2008: Results of the 4th National Survey of Australian Secondary Students, HIV/AIDS and Sexual Health* (Melbourne: Australian Research Centre in Sex, Health & Society, La Trobe University, 2009) 27.

Twenty-nine percent of the sexually active Year 10 students reported having unwanted sex.[70] The reasons for engaging in unwanted sex included intoxication and peer pressure.

In a recent submission, the New South Wales Commission for Children and Young People suggested that 'much sexual offending amongst young people is impulsive in nature and committed as a result of their immaturity, and often peer pressure'.[71] The New South Wales Legislative Council Standing Committee on Law and Justice concluded that:

> [S]everal factors distinct to adolescence contribute to juvenile sexual offending, including impulsivity, immaturity and peer pressure, coupled with incomplete brain development. In addition, the Committee recognises that the majority of juvenile offenders have a greater capacity for rehabilitation than adults, due to their ongoing development.[72]

In her opinion, Christabel Chamarette similarly maintained that in 'the majority of cases, an adolescent's behaviour is more appropriately described as an impulsive act by an immature juvenile rather than evidence of long-term pathology'.[73]

Also, during its consultations for this reference the Commission was advised by child protection expert, Emeritus Professor Freda Briggs that her research reveals that about one-third of children aged over 12 years engage in consensual sexual activities. However, she also explained that there appears to be a significant increase in the prevalence of problem sexual behaviour in children (including primary school aged children). Such problem behaviours include selecting younger or vulnerable children, the use of threats or bullying to obtain 'consent' and the use of pornographic language. Professor Briggs cautioned against excusing such behaviour on the basis of childhood experimentation or sexual curiosity.[74]

A recent report published by the Australian Crime Commission stated that '[s]cholars and clinicians agree that the "earliest possible intervention" leads to the best rehabilitative outcomes' for young people exhibiting

70. Ibid 31.
71. New South Wales Commission for Children and Young People, Submission to the Standing Committee on Law and Justice, *Inquiry into Spent Convictions for Juvenile Offenders*, January 2010, 3.
72. New South Wales Legislative Council Standing Committee on Law and Justice, *Spent Convictions for Juvenile Offenders* (2010) 53.
73. Chamarette C, 'Opinion provided to the Law Reform Commission of Western Australia' (10 October 2010).
74. Email consultation with Emeritus Professor Freda Briggs, University of South Australia (30 July 2010).

sexual offending behaviours.[75] It was also explained that young people exhibiting inappropriate sexualised behaviours are likely to have also experienced significant disadvantage (eg, childhood trauma, social or economic disadvantage, homelessness, intellectual impairment or alcohol/drug misuse) and therefore the provision of 'integrated services' is required to address their complex therapeutic needs.[76] For those young people who are dealt with by the justice system it was stated that:

> The clinical and criminological literature on adolescents who have committed sexual offences indicates that the pathologisation of the young person and a labelling or overly punitive response is likely to be more harmful than rehabilitative.[77]

75. O'Brien W, *Australia's Response to Sexualised or Sexually Abusive Behaviours in Children and Young People* (Canberra: Australian Crime Commission, 2010) 3.
76. Ibid 14.
77. Ibid 47.

Key issues impacting on reform

As noted in the Introduction to this Discussion Paper, the Commission has undertaken consultations with a large number of agencies and individuals who are involved in some capacity with the practical application of Western Australia's sex offender registration scheme. As a result of these consultations, and taking into account research conducted with respect to comparable schemes (both nationally and internationally), the Commission has found that there are a number of key issues impacting on reform in this area. These five key issues are discussed below in order to provide background to the Commission's approach to this reference.

1 In actions concerning children the best interests of the child is a primary consideration

The Western Australian sex offender registration scheme established by the *Community Protection (Offender Reporting) Act 2004* (WA) ('the CPOR Act') impacts upon children in two main, but potentially conflicting, ways. On the one hand, the purpose of the scheme is to protect children from sexual abuse and, on the other, it serves to impose significant obligations on and potentially stigmatise children who have been convicted of sexual offences.[1] In regard to the sex offender registration and community notification schemes in the United States it has been observed that:

> Children who commit sexual offenses generally have the same vulnerability and are in the same need of protection as the child victims whom the proponents of Megan's Laws claim to protect. But Megan's Laws have the unique propensity to gravely harm some children in the hope of protecting an unknown few. Many child sex offenders are victims of sexual abuse themselves. Many more engage in common sexual behaviour, sometimes healthy, sometimes inappropriate, that they will most likely learn to manage. Megan's Laws stigmatize and isolate these children, limiting their opportunities for normal growth and exacerbating the kinds of vulnerabilities that lead to future criminality, both sexual and nonsexual.[2]

Article 3(1) of the *Convention on the Rights of the Child*[3] proclaims that in 'all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration'. At the same time Article 34 requires children to be protected from sexual exploitation and sexual abuse. The principle that the best interests of the child should be a primary consideration (rather than *the* primary consideration) recognises that in some circumstances other interests may trump the interests of an individual child. As noted by the Australian Human Rights Commission:

> Article 3.1 provides for a child's interests to be *among* the first considerations rather than requiring them to be the first considered or favoured. There are circumstances in which the community or other parties might have an equal or even superior interests so that a child's interests may not prevail.[4]

The decision whether sex offender registration laws should apply to children must necessarily involve a balancing exercise between the interests of the individual child offender and the interests of children generally. To impose ongoing reporting obligations upon children should not be made lightly. However, if it can be established that a juvenile offender poses a significant risk to other children then sex offender registration may be warranted. Underpinning the Commission's approach to reform is that when determining if a particular child offender is to be subject to the requirements of the CPOR

1. For a description of some of the potential adverse consequences of sex offender registration, see below 'Sex offender registration may involve adverse consequences for the offender'.
2. Garfinkle E, 'Coming of Age in America: The misapplication of sex-offender registration and community-notification laws to juveniles' (2003) 91 *California Law Review* 163, 205.
3. Opened for signature 20 November 1989, 1588 UNTS 530 (entered into force 2 September 1990; entered into force for Australia 16 January 1991).
4. Australian Human Rights Commission, *The Best Interests of the Child,* Human Rights Brief No 1 <http://www.humanrights.gov.au/human_rights/briefs/brief_1.html>. In *Minister of State for Immigration & Ethnic Affairs v Ah Hin Teoh* [1995] HCA 20, [31] Mason CJ and Deane J observed in regard to Article 3(1) of the *Convention on the Rights of the Child* that the 'article is careful to avoid putting the best interests of the child as the primary consideration; it does no more than give those interests first importance along with such other considerations as may, in the circumstances of a given case, require equal, but not paramount weight'. Further, McHugh J stated that the 'use of the word "a" indicates that the best interests of the children need not be the primary consideration ... a primary consideration may have to accommodate itself to other overriding interests' (at [47]).

Act the best interests of the individual child should be a, but not necessarily the, primary consideration.[5]

2 The law generally treats children differently

Children are generally treated differently (and more leniently) than adults by the criminal justice system. Children are dealt with by a separate court (Children's Court) and juvenile justice principles and legislation promote rehabilitation and reintegration into the community as key considerations. In determining registrable status under the scheme, the CPOR Act generally applies equally to children as it does to adults; however, there are three special rules for juvenile reportable offenders. First, reporting periods are halved and, unlike adults, children are never subject to lifetime registration.[6] Second, the Commissioner of Police has a limited discretion to waive reporting obligations for certain juveniles convicted of specified, less serious, sexual offences.[7] Finally, if a child commits a single prescribed offence he or she will not be automatically subject to registration. The only offences currently prescribed relate to child pornography.[8] In addition, it is arguable that a juvenile who is referred to a juvenile justice team is not liable to registration and there is no such diversionary option available for adults.[9]

Bearing in mind the Commission's terms of reference, an important question is whether these special considerations for juveniles are sufficient to recognise that children should be distinguished from adults in the criminal justice process. In the United States context (where registered offenders may be subject to community notification) it has been observed that 'policies that subject juvenile offenders to adult registration and public notification requirements represent a marked departure from traditional judicial policy separating juvenile and adult offenders'.[10]

In Western Australia, in the overwhelming majority of cases, a juvenile is subject to exactly the same rules as an adult in determining if the offender is a reportable offender under the CPOR Act. For example, a 12-year-old convicted of sexual penetration of another 12-year-old is equally a reportable offender as a 50-year-old convicted of the same offence. In this sense the application of the scheme arguably treats children more harshly than adults because it fails to recognise that in many cases juvenile child sex offenders are inherently different from many adult child sex offenders. It has been contended that 'sex crimes are often committed by juveniles for different reasons than those prompting adult sex crimes'.[11] For example, it has been argued that the sexual preferences of juvenile sex offenders are similar to the sexual preferences of other juveniles and therefore sex offending by juveniles 'appears to result more from a lack of appropriate channels for sexual expression than from the kind of psychological disorder attributed to most adult offenders'.[12] Further, a higher proportion of juvenile sex crime is committed in groups than is the case for adult sex crime (a feature of juvenile crime generally). Because group activity may be the result of peer pressure some level of juvenile sexual crime may be similar to other juvenile crime with the culprits outgrowing the behaviour as they mature.[13] And most significantly (as noted above), sexual reoffending rates are lower for juveniles than for adults.[14]

Further, under the law in Western Australia as it currently stands, an adult convicted of sexual penetration without consent against an adult victim is not liable to registration whereas a juvenile convicted of sexual penetration without consent against a child will be subject to the registration requirements. Likewise, an adult convicted of indecently assaulting an adult is not, unlike a juvenile who indecently assaults another child, subject to the scheme.[15] And notably, a child who engages in consensual sexual activity with another child of a relatively close age is likely to be exhibiting normal sexual tendencies (ie, because the child is sexually attracted to his or her own peers) whereas an adult who engages in consensual sexual

5. The need to take a 'child rights-based approach' was emphasised to the Commission: submission from National Children's and Youth Law Centre (September 2010) 2–3.
6. *Community Protection (Offender Reporting) Act 2004* (WA) s 47.
7. *Community Protection (Offender Reporting) Act 2004* (WA) s 61.
8. See *Community Protection (Offender Reporting) Regulations 2004* (WA) reg 8.
9. See further Chapter Two, 'Mandatory registration'.
10. Letourneau E et al, 'Do Sex Offender Registration and Notification Requirements Deter Juvenile Sex Crimes?' (2010) 37 *Criminal Justice and Behaviour* 553, 554.
11. Garfinkle E, 'Coming of Age in America: The misapplication of sex-offender registration and community-notification laws to juveniles' (2003) 91 *California Law Review* 163, 184.
12. Ibid 190.
13. Ibid 193.
14. Ibid and see above, 'Are they likely to reoffend?'
15. As discussed in the Introduction to this Paper, the CPOR Act includes provision for certain sexual offences committed against adults to be subject to registration but these provisions have not yet commenced: see *Community Protection (Offender Reporting) Act 2004* (WA) sch 3. Even if schedule 3 is proclaimed in the future it will only require registration, for stipulated sexual offences against adults, if the offender has previously been found guilty of an offence listed in schedule 3. It is noted that schedule 3 includes sexual penetration of an adult without consent but it does not include indecent assault of an adult.

activities with a child may have a deviant or abnormal sexual attraction to children.[16]

So in many ways, the sex offender registration scheme in Western Australia applies more harshly to children than it does to adults. The Commission is of the view that justice processes must wherever possible recognise the differences between children and adults and, accordingly, proposed reforms in this Paper are designed to reflect this principle.

3 Police and justice resources are required for the effective operation of sex offender registration schemes

The Western Australian sex offender registration scheme utilises significant police resources and, to a lesser extent, resources of other justice agencies.[17] Police are required to meet with reportable offenders, record their personal details, update their personal details and visit them on an ongoing basis. Reportable offenders must report to a designated police officer and all such officers are required to undergo training in relation to the scheme.[18]

16. It has been observed that there 'is now general consensus among researchers and practitioners that sexual recidivism is associated with at least two broad factors: deviant sexual interests and antisocial behaviour/lifestyle instability': Gelb K, *Recidivism of Sex Offenders*, Research Paper (Melbourne: Victorian Sentencing Advisory Council, 2007) 30.
17. Under the scheme, staff from the Department of Corrective Services are required to explain reporting obligations to reportable offenders who have been sentenced to imprisonment and court staff are required to explain reporting obligations to those offenders who are sentenced in the Supreme Court, District Court and Children's Court. Further, the Commission was told that juvenile justice officers and community corrections officers do sometimes assist reportable offenders (who are under the supervision of the Department of Corrective Services) to comply with their reporting requirements: consultation with Gaelyn Shirley, (Youth Justice Services) and Norm Smith (Manager, Kimberley Community Justice Services), Department of Corrective Services, Broome (21 July 2010); consultation with Lex McCulloch (Assistant Commissioner Youth Justice Services), Steve Robins (Assistant Commissioner, Adult Community Corrections) and Angie Dominish, Marlene Hamilton & Alisha Edwards, Department of Corrective Services (7 September 2010).
18. The Commission was advised that all designated ANCOR police officers are required to undergo a three-day training course: email consultation with Martyn Clancy-Lowe, State Coordinator Sex Offender Management Squad (15 November 2010). The Commission was also told that in the Kimberley there are approximately 40 designated police officers and each of these officers has undergone a four-hour training session: consultation with Sergeant Kevin Hall, Family Protection Coordinator, Western Australia Police, Kimberley (20 July 2010).

In reviewing the New South Wales scheme, the Ombudsman observed that:

> The broader the definition of 'registrable offence', the more registrable persons there will be. This directly impacts on the time and resources police must expend on initial registration and updating information. Police do have some control over the resources allocated to monitoring activities, for example, by targeting their monitoring to the extent of the risk posed by registered persons.[19]

Similar observations have been made in relation to sex offender registration schemes in the United States. It has been noted that as registers expand and include greater numbers of low-risk offenders, the 'ability to accurately identify and focus resources on those most likely to sexually reoffend will be diminished'.[20] Likewise, Human Rights Watch mentioned in its review of sex offender registration schemes that a law enforcement official had revealed that the expansion of registers to cover a wider range of offences and to require longer registration periods has undermined the ability of police to effectively monitor high-risk sex offenders.[21]

In developing the national model for sex offender registration laws in Australia, the working party observed that the most resource intensive aspect to registration schemes would relate to the ongoing monitoring of offenders and it was commented that 'local commands will need to balance the resources they put into offender monitoring and management with their other operational priorities'.[22] It is logical to presume that as the number of registrable offenders increases police will have less time to direct resources to ongoing monitoring and case management.

However, police consulted in Perth contend that the registration of less serious offenders does not impact on the effectiveness of the scheme because low-risk offenders are not required to report very often and police do not actively monitor such offenders.[23] In contrast, the Commission was told by one regional police officer that resources would be better allocated if they could concentrate their monitoring efforts on high-risk

19. New South Wales Ombudsman, *Review of the Child Protection Register: Report under s 25(1) of the Child Protection (Offenders Registration) Act 2000* (2005) 18.
20. Levenson J et al, 'Failure to Register as a Sex Offender: Is it associated with recidivism?' [2009] *Justice Quarterly* 1, 22.
21. Human Rights Watch, *No Easy Answers: Sex offender laws in the US* (2007) 45.
22. Inter-jurisdictional Working Party, *Child Protection Offender Registration with Police: A national approach*, Report to the Australasian Police Ministers' Council (2003) 179.
23. Consultation with Detective Inspector Paul Steel (Sex Crime Division) and Martyn Clancy-Lowe (State Coordinator Sex Offender Management Squad), Western Australia Police (28 June 2010).

offenders. From the Commission's visit to the Kimberley in July 2010 it is clear that the resourcing implications are far more pronounced in regional areas. Given the remoteness of many parts of the state, police often visit reportable offenders instead of requiring them to report to a police station and will visit remote communities to check on reportable offenders on a regular basis.

While the Commission understands that low-risk offenders may be subject to little or no monitoring by police and they are not required to report as frequently to the police as higher risk offenders, the fact remains that all reportable offenders must report on a regular basis (at least annually) and they must report all changes to their personal circumstances. An offender's risk level will have no bearing on how often those details change and hence how often the offender is required to make contact with police. If police were not required to deal with low-risk offenders at all there would obviously be more time available to monitor higher risk offenders. As the total number of reportable offenders continues to grow over time, the impact on resources will be even greater.

Bearing in mind that the main objective of sex offender registration is community protection, the Commission is of the view that the effective allocation of police resources demands that such resources should be directed to those offenders who pose the greatest risk to community safety.

4 In order to maximise community protection, sex offender registration should (as far as is practicable) be based on an assessment of risk

As noted above, in order to ensure that resources are allocated to those offenders who pose the greatest risk to members of the community it is necessary to ensure that sex offender registration is not applied too broadly – otherwise resources will be redirected away from high-risk offenders to low-risk offenders. The difficulty—and the key issue to be considered by the Commission in this Paper—is how and when to draw the line. In this regard, it has been observed that the 'most critical aspect of any registration system, which needs to be clearly defined from the outset, is precisely who the system is intended to capture'.[24]

The Commission acknowledges that assessing risk is problematic and whatever method is used it will never be 100% accurate.[25] Hence the view that it is 'safer' to capture more rather than less offenders.[26] The current scheme assumes that a conviction for a child sexual offence of itself demonstrates sufficient risk to justify registration and this explains the current mandatory approach: registration is applied automatically upon conviction and sentence. However, an all-inclusive approach arguably comes at a cost: to community safety by diverting resources away from where they are most needed and to individual offenders by requiring them to unnecessarily comply with onerous obligations.

The Commission has found that the Western Australian scheme applies mandatory registration more broadly than any other Australian jurisdiction. The differences between the laws in other Australian states and territories are fully explored later in this Paper.[27] Suffice to say at this stage, the mandatory nature of the law in this state (without provision for exceptions) does not enable any consideration of the risk or dangerousness of the offender before registration is required or even after the event by enabling a subsequent review of the offender's registration status.[28] In discussing sex offender registration and notification schemes in the United States, it has been argued that because such schemes are clearly intended to protect public safety an offender's 'dangerousness or risk of recidivism' is relevant.[29] However, mandatory schemes do not involve any individualised assessment of risk in determining who should be subject to registration. The Law Council of Australia has recently pronounced its view that registration should only apply if a sentencing court is satisfied that the offender 'poses a risk to the lives or sexual safety of one or more children, or children generally'.[30]

The Commission has approached this reference with the view that, as far as is practicable, registration and reporting obligations should only be required where such obligations are necessary to protect the safety of any person

24. Swain M, 'Registration of Paedophiles' (1997) 12 *New South Wales Parliamentary Library Research Service Briefing Paper* 7.

25. For a discussion of the risk assessment tool used by police to determine reporting frequency, see Chapter Two, 'Periodic reporting'.

26. The Law Council of Australia noted that a 'tendency to ensure that the list of qualifying offences is sufficiently comprehensive will inevitably result in the inclusion of some offences which, although potentially serious in nature, may also capture conduct which is at worst imprudent': Law Council of Australia, *Policy Statement on Registration and Reporting Obligations for Child Sex Offenders* (2010) 3.

27. See Chapter Three, 'Nationally consistent sex offender registration laws'.

28. Only offenders who are subject to lifetime registration are entitled to apply for an order suspending their reporting obligations.

29. Case Note, 'Making Outcasts Out of Outlaws: The unconstitutionality of sex offender registration and criminal alien detention' (2004) 117 *Harvard Law Review* 2731, 2734.

30. Law Council of Australia, *Policy Statement on Registration and Reporting Obligations for Child Sex Offenders* (2010) 3.

or persons in general.[31] This view favours a discretionary approach whereby the individual circumstances of the offence and the offender are examined. On the other hand, the Commission recognises that any discretionary scheme will be more resource intensive at the front end (for police,[32] prosecution, courts and other justice agencies) than the present automatic system. Hence, it is necessary to ensure that any provision for discretion does not unnecessarily redirect resources from the operation of the scheme to protracted and lengthy court proceedings to determine registration status. In some instances, the mere fact that an offender has been convicted and sentenced for a sexual offence committed against a child may be sufficient to establish a prima facie case for registration. In other cases it may not be appropriate to apply registration unless there is clear evidence of an ongoing risk to the community. The Commission believes that a balance needs to be struck between ensuring that the sex offender registration scheme continues to work efficiently and effectively and to ensure that the scheme does not apply unnecessarily to low-risk offenders or minor offending. The Commission's proposals for reform in this Discussion Paper are designed to enable an individualised assessment of risk during the registration process. In some instances there will be an obligation on the state to establish that the offender poses a risk to the community, whereas in other cases the individual offender will need to satisfy the decision-maker that he or she does not pose a risk to the lives or safety of any person and that registration is inappropriate.[33]

5 Sex offender registration may involve adverse consequences for the offender

In determining the best way to ensure that sex offender registration does not apply too broadly or unfairly it is important to consider the practical implications of registration and reporting for the registered offender. It has been observed that sex offender registration schemes do not restrict 'a registered person's freedom of movement' and therefore it can be argued that such schemes do not 'amount to "quasi-custody" or a form of additional punishment'.[34] In regard to the New South Wales scheme it has been argued that the obligations are not 'particularly onerous'.[35] Some may take the view that a requirement to report regularly to police and provide them with personal details is inconsequential given the serious nature of child sex offending. However, the Commission takes a different view.

The Commission accepts that the purpose of sex offender registration is not to further punish an offender; however, the reality is that registration and reporting obligations can be demanding and may have serious adverse consequences for the offender. This was recognised in South Australia when the Attorney General stated during parliamentary debates that the provisions under sex offender registration laws are 'not designed to be a punishment, although they will have unpleasant consequences for the offender'.[36] In New South Wales it was also observed that 'providing relevant personal information to police may be a traumatic experience' (and for that reason provisions were inserted into the legislation in that jurisdiction to lessen the potential trauma such as a right to a support person and the requirement that reporting must be conducted in private).[37]

Although similar provisions exist in Western Australia, regular reporting to police, even in private and with a support person, may be distressing and upsetting for some offenders. Of note, during parliamentary debates in Western Australia the former Minister for Police stated that being placed on the register 'would clearly have a significant impact on [a] person's life'.[38] In addition, the current Attorney General expressed the view that being placed on the register and being required to report for a specified period of time is a 'significant form of punishment'.[39]

Most significantly, the scheme imposes various obligations upon offenders and these obligations usually continue for a number of years after the offender has completed

31. In the main, the registration scheme is intended to apply to child sex offenders; however, a limited number of offences covered by the scheme may involve offences committed against adult victims.
32. Depending on the circumstances of the case the police may be required to present evidence in court to demonstrate why a particular offender should be required to register and report with police.
33. See Chapter 5, Proposal 7 and Chapter 6, Proposal 15.
34. New South Wales Ombudsman, *Review of the Child Protection Register: Report under s 25(1) of the Child Protection (Offenders Registration) Act 2000* (2005) 27. Overseas courts have consistently held that sex offender registration is not a form of punishment: see Hunt D, *Child Protection Through Offender Registration* (2001) 13 *Judicial Officers' Bulletin* 65, 67; Thomas T, 'The Sex Offender Register, Community Notification and Some Reflections on Privacy' in Harrison K (ed) *Managing High-Risk Sex Offenders in the Community: Risk management, treatment and social responsibility* (Uffculme: Willan Publishing, 2010) 61.
35. Hunt, ibid 67.
36. South Australia, *Parliamentary Debates*, House of Assembly, 29 August 2006, 759 (MJ Atkinson, Attorney General).
37. New South Wales, *Parliamentary Debates*, Legislative Assembly, 8 June 2000, 6907 (Mr Campbell).
38. Western Australia, *Parliamentary Debates,* Legislative Assembly, 28 October 2004, 7524b–7542a (MH Roberts, Minster for Police and Emergency Services).
39. Western Australia, *Parliamentary Debates,* Legislative Assembly, 1975b–1993a (CC Porter).

any sentence imposed for the original offence.[40] For some offenders the obligations remain for life.[41] The Commission discusses the operation of the CPOR Act in detail in Chapter Two, but at this stage highlights that the obligations of and potential consequences for a registrable offender include:[42]

- A requirement to personally attend at a police station within seven days following release from prison or after sentencing and provide police with a long list of personal details (eg, residential address; any telephone numbers or email addresses regularly used by the offender; the names and ages of any children with whom the offender generally resides or with whom the offender has regular unsupervised contact; the offender's place and nature of employment; details of any vehicle usually driven by the offender; details of any tattoos or permanent distinguishing marks; and any current travel plans).[43]

- A requirement to report to the police at least once a year or as often as directed. Reporting frequency in Western Australia varies: some registrable offenders are required to report on a weekly basis while others may be required to report monthly or quarterly, etc.[44]

- A requirement to report any changes to the list of required personal details (eg, if a reportable offender moves address, buys a new car, gets a new job or removes a tattoo he or she has to report these changes to the police).[45]

- A requirement to report details of any travel plans (ie, plans to leave the offender's usual place of residence for seven or more days or any interstate and overseas travel).[46]

- A requirement at the time of personally reporting to produce identification and provide a photograph (or, if that requirement is waived, to enable fingerprints to be taken). If necessary, fingerprints and photographs may be taken using reasonable force if the offender does not voluntarily comply with the requirement.[47]

- The potential to be detained by police if it is considered reasonably necessary to enable the person to be given notice of his or her reporting obligations.[48]

- The possibility of being charged with an offence for failing to comply with the reporting obligations (or for providing false or misleading information). These offences have a maximum penalty of $12 000 or two years' imprisonment.[49]

- The possibility of being subject to random and unannounced visits by police.[50]

- The possibility that a reportable offender's registrable status may become known to third parties (eg, a person present in court at the time of sentencing or during proceedings for failing to comply with the CPOR Act; family members, friends or employers may question an offender in order to find out why he or she is receiving regular police visits[51]).

- The negative stigma that attaches to the label 'sex offender' especially if an offender's registrable status becomes known to others.[52]

40. See Seidler K, 'Community Management of Sex Offenders: Stigma versus support' (2010) 2 *Sexual Abuse in Australia and New Zealand* 66, 67.
41. In Western Australia adult reportable offenders are subject to reporting obligations for eight years, 15 years or life and juvenile reportable offenders are subject to reporting obligations for either four years or seven-and-a-half years: see further Chapter Two, 'Reporting periods'.
42. The Commission notes that registration does not impact upon whether a convicted child sex offender is granted a working with children check – that issue is determined by reference to the *Working With Children (Criminal Record Checking) Act 2004* (WA). In some other jurisdictions permission to work with children is linked with or included in the sex offender registration laws.
43. *Community Protection (Offender Reporting) Act 2004* (WA) s 26.
44. *Community Protection (Offender Reporting) Act 2004* (WA) s 28. The Commission notes that the Canadian registration scheme (discussed in Chapter Three) only requires registered offenders to report once a year (or if their circumstances change). Furthermore, police are only entitled to access the register if they are investigating a crime which is reasonably suspected of being of a sexual nature. Nonetheless, it has been held that the impact of the *Sex Offender Information and Registration Scheme 2004* (Can) is 'substantial': *R v Burke* (2005) ONCJ 422 (Caldwell J) [10].
45. *Community Protection (Offender Reporting) Act 2004* (WA) s 29.
46. *Community Protection (Offender Reporting) Act 2004* (WA) ss 29A–31.
47. *Community Protection (Offender Reporting) Act 2004* (WA) ss 38–41.
48. *Community Protection (Offender Reporting) Act 2004* (WA) s 72.
49. *Community Protection (Offender Reporting) Act 2004* (WA) ss 63 & 64.
50. Consultation with Detective Inspector Paul Steel (Sex Crime Division) and Martyn Clancy-Lowe (State Coordinator Sex Offender Management Squad), Western Australia Police (28 June 2010).
51. In a recent study in New South Wales it was observed by one registered offender that if he wishes to commence a new relationship he would need to inform his new partner about his past conviction and the fact that he is on the register: Seidler K, 'Community Management of Sex Offenders: Stigma versus support' (2010) 2 *Sexual Abuse in Australia and New Zealand* 66, 71.
52. For a more detailed discussion of the impact of 'labelling', see Chapter Five, 'Labelling and rehabilitation'.

A study conducted with eight registered offenders in New South Wales concluded that the sex offender register 'can serve to marginalise offenders in the community, it forces their continued interaction with police, and it increases their potential experience of stress and alienation'.[53] The Commission has been told of one case where a juvenile reportable offender in Western Australia was described as a 'paedophile' on Facebook and as a consequence he was 'unwilling to leave the house alone or travel on public transport'.[54] Consultations with various lawyers also revealed that some reportable offenders have felt constrained by the registration requirements and were concerned about being branded a 'sex offender'.

In reaching the view that registration and reporting under the CPOR Act creates onerous obligations and may result in adverse consequences, the Commission is not suggesting that the scheme is unnecessary. What the Commission wishes to emphasise is that given these obligations and consequences it is vital that the registration scheme targets and is applied to only those offenders who warrant such an intrusion.

53. Seidler K, 'Community Management of Sex Offenders: Stigma versus support' (2010) 2 *Sexual Abuse in Australia and New Zealand* 66, 70.
54. Information obtained from a Western Australian psychologist.

Chapter Two

The Operation of the Community Protection (Offender Reporting) Act

Contents

Introduction 35

Reportable offenders 36

Mandatory registration 36

Schedule 1 – Class 1 offences 37

Schedule 2 – Class 2 offences 38

Exception to mandatory registration 39

Retrospective registration 40

Discretionary registration 40

Offender reporting orders 40

Past offender reporting orders 41

Prohibition orders 41

Reporting 43

Reporting periods 43

Inclusion on the register for life 44

Initial report 44

Ongoing reporting 46

Notification of changes 46

Travel plans 46

Periodic reporting 47

Notification of reporting obligations 49

Assistance and support to reportable offenders 50

Reporting by remote offenders 51

Case management and monitoring of offenders 51

Breach of reporting obligations 52

Suspension of reporting obligations 55

Application to District Court for offenders subject to lifetime registration 55

Discretion of Commissioner of Police for juvenile offenders 55

Access to register and confidentiality 57

Introduction

The *Community Protection (Offender Reporting) Act 2004* (WA) ('the CPOR Act') was passed on 8 December 2004 and commenced operation on 1 February 2005. The introduction of a sex offender registration scheme in Western Australia was preceded by the development of a model for nationally consistent child sex offender registration laws by the Australasian Police Ministers' Council working party.[1] By 2007 every Australian state and territory had enacted child sex offender registration laws.

The overriding objective of the CPOR Act is to protect the community because the legislation clearly aims to reduce reoffending and facilitate the investigation and prosecution of future offences. The legislation anticipates that these goals will be achieved by requiring child sex offenders (and certain other serious offenders) to notify police of their whereabouts and other personal details on an ongoing basis. Also, with a view to reducing the likelihood of reoffending, the CPOR Act enables courts to make orders prohibiting offenders from engaging in certain specified conduct.[2] In addition to the above goals, it was also emphasised during parliamentary debates that the scheme is intended to assist 'police from other jurisdictions in monitoring high-risk sex offenders; and provide greater peace of mind for victims, their families and the wider community'.[3]

As at 31 December 2009, there were 1704 registered offenders in Western Australia: 1630 adults and 74 juveniles. However, a proportion of the adult offenders are subject to the registration scheme as a result of offences that occurred when they were under the age of 18 years.[4] The Western Australia Police advised the Commission that at the end of 2009 there had been 212 offenders who had been registered as a result of offences committed when they were under the age of 18 years.[5] Hence, juvenile offenders represent approximately 12% of the total number of registered offenders in Western Australia. Overall, about 15% of registered offenders in Western Australia at the end of 2009 were Aboriginal; however, Aboriginal juveniles appear to be considerably overrepresented, constituting approximately 34% of registered offenders who were aged less than 18 years at the end of 2009.[6]

1. The background to the development of this national model and the approach adopted in other jurisdictions is considered in Chapter Three.
2. See *Community Protection (Offender Reporting) Act 2004* (WA) Preamble.
3. Western Australia, *Parliamentary Debates*, Legislative Assembly, 22 September 2004, 6279b–6282a (MH Roberts, Minster for Police and Emergency Services).
4. Email from Malcolm Penn, Executive Manager, Legislative Services, Legal and Legislative Services Unit, Western Australia Police attaching report from the Sex Offender Management Squad, Western Australia Police (17 May 2010).
5. Consultation with Detective Inspector Paul Steel (Sex Crime Division) and Martyn Clancy-Lowe (State Coordinator Sex Offender Management Squad), Western Australia Police (28 June 2010).
6. Email from Malcolm Penn, Executive Manager, Legislative Services, Legal and Legislative Services Unit, Western Australia Police attaching report from the Sex Offender Management Squad, Western Australia Police (17 May 2010).

Reportable offenders

Whether a particular offender is subject to registration and reporting obligations under the *Community Protection (Offender Reporting) Act 2004* (WA) ('the CPOR Act') is determined by the statutory definition of 'reportable offender'.[1] For present purposes, reportable offenders can be grouped into three main categories:

- **Mandatory registration** – offenders who are or have been sentenced for a Class 1 or Class 2 offence on or after 1 February 2005.[2]
- **Retrospective registration** – offenders who have been previously sentenced for a reportable offence and who are currently in custody or subject to supervision; or offenders who have previously been sentenced in relation to two reportable offences and at least one of those offences was committed in the eight years prior to 1 February 2005.
- **Discretionary registration** – offenders who are or have been sentenced for an offence that is not a Class 1 or Class 2 offence and the court makes an offender reporting order or past offender reporting order.

Mandatory Registration

An offender who is sentenced for a Class 1 or Class 2 offence (refer to table below) is automatically subject to registration and reporting requirements. The term 'sentence' is defined very broadly under s 3 of the CPOR Act to include:

- an order releasing an offender without sentence;[3]
- a conditional release order (ie, good behaviour bond);[4]
- an order to impose no punishment or no punishment with conditions; or a recognisance on a young offender;[5]
- a custody order made in relation to an accused who is acquitted on account of unsoundness of mind;[6]
- a special order requiring a serious and repeat young offender to remain in custody for an additional 18 months;[7]
- a pre-sentence order;[8] and
- any equivalent order under the laws of another jurisdiction.

Thus, anyone found guilty of a Class 1 or Class 2 offence is subject to the registration scheme irrespective of the leniency of the sentence imposed or the circumstances of the offence.[9] However, arguably, a referral to a juvenile justice team is excluded from the reach of the mandatory registration provisions.[10] A juvenile offender can be referred by the Children's Court to a juvenile justice team but only if the offence is not listed in Schedule 1 or 2 of the *Young Offenders Act 1994* (WA). Class 1 or Class 2 offences which are potentially referable to a juvenile justice team include indecent dealing of a child and sexual penetration of a child aged between 13 and 16 years.

Class 1 offences are listed in Schedule 1 of the CPOR Act and include any equivalent offence in another jurisdiction.[11] Class 2 offences are listed in Schedule 2.[12] Schedules 1 and 2 of the CPOR Act are reproduced below for ease of reference. In the overwhelming majority of instances, Schedules 1 and 2 offences are sexual offences against or involving children.

1. *Community Protection (Offender Reporting) Act 2004* (WA) s 6.
2. This includes offenders who are sentenced for a Class 3 offence at any time after commencement of the legislation provided that they have previously been convicted of another Class 3 offence. Class 3 offences are listed in Schedule 3 and cover serious and sexual offences committed against adults; however, as discussed in the Introduction to this Paper, Schedule 3 has not yet been proclaimed.
3. Under *Sentencing Act 1995* (WA) pt 6.
4. Under *Sentencing Act 1995* (WA) pt 7.
5. Under *Young Offenders Act 1994* (WA) ss 66, 67, 69 or 70.
6. Under *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) pt 4.
7. Under *Young Offenders Act 1994* (WA) s 126.
8. A pre-sentence order under Part 3A of the *Sentencing Act 1995* (WA) is currently the only prescribed order under reg 6A of the *Community Protection (Offender Reporting) Regulations 2004* (WA).
9. Section 111 also provides that the fact a conviction becomes spent does not affect the person's reportable offender status.
10. The definition of 'sentence' under s 3 of the CPOR Act is not exhaustive; however, because it refers to a number of less serious sentencing options it can be inferred that by not including a referral to a juvenile justice team it was intended to exclude this option from the ambit of mandatory registration. The Commission understands that, in practice, it is generally accepted that juvenile offenders who admit responsibility for the offence and are referred to a juvenile justice team are not required to register: consultation with Claire Rossi and Sarah Dewsbury, Legal Aid WA (8 June 2010).
11. *Community Protection (Offender Reporting) Act 2004* (WA) s 10. Class 1 offences are defined to include any offence involving an intention to commit a Class 1 offence or an attempt, conspiracy or incitement to commit a Class 1 offence.
12. *Community Protection (Offender Reporting) Act 2004* (WA) s 11. Class 2 offences are also defined to include attempts, conspiracies, etc; certain prescribed Commonwealth offences; and equivalent offences in other jurisdictions.

Schedule 1 – Class 1 offences

Enactment	Description of offence
The Criminal Code	
s 187	Facilitating sexual offences against children outside WA
s 279	Murder (if the person against whom the offence is committed is a child)[13]
s 320	Sexual offences against child under 13 (except s 320(6))
s 321	Sexual offences against child of or over 13 and under 16 years (except s 321(6))
s 321A	Persistent sexual conduct with child under 16
s 322	Sexual offences against child of or over 16 years by person in authority, etc (except s 322(6))
s 325	Sexual penetration without consent (if the person against whom the offence is committed is a child)
s 326	Aggravated sexual penetration without consent (if the person against whom the offence is committed is a child)
s 327	Sexual coercion (if the person against whom the offence is committed is a child)
s 328	Aggravated sexual coercion (if the person against whom the offence is committed is a child)
s 329	Sexual offences by relatives and the like[14] (except s 329(8))
s 330	Sexual offences against incapable person[15]
Crimes Act 1914 (Cth)	
s 50BA	Sexual intercourse with a child under 16
s 50BB	Inducing child under 16 to engage in sexual intercourse

13. This is the only non-sexual offence listed in Schedule 1. The murder of a child may not necessarily involve any sexual misconduct or be sexually motivated. Also, it may include infanticide type offences or murders which have occurred in the context of a domestic relationship breakdown. The Commission was advised in June 2010 that there are six offenders who are registered in Western Australia for murder and one of these is a female offender who killed her baby: consultation with Detective Inspector Paul Steel (Sex Crime Division) and Martyn Clancy-Lowe (State Coordinator Sex Offender Management Squad), Western Australia Police (28 June 2010).
14. Sexual offences by relatives include offences committed against adult victims. As at September 2010 there was one reportable offender who was convicted for a sexual offence against an adult relative: email consultation with Martyn Clancy-Lowe (State Coordinator Sex Offender Management Squad), Western Australia Police (3 September 2010).
15. An incapable person includes an incapable person who is an adult. As at September 2010 there were seven reportable offenders who have been convicted for a sexual offence against an incapable person over the age of 18 years: email consultation with Martyn Clancy-Lowe (State Coordinator Sex Offender Management Squad), Western Australia Police (3 September 2010).

Schedule 2 – Class 2 offences

Enactment	Description of offence
The Criminal Code	
s 186	Occupier or owner allowing child to be on premises for unlawful carnal knowledge
s 204B(2)	Using electronic communication to procure, or to expose to indecent matter, a child under 16
s 204B(3)	Using electronic communication to procure, or to expose to indecent matter, a child under 13
s 217	Involving child in child exploitation
s 218	Production of child exploitation material
s 219	Distribution of child exploitation material
s 220	Possession of child exploitation material
s 320(6)	Indecently recording child under 13
s 321(6)	Indecently recording child of or over 13 and under 16
s 322(6)	Indecently recording child of or over 16 by person in authority etc
s 323	Indecent assault (if the person against whom the offence is committed is a child)
s 324	Aggravated indecent assault (if the person against whom the offence is committed is a child)
s 331B	Sexual servitude (if the person against whom the offence is committed is a child)
s 331C	Conducting business involving sexual servitude (if the person against whom the offence is committed is a child)
s 331D	Deceptive recruiting for commercial sexual services (if the person against whom the offence is committed is a child)
s 557K(4)	Child sex offender habitually consorting with another child sex offender
s 557K(6)	Child sex offender being in or near a place where children are regularly present
Prostitution Act 2000	
s 16	Causing, permitting or seeking to induce child to act as prostitute
s 17	Obtaining payment for prostitution by a child
Classification (Publications, Films and Computer Games) Enforcement Act 1996	
s 60 (deleted)	Child pornography
s 101 (deleted)	Objectionable material offences (if the objectionable material is child pornography
Children and Community Services Act 2004	
s 192	Employment of child to perform in indecent manner
Crimes Act 1914 (Cth)	
s 50BC	Sexual conduct involving child under 16
s 50BD	Inducing child under 16 to be involved in sexual conduct
s 50DA	Benefiting from offence against Part IIIA
s 50DB	Encouraging offences against Part IIIA
Customs Act 1901 (Cth)	
s 233BAB	Special offences relating to tier 2 goods (if the offence involves items of child pornography or of child abuse material

Exception to mandatory registration

As explained above, being sentenced by a court for an offence listed in either of the above schedules is sufficient to trigger automatic registration. However, s 6(4) of the CPOR Act provides that a person is not a reportable offender merely because he or she committed a single prescribed offence as a child. Currently, the only prescribed offences are child pornography or offences concerning objectionable material (if the objectionable material is child pornography) under ss 60 and 101 of the *Classification (Publications, Films and Computer Games) Enforcement Act 1996* (WA).[16]

This exclusionary category is based upon the Australasian Police Ministers' Council (APMC) working party's proposed national model which suggested that juvenile offenders convicted of a single pornography or indecency offence should not be subject to mandatory registration.[17]

However, by failing to extend the exclusionary category to indecency offences the Western Australian legislation departs from the national model. Furthermore, as discussed in Chapter Three, there are broader exceptions to the mandatory registration rule in all other Australian jurisdictions.[18]

Western Australia's child pornography laws were reformed in August 2010 and are now contained in ss 217–220 of the *Criminal Code* (WA).[19] The Commission notes that the *Community Protection (Offender Reporting) Regulations 2004* (WA), which list the prescribed offences for the purpose of this exclusionary category, have not yet been amended to reflect these reforms. Therefore, a juvenile offender who is convicted of a single offence relating to the possession or distribution of child pornography under the new provisions will be subject to mandatory registration.

During a 2009 parliamentary inquiry in relation to the new child pornography laws it was recognised that the proposed offences may potentially apply to the practice of 'sexting'. Sexting was described as:

> [T]he practice of swapping sexually explicit images of *oneself* on mobile phones (or by email). It has been suggested that teenagers tend to send such photos as a joke, to feel sexy or to be funny and flirtatious.[20]

Concern was expressed about children being caught under the provisions for such behaviour[21] and the Standing Committee on Uniform Legislation and Statutes Review observed that if the bill is passed there will be 'significant consequences for any person, including a child, charged or convicted of the proposed offences'.[22] The potential consequences discussed included registration on the Australian National Child Offender Register (ANCOR).

Bearing in mind that the practice of 'sexting' may not necessarily involve any predatory or sexually deviant behaviour, the Commission is of the view that a child convicted of child pornography should not be liable to mandatory registration under the CPOR Act. In any event, this view simply reflects the previous law because a child convicted of a single child pornography offence under the repealed law was not included in the definition of a reportable offender. Although other proposals for reform in this Paper will remove the need to provide for a special statutory exception for juveniles,[23] the Commission proposes that Regulation 8 of the *Community Protection (Offender Reporting) Regulations 2004* (WA) be amended to ensure that it reflects the state of the current law.

PROPOSAL 1

Exception for juvenile offenders convicted of a single prescribed offence

That regulation 8 of the *Community Protection (Offender Reporting) Regulations 2004* (WA) be amended to include the newly enacted offences under ss 217–220 of the *Criminal Code* (WA).

16. See *Community Protection (Offender Reporting) Regulations 2004* (WA) reg 8.
17. Inter-jurisdictional Working Party, *Child Protection Offender Registration with Police: A national approach,* Report to the Australasian Police Ministers' Council (2003) 85.
18. See Chapter Three, 'Nationally consistent sex offender registration laws'.
19. Sections 217–220 were inserted into the *Criminal Code* following the enactment of the *Child Pornography and Exploitation Material and Classification Legislation Amendment Act 2010* (WA). This Act (which commenced on 28 August 2010) introduced changes to child pornography laws by inserting the relevant provisions into the Criminal Code, by increasing the penalties for child pornography offences, and by providing for nationally consistent offence definitions.
20. Standing Committee on Uniform Legislation and Statutes Review, *Child Exploitation Material and Classification Legislation Amendment Bill 2009*, Report No 41 (2009) 49.
21. See, eg, Commissioner for Children and Young People, Submission to the Legislative Council Standing Committee on Uniform Legislation and Statutes Review, *Inquiry into the Child Exploitation Material and Classification Legislation Amendment Bill 2009* (2009) 2.
22. Standing Committee on Uniform Legislation and Statutes Review, *Child Exploitation Material and Classification Legislation Amendment Bill 2009*, Report No 41 (2009) 55–6.
23. See Chapter Five, Proposals 5 & 7.

Retrospective Registration

The CPOR Act applies retrospectively to two groups of offenders: existing controlled reportable offenders and offenders who have been sentenced for two or more reportable offences in the past, with at least one of these offences committed after 1 February 1997. An existing controlled reportable offender is an offender who was immediately before 1 February 2005 in custody (either in prison or in custody following an acquittal on account of unsoundness of mind) or under the supervision of the Department of Corrective Services (eg, subject to a community-based order or parole).[24]

The Western Australian scheme's retrospective application is wider than was recommended under the national model and most other Australian jurisdictions. South Australia extends retrospectivity to offenders who committed a Class 1 offence within the 15-year period prior to commencement of its legislation.[25] In contrast, other jurisdictions limit retrospectivity to offenders who were in government custody or subject to supervision immediately prior to commencement of the relevant legislation.[26] This latter approach is consistent with the recommendation of the APMC working party. It was recognised that applying registration to historical offenders involves a balancing exercise between capturing those offenders who are at risk of further offending and resourcing constraints – increasing the number of registered offenders will inevitably stretch police resources.[27]

In relation to whether the Western Australian scheme should apply to *all* previously convicted sex offenders, the former Police Minister acknowledged that 'the wider we draw the net, the thinner the resources available for monitoring offenders without necessarily a great deal of community value'.[28] It was determined that registration should apply retrospectively to offenders convicted of two prior relevant offences provided that one offence occurred in the previous eight years. This determination was made on the basis of research that revealed that most recidivist sex offenders reoffend within a few years but after eight years the recidivism rate falls to about 5% or less.[29]

Discretionary Registration

As explained above, mandatory registration almost always applies to both adult and juvenile offenders who are sentenced for specified child sexual offences. Additionally, the CPOR Act provides for a system of discretionary registration – a court has the option of making an offender reporting order or a past offender reporting order in particular situations. Therefore, in these situations the court can consider all of the circumstances of the offence and the offender before making a determination as to whether registration is necessary.

Offender reporting orders

If a court finds a person guilty of an offence that is not a Class 1 or Class 2 offence the court may order that the offender comply with the reporting obligations under the CPOR Act. If such an order is made, the reporting period applies as if the offender had been found guilty of a Class 2 offence. An offender reporting order can only be made if the court is 'satisfied that the offender poses a risk to the lives or sexual safety of one or more persons, or persons generally'.[30] An application for an offender reporting order may be made by the prosecution; however, the court is empowered to make an order in the absence of an application. Pursuant to s 21(2a) of the *Sentencing Act 1995* (WA) the court has the power to direct that a pre-sentence report contain matters that are relevant to the making of an offender reporting order. However, it is noted that in practice a pre-sentence report may have already been prepared by the time an application for an offender reporting order is made or by the time the court is aware that the offences involved an underlying sexual motive.

The provision in Western Australia for a discretionary order follows the national model. The national working party recommended that a sentencing court should have the power to make a reporting order for non-Class offences but suggested that such instances would be rare for offences that are outwardly non-sexual (eg, burglary, kidnapping).[31] In 2009, there were only two offender

24. *Community Protection (Offender Reporting) Act 2004* (WA) s 3; *Community Protection (Offender Reporting) Regulations 2004* (WA) reg 7.
25. *Child Sex Offenders Registration Act 2006* (SA) s 6.
26. See *Child Protection (Offenders Registration) Act 2000* (NSW) s 3A; *Sex Offenders Registration Act 2004* (Vic) s 6; *Child Protection (Offender Reporting) Act 2004* (Qld) s 5; *Child Protection (Offender Reporting and Registration) Act* (NT) s 7; *Community Protection (Offender Reporting) Act 2005* (Tas) s 5; *Crimes (Child Sex Offenders) Act 2005* (ACT) s 8.
27. Inter-jurisdictional Working Party, *Child Protection Offender Registration with Police: A national approach,* Report to the Australasian Police Ministers' Council (2003) 73–76.
28. Western Australia, *Parliamentary Debates*, Legislative Assembly, 28 October 2004, 7524b–7542a (MH Roberts, Minister for Police and Emergency Services).
29. Western Australia, *Parliamentary Debates*, Legislative Assembly, 27 October 2004, 7418b–7424a (MH Roberts, Minister for Police and Emergency Services).
30. *Community Protection (Offender Reporting) Act 2004* (WA) s 13.
31. Inter-jurisdictional Working Party, *Child Protection Offender Registration with Police: A national approach,* Report to the Australasian Police Ministers' Council (2003) 70.

reporting orders made under s 13 of the CPOR Act. Both offenders were adults and the Western Australia Police have told the Commission that there were no applications made in 2009 in relation to juvenile offenders.[32]

Past offender reporting orders

The Commissioner of Police is able to apply to a court for a past offender reporting order in relation to an offender who was sentenced before the legislation commenced and who is not otherwise a reportable offender under the provisions of the CPOR Act.[33] Again, the court can only make such an order if 'satisfied that the offender poses a risk to the lives or sexual safety of one or more persons, or persons generally.[34] Bearing in mind the provision for retrospectivity discussed above, an application for a past offender reporting order might conceivably be made in relation to a child sex offender who was convicted more than eight years before the commencement of the legislation or who was only previously sentenced for one child sex offence.

The Commission has been advised that from the end of 2007 until October 2010 a total of seven applications were made for a past offender reporting order. Of these, four orders were made; one application was discontinued after the offender died; one application was dismissed; and the decision in relation to the final application has been reserved.[35]

Prohibition Orders

Although not directly relevant for the Commission's terms of reference, it is worth noting that the Commissioner of Police can apply to a court for a prohibition order prohibiting a reportable offender from engaging in specified conduct.[36] A court can only make a prohibition order if satisfied that the order will reduce the risk that the offender will harm the life or sexual safety of a child (or children generally).[37] The types of conduct that may be prohibited include associating with or contacting certain people, being at a particular location, engaging in specified behaviour and being in specified employment.[38] It has been suggested that a prohibition order is likely to be beneficial in relation to a reportable offender who 'only offended within the precincts of a primary school, or whose *modus operandi* was to become engaged in an educational establishment or a youth group'.[39]

A prohibition order may last for up to five years in the case of adult reportable offenders and two years for juvenile reportable offenders; however, a new order can be sought upon expiration of an existing order.[40] A reportable offender who fails to comply with the conditions of the order (without reasonable excuse) commits an offence and is liable to a maximum penalty of $12 000 and two years' imprisonment.[41] A reportable offender who is subject to a prohibition order is required to comply with the conditions of the order in addition to the general reporting obligations (discussed below). In contrast to the general reporting obligations, a prohibition order may impose considerable restrictions on an offender's freedom of movement. For example, in one case a reportable offender was 'prohibited from travelling on any form of public transport or from being within 50 m of any bus, ferry or train station, except during the hours of 10.00 am and 2.00 pm on weekdays, excluding public and school holidays and excluding occasions when he was travelling to or from work and medical appointments'.[42] In another case, an offender was prohibited from engaging in a number of activities including having unsupervised contact with children, associating with known child sex offenders, accessing internet chat sites, consuming alcohol, attending amusement arcades, and attending computer game retail stores.[43]

The Commission has been advised that between the end of 2007 and October 2010, a total of nine interim prohibition order applications were made by the State

32. Email from Malcolm Penn, Executive Manager, Legislative Services, Legal and Legislative Services Unit, Western Australia Police attaching a report from the Sex Offender Management Squad (17 May 2010).
33. *Community Protection (Offender Reporting) Act 2004* (WA) s 15.
34. *Community Protection (Offender Reporting) Act 2004* (WA) s 19(1).
35. Telephone consultation with Carol Connelly, State Solicitor's Office (22 October 2010).
36. *Community Protection (Offender Reporting) Act 2004* (WA) s 87. A prohibition order includes a child protection prohibition order and an interim child protection prohibition order. Pursuant to s 105 the Commissioner of Police can, when determining whether to make an application or when making an application for a prohibition order, 'direct any public authority to provide to the Commissioner ... any information held by the public authority that is relevant to an assessment of whether the reportable offender poses a risk to the lives or the sexual safety of one or more children, or children generally'.
37. *Community Protection (Offender Reporting) Act 2004* (WA) s 90(1).
38. *Community Protection (Offender Reporting) Act 2004* (WA) s 93.
39. [Case name deleted to protect identity] [2005] WASCA 252, [114] (Wheeler JA).
40. *Community Protection (Offender Reporting) Act 2004* (WA) s 91.
41. *Community Protection (Offender Reporting) Act 2004* (WA) s 101.
42. [Case name deleted to protect identity] [2010] WASC 267 [15].
43. *Commissioner of Police v PJC* [2010] WADC 135, [22]. It is noted that in this case the offender consented to the order, and welcomed the intervention and assistance being offered by police.

Solicitor's Office and, of these, seven orders were made.[44] Six out of the seven offenders subject to an interim prohibition order were subsequently made subject to a substantive prohibition order. In one instance an application for a substantive prohibition order was made without first seeking an interim order and, in this case, the order was granted.[45] The Western Australia Police also advised that a further two prohibition orders have been made following an application lodged directly by the police.[46] The Western Australia Police have only ever sought a prohibition order against one juvenile reportable offender (and, in this case, the order was made).

44. One application was dismissed and one application was adjourned sine die.
45. Telephone consultation with Carol Connelly, State Solicitor's Office (22 October 2010).
46. Email consultation with Martyn Clancy-Lowe, State Coordinator, Sex Offender Management Squad, Western Australia Police (12 November 2010).

Reporting

In Chapter One of this Paper, the Commission summarised the general obligations imposed upon reportable offenders and emphasised that the scheme under the *Community Protection (Offender Reporting) Act 2004* (WA) ('the CPOR Act') creates onerous obligations and may result in adverse consequences for the offender. This section examines the reporting obligations in more detail.[1]

Reporting Periods

The CPOR Act stipulates different reporting periods for different offenders. Moreover, the scheme differentiates juvenile offenders from adult offenders: juvenile offenders are only required to report for half of the period applicable to adult offenders and juvenile offenders are not subject to lifetime reporting.[2] The reporting period commences when the offender is sentenced or, if the offender is in custody, at the time he or she is released from custody.[3]

The following table sets out the general reporting periods that apply to adult and juvenile reportable offenders.[4]

The reporting period is determined only by reference to the offence category; the circumstances of the offence and the offender and his or her risk of reoffending are not (and cannot be) taken into account under the Western Australian regime. This is consistent with most other Australian jurisdictions. However, in Tasmania the length of the reporting period is determined by the sentencing court.[5] The legislation provides for maximum reporting periods (8 years, 15 years and life) and the court can impose any period up to the maximum allowable in the circumstances.[6]

Offences	Reporting periods
Only ever been found guilty of a single Class 2 offence	Adult reportable offender: 8 years Juvenile reportable offender: 4 years
Only ever been found guilty of a single Class 1 offence	Adult reportable offender: 15 years Juvenile reportable offender: 7½ years
Offender is a reportable offender because of a Class 1 offence and then commits and is found guilty of another Class 1 or Class 2 offence Offender is a reportable offender because of a Class 2 offence and then commits and is found guilty of a Class 1 offence Offender is a reportable offender because of a Class 2 offence and then commits and is found guilty of another Class 2 offence and has previously been found guilty of 3 or more Class 2 offences	Adult reportable offender: life Juvenile reportable offender: 7½ years

1. The Commission notes that there are different conditions imposed upon reportable offenders who are participants in the State Witness Protection Program: *Community Protection (Offender Reporting) Act 2004* (WA) Div 10. A person is also not a reportable offender if he or she is receiving protection under a prescribed foreign witness protection program: see s 6(5).
2. The reporting period for a juvenile offender is seven-and-a-half years in circumstances where an adult would be subject to lifetime reporting: *Community Protection (Offender Reporting) Act 2004* (WA) s 47. In comparison, the United Kingdom sex offender registration scheme imposes lifetime reporting on more serious juvenile sex offenders: *Sexual Offences Act 2003* (UK) s 82.
3. *Community Protection (Offender Reporting) Act 2004* (WA) s 45.
4. *Community Protection (Offender Reporting) Act 2004* (WA) s 46. Class 3 offences are excluded from this table because schedule 3 of the Act has not yet commenced.
5. *Community Protection (Offender Reporting) Act 2005* (Tas) s 24.
6. In *State of Tasmania v K,* Supreme Court of Tasmania, Sentencing Remarks, 20 May 2010 (Wood J) <http://www.supremecourt.tas.gov.au/decisions/sentences/latest_sentences> the offender was sentenced to 10 years' imprisonment (with a minimum term of six years) for three counts of maintaining a sexual relationship with a person under the age of 17 years. The victims were the offender's three daughters. The offender

Inclusion on the register for life

The CPOR Act is silent about whether a reportable offender's details remain on the sex offender register following expiration of the relevant reporting period. Section 114 (2)(d) of the CPOR Act provides that regulations may be made 'requiring or authorising the Commissioner [of Police] to remove specified information, or information of a specified class, from the Register'. However, to date, no such regulations have been made.

During parliamentary debates it was stated that 'offenders are kept on the register indefinitely'.[7] However, the Western Australia Police told the Commission that, in practice, once a reportable offender's reporting period expires their case is marked 'finalised' and their details are removed from the register. Nonetheless, their details remain on the Managed Person's System (also maintained by ANCOR), which means that if they are subsequently dealt with for another reportable offence, their previous registration status is known.[8] The Commission has spoken with a representative of ANCOR who has advised that the Managed Person's System contains information obtained directly from the police and includes persons who have been charged with a reportable offence (but are not yet registrable) and finalised cases.[9] The Commission was also told that in some jurisdictions the legislation requires police to destroy—at the end of the reporting period—certain personal information (eg, documents, fingerprints and photographs) that have been provided by the offender in compliance with the reporting obligations.[10] In contrast, s 42 of the CPOR Act enables the police to retain copies of any documents, any fingerprints or any photographs for 'law enforcement, crime prevention or community protection purposes'. So it appears that, although a reportable offender's status will be marked as finalised on the ANCOR database, the police can retain information provided by the offender indefinitely and the fact that the offender was a reportable offender under the CPOR Act will remain recorded for life.

Initial Report

The initial requirement for a reportable offender to report his or her personal details to the police generally arises within seven days of sentencing or seven days following release from custody.[11] The written notification of reporting obligations, which is served on the offender, recommends that the offender telephone the Western Australia Police ANCOR Unit to arrange an appointment time before the expiry of the seven-day period. The initial report must be made in person.[12] The brochure provided to reportable offenders directs them to telephone the Sex Offender Management Squad (based in Perth) to find out where they should report.[13] Under s 34 of the CPOR Act reports are usually made to the offender's local police station or at another location approved by police (or at another place approved under the regulations).

The legislation also stipulates that every reportable offender must report to the police before leaving Western Australia (unless that offender has arrived from another jurisdiction for a period of less than 14 days). This means that if a reportable offender is sentenced for a reportable offence and intends leaving Western Australia the next day, he or she is required to report before leaving. This provision ensures that reportable offenders cannot avoid their reporting obligations by moving interstate and enables the Western Australia Police to provide information about the movement of reportable offenders to other jurisdictions.

Pursuant to s 26 of the CPOR Act the reportable offender must report all of the following details to police at the initial report:

(a) his or her name, together with any other name by which he or she is, or has previously been, known; and

was 71 years at the time of sentencing and a reporting period of five years under the *Community Protection (Offender Reporting) Act 2005* (Tas) was imposed. It is possible that the offender's age was taken into account when setting the reporting period because if the offender was released at the earliest possible time he would be 77 years and he would be 82 years by the time he finished reporting under the sex offender registration scheme.

7. Western Australia, *Parliamentary Debates,* Legislative Assembly, 8 April 2008, 1975b–1993a (JC Kobelke).
8. Consultation with Detective Inspector Paul Steel (Sex Crime Division) and Martyn Clancy-Lowe (State Coordinator Sex Offender Management Squad), Western Australia Police (28 June 2010).
9. Telephone consultation with Rebecca Reid, Business Analyst, ANCOR, CrimTrac (5 October 2010).
10. See, eg, *Crimes (Child Sex Offenders) Act 2005* (ACT) s 82(2); *Child Sex Offenders Registration Act 2006* (SA) s 30; *Sex Offender Registration Act 2004* (Vic) s 30.
11. *Community Protection (Offender Reporting) Act 2004* (WA) s 24. There are different periods specified in s 24 for reportable offenders who were in custody or sentenced before commencement of the Act. Also, a reportable offender who enters Western Australia from another jurisdiction is required to report to the police within 14 days so long as he or she will be remaining in Western Australia for 14 or more consecutive days.
12. *Community Protection (Offender Reporting) Act 2004* (WA) s 35(1)(a).
13. The Sex Offenders Management Squad is responsible for maintaining the register on behalf of the Commissioner for Police under s 80 of the *Community Protection (Offender Reporting) Act 2004* (WA): COPs Manual, CR-12.3 *Community Protection (Offender Reporting) Act 2004*.

(b) in respect of each name other than his or her current name, the period during which he or she was known by that other name; and

(c) his or her date of birth; and

(d) the address of each of the premises at which he or she generally resides[14] or, if he or she does not generally reside at any particular premises, the name of each of the localities in which he or she can generally be found; and

(da) any telephone number that he or she has or that he or she regularly uses; and

(db) any email address that he or she has or that he or she regularly uses; and

(dc) the name of any Internet service provider whose Internet carriage service —

(i) he or she is supplied with; or

(ii) he or she regularly uses; and

(dd) any name (other than a name reported under paragraph (a)) that he or she uses, or by which he or she is known, when using the internet for the purposes of communication; and

(de) any —

(i) internet website; or

(ii) communication service provided by means of the internet,

in connection with which he or she uses a name referred to in paragraph (a) or (dd) or an email address referred to in paragraph (db); and

(e) the names and ages of any children who generally reside[15] in the same household as that in which he or she generally resides, or with whom he or she has regular unsupervised contact;[16] and

(f) if he or she is employed —

(i) the nature of his or her employment; and

(ii) the name of his or her employer (if any); and

(iii) the address of each of the premises at which he or she is generally employed[17] or, if he or she is not generally employed at any particular premises, the name of each of the localities in which he or she is generally employed; and

(g) details of his or her affiliation with any club or organisation that has members who are children or that conducts activities in which children participate; and

(h) the make, model, colour and registration number of any motor vehicle owned by, or generally driven[18] by, him or her; and

(i) details of any tattoos or permanent distinguishing marks that he or she has (including details of any tattoo or mark that has been removed); and

(j) whether he or she has ever been found guilty in any foreign jurisdiction of a reportable offence or of an offence that required him or her to report to a corresponding registrar or been subject to a corresponding offender reporting order or a corresponding prohibition order recognised under section 108 and, if so, where that finding occurred or that order was made; and

(k) if he or she has been in government custody since he or she was sentenced or released from government custody (as the case may be) in respect of a reportable offence or corresponding reportable offence — details of when and where that government custody occurred; and

(l) if, at the time of making a report under this Division, he or she leaves, or intends to leave, Western Australia to travel elsewhere in Australia on an average of at least once a month (irrespective of the length of any such absence) —

(i) in general terms, the reason for travelling; and

(ii) in general terms, the frequency and destinations of the travel. [19]

14. A person generally resides at an address if he or she resides at that address for at least 14 days (whether consecutive or not) in any 12-month period: *Community Protection (Offender Reporting) Act 2004* (WA) s 26(2)(a).
15. A child generally resides in the same premises as the reportable offender if that child lives with the reportable offender at that address for at least 14 days (whether consecutive or not) in any 12-month period: *Community Protection (Offender Reporting) Act 2004* (WA) s 26(2)(b).
16. A reportable offender has regular unsupervised contact with a child if he or she has unsupervised contact with the child for at least 14 days (whether consecutive or not) in any 12-month period: *Community Protection (Offender Reporting) Act 2004* (WA) s 26(2)(c). The Western Australia Police have advised that they do not consider attendance at a school, TAFE or another educational/training institution in which persons under the age of 18 years attend to constitute unsupervised contact with a child. Nor do they require details of the names and ages of children who belong to a sporting club or other organisation so long as membership of the organisation is notified: Consultation with Detective Inspector Paul Steel (Sex Crime Division) and Martyn Clancy-Lowe (State Coordinator Sex Offender Management Squad), Western Australia Police (28 June 2010).
17. A reportable offender is generally employed at any particular premises if he or she is employed at those premises for at least 14 days (whether consecutive or not) in any 12-month period: *Community Protection (Offender Reporting) Act 2004* (WA) s 26(2)(d).
18. A person generally drives a motor vehicle if he or she drives that vehicle for at least 14 days (whether consecutive or not) in any 12-month period: *Community Protection (Offender Reporting) Act 2004* (WA) s 26(2)(e). The Commission notes that in most other jurisdictions the relevant period for determining whether a reportable offender generally resides at an address, generally resides with a child or has regular unsupervised contact with a child, etc is also at least 14 days in any 12-month period. However, in the Australian Capital Territory the applicable period is at least seven days: *Crimes (Child Sex Offenders) Act 2005* (ACT) s 60.
19. Footnotes added.

The details that must be reported in Western Australia are evidently wide-ranging and extensive;[20] however, all of the abovementioned details are not necessarily relevant to all reportable offenders (eg, a reportable offender who is unemployed, a reportable offender who does not have access to a computer or a reportable offender who is unable to drive). The Commission understands that the police officer who takes the initial report will question the reportable offender about the various issues in order to prompt the correct responses.[21] Therefore, although the obligation to report all of abovementioned details squarely falls on the reportable offender, the police do assist and do not expect a reportable offender to commit all the requirements to memory.[22]

Ongoing Reporting

Over and above the requirement to initially report the abovementioned personal details, a reportable offender has various ongoing reporting requirements. In summary, ongoing reporting obligations include the requirement to report changes in personal details, to report travel plans and to report annually (or more frequently if required to do so by police).

Notification of changes

Section 29(1) of the CPOR Act provides that a reportable offender must report to police 'any change in his or her personal details within 7 days after that change occurs'. The phrase 'personal details' is defined to mean all of the information that must be reported at the initial report (as set out above).[23] In relation to a reportable offender's usual place of residence or employment, cohabitation or unsupervised contact with children, or any motor vehicle that the reportable offender generally drives, the obligation to report a change does not arise until the change has been effective for least 14 days in any 12-month period.[24] Notification of any changes to a reportable offender's address or changes in relation to tattoos and other distinguishing marks must be made in person to the police.[25]

Reports about other changes can be made either in person or in any way permitted by the Commissioner of Police (or by regulations).[26] Hence, the default position is that all reports must be made in person unless the police have permitted reporting by alternative means.[27] During consultations, the Commission was told that police allow various changes to be reported by telephone and, if this occurs, a receipt number is provided to the offender. In addition to the legislative requirement to report certain details in person, as a matter of practice the police generally also require 'in person' reports of changes concerning unsupervised contact or cohabitation with children.[28]

Travel plans

Reportable offenders have an ongoing obligation to report travel plans within and outside Western Australia (including interstate and overseas). Section 29A of the CPOR Act provides that a reportable offender who intends to leave his or her usual place or places of residence for a period of seven or more days, but does not intend to leave Western Australia, must (at least seven days before leaving) provide the police with details in regard to the expected duration of the planned absence, each location at which he or she intends to reside during the absence and the dates at which he or she will be at each location. If it is impracticable to comply with the requirement to report these details at least seven days in advance, the reportable offender will not be in breach of the legislation if he or she reports the details to police no later than 24 hours after leaving his or her usual place of residence.

Reportable offenders are also required to report all interstate and overseas travel at least seven days before leaving Western Australia.[29] The Western Australia Police have advised that they will usually accept reports concerning travel plans over the phone so long as a copy

20. The Commission notes that the requirement to provide details concerning telephone numbers, internet service providers, email addresses and computer usage is not included in the comparable legislation in the Australian Capital Territory, Northern Territory, Queensland and Tasmania.
21. Consultation with Sergeant Kevin Hall (Family Protection Coordinator) Kimberley District Office Western Australia Police (20 July 2010); Consultation with Detective Alan Goodger, Western Australia Police, Kununurra (22 July 2010).
22. Also, the list of required personal details is summarised in the brochure provided to reportable offenders.
23. *Community Protection (Offender Reporting) Act 2004* (WA) s 3.
24. *Community Protection (Offender Reporting) Act 2004* (WA) s 29(2).
25. *Community Protection (Offender Reporting) Act 2004* (WA) s 35(1)(c) & (d).
26. *Community Protection (Offender Reporting) Act 2004* (WA) s 35(2). As at 13 October 2010 the *Community Protection (Offender Reporting) Regulations* (WA) did not include any alternative methods of reporting.
27. The brochure handed to reportable offenders states that '[u]nless otherwise informed, you must report in person'.
28. Consultation with Detective Inspector Paul Steel (Sex Crime Division) and Martyn Clancy-Lowe (State Coordinator Sex Offender Management Squad), Western Australia Police (28 June 2010).
29. *Community Protection (Offender Reporting) Act 2004* (WA) s 30.

of the itinerary has been provided.[30] Reportable details include proposed destinations, dates for the journey, addresses and locations where the offender intends to reside throughout the journey, and whether the offender intends to return to Western Australia. As in the case of intrastate movements, if it is impracticable to report these details seven days prior to departure, the obligation will be fulfilled if the offender reports the required details no later than 24 hours after leaving Western Australia.[31] In addition any diversion from the original itinerary must be reported to the police as soon as is practicable after making the decision to change travel plans.[32] Upon return to Western Australia the reportable offender must report to police within seven days. If the reportable offender travelled overseas, he or she must produce his or her passport and any other travel documents.[33]

Periodic reporting

All reportable offenders in Western Australia must report their personal details to police at least once a year. This annual report must be made in the calendar month in which the initial report was made and must be made in person.[34] However, s 28(3) of the CPOR Act also provides that the police can require a reportable offender to report at any time so long as the reportable offender is notified of this requirement in writing. In practice, the Western Australia Police undertake a risk assessment of each reportable offender to determine how frequently they should report. The Commissioner's Orders and Procedures Manual ('the COPs Manual') provides that the 'frequency in which a reportable offender will be required to report will be based on the likelihood of him or her reoffending'.[35]

Risk assessment

An 'internationally accredited' actuarial risk assessment tool, the Risk Matrix 2000 (RM2000) is used by the Western Australia Police to determine the risk of reoffending for adult reportable offenders.[36] Actuarial risk assessment tools are generally based on an offender's static and past factors.[37] The RM2000 consists of three scales: RM2000/S (predicts sexual offending), RM2000V (predicts non-sexual violent offending) and RM2000/C (predicts both sexual offending and non-sexual violent offending).[38] The RM2000 is designed to be used with adult male sex offenders so long as at least one of their prior sexual offences was committed after the age of 16 years.[39] The RM2000 Guide explains that when using the assessment tool it is

> important to recognize that decisions about individuals should be based on the relevant legal, policy, professional, organizational and clinical frameworks, taking into account all the available information about the individual concerned including their living circumstances.[40]

This is consistent with a recent observation that in practice there is now considerable support for using a combination of actuarial and clinical risk assessment processes that combine both 'static and dynamic' factors.[41]

In general terms, the RM2000/S has two stages. The first stage consists of three questions relating to the present age of the offender (or age at the time of expected release from custody), past sexual offence sentencing appearances and past sentencing appearances for any criminal offence. On the basis of the answers to these questions the offender is classified as low, medium, high or very high risk. The second stage involves a further four questions: whether the offender has ever been convicted of a sexual offence against a male victim; whether the offender has ever been convicted of a sexual offence against a stranger; whether the offender has never lived in a 'marriage-like' relationship with another adult for at least two years; and whether the offender has ever been convicted of a non-contact offence (excluding internet offences). If two or three of these factors are present the offender's risk category is increased by one (eg, from low to medium) and if all four are present the risk

30. Consultation with Detective Inspector Paul Steel (Sex Crime Division) and Martyn Clancy-Lowe (State Coordinator Sex Offender Management Squad), Western Australia Police (28 June 2010).
31. If a reportable offender reports travel details after leaving Western Australia, he or she must do so by facsimile or email to the Commissioner of Police: *Community Protection (Offender Reporting) Act 2004* (WA) s 30 (4).
32. *Community Protection (Offender Reporting) Act 2004* (WA) s 31.
33. *Community Protection (Offender Reporting) Act 2004* (WA) s 32.
34. *Community Protection (Offender Reporting) Act 2004* (WA) ss 28 & 35.
35. COPs Manual, CR-12.3 *Community Protection (Offender Reporting) Act 2004*.
36. Consultation with Detective Inspector Paul Steel (Sex Crime Division) and Martyn Clancy-Lowe (State Coordinator Sex Offender Management Squad), Western Australia Police (28 June 2010). During this consultation the Commission was told that the RM2000 has been tested on approximately 10 000 offenders worldwide.
37. Barnett G et al, 'An Examination of the Predictive Validity of the Risk Matrix 2000 in England and Wales' (2010) 22 *Sexual Abuse: A Journal of Research and Treatment* 443, 444.
38. Thorton D, *Scoring Guide for Risk Matrix 2000.9/SVC* (February 2007) 3.
39. Ibid 3.
40. Ibid 4–5.
41. Barnett G et al, 'An Examination of the Predictive Validity of the Risk Matrix 2000 in England and Wales' (2010) 22 *Sexual Abuse: A Journal of Research and Treatment* 443, 444.

category jumps by two (eg, from low to high).[42] The predicted rate of recidivism within five years—based on the RM2000/S—ranges from 8% (for low-risk offenders) to 85% (for very high-risk offenders). The rates increase over a 15-year period to 11% (for low-risk offenders) to 91% (for very high-risk offenders).[43] Preliminary figures provided by the Western Australia Police suggest that the rate of reoffending among registered sex offenders in this state is considerably less than predicted under this model. This might indicate that the sex offender registration scheme has had a positive impact on reoffending levels.

The RM2000 Guide states that the tool is not appropriate for young adolescent sex offenders and female sex offenders, and also expresses a degree of caution about the tool being used for other specific groups (including mentally disordered, low functioning and older adolescent offenders).[44] While the reliability of risk prediction in regard to juvenile and female offenders is well acknowledged, it has also been observed that because the majority of research in relation to sexual offending stems from North America there may also be issues in relation to the reliability of such risk assessment tools for Indigenous offenders.[45] A recent study that considered the predictive accuracy of the RM2000/S (by examining reconviction rates for 9824 adult male convicted sex offenders in England and Wales) concluded that the RM2000/S had 'moderate predictive accuracy' across a range of different sex offenders 'suggesting that it is a robust tool that produces moderately reliable results across this heterogeneous group'.[46]

In Western Australia, the risk assessment questionnaire is completed by the local police 'case manager'[47] and then the Sex Offenders Management Squad in Perth considers the assessment and recommends how often the offender should report.[48] The police use their judgement to determine if the results of this objective assessment accord with their subjective views of the offender's likely risk. Very high-risk offenders are usually required to report between once a week and once a month,[49] high-risk offenders are usually required to report every couple of months, medium-risk offenders usually report two to four times a year and low-risk offenders usually report once or twice a year. The Commission was told that there are only a small number of reportable offenders in Western Australia who are reporting solely on an annual basis.[50]

As noted above, although guided by the RM2000/S risk level and general recommended reporting frequency for each category, case managers are able to set the reporting frequency based on their own subjective risk assessment and views.[51] For example, the Commission was told that all reportable offenders in one regional town are required to report at least once every three months[52] – it appears that the police do not reduce the reporting frequency below this level even if they consider that the offender is low risk. It was also suggested that approximately half of the reportable offenders in this town (all adults) arguably did not need to be subject to registration at all. This view appeared to be based on the nature of the underlying reportable offence (eg, 'consensual' sexual activity between a very young adult with an older child under the age of 16 years). It is possible that police are imposing more frequent reporting obligations than may be necessary because they are reluctant to reduce the reporting frequency in case an offender subsequently reoffends and they are held to account. The potential for this to occur was canvassed by the Australasian Police Ministers' Council (APMC) working party; it was noted that police officers may order frequent reporting requirements in order to avoid potential criticism if an offender later reoffends.[53]

Presently, the Western Australia Police do not use an actuarial risk assessment tool for juvenile offenders. When assessing the appropriate reporting frequency for juvenile offenders the police take into account individual factors such as the nature or type of offence, family support,

42. Thorton D, *Scoring Guide for Risk Matrix 2000.9/SVC* (February 2007) 17–28. See also Barnett, ibid 451.
43. Thornton, Ibid 15.
44. Ibid 32.
45. New South Wales Sentencing Council, *Penalties Relating to Sexual Assault Offences in New South Wales* (2009) vol 3, [4.49].
46. Barnett G et al, 'An Examination of the Predictive Validity of the Risk Matrix 2000 in England and Wales' (2010) 22 *Sexual Abuse: A Journal of Research and Treatment* 443, 466.
47. A case manager is a designated police officer at a local police station: COPs Manual, CR-12.3 *Community Protection (Offender Reporting) Act 2004*.
48. When sending the risk assessment questionnaire to the Sex Offenders Management Squad, the local district manager or the case manager can add additional information based on his or her observations of or previous dealings with the offender: COPs Manual, CR-12.3 *Community Protection (Offender Reporting) Act 2004*.
49. Although the Commission was told by a lawyer that one reportable offender was required to report twice a week: consultation with Judy Seif, Barrister (3 September 2010).
50. Consultation with Detective Inspector Paul Steel (Sex Crime Division) and Martyn Clancy-Lowe (State Coordinator Sex Offender Management Squad), Western Australia Police (28 June 2010).
51. Consultation with Sergeant Kevin Hall, Family Protection Coordinator, Western Australian Police, Kimberley (20 July 2010); consultation with Detective Alan Goodger, Kununurra Police (22 July 2010). The local case manager will usually seek advice from the local district manager when setting or changing reporting frequency.
52. Consultation with Western Australia Police.
53. Inter-jurisdictional Working Party, *Child Protection Offender Registration with Police: A national approach,* Report to the Australasian Police Ministers' Council (2003) 106.

schooling, other violent offences and other relevant current factors.[54] As far as the Commission is aware there is no routine use of clinical (ie, psychological) assessments for adult or juvenile offenders when determining risk levels and the frequency of reporting obligations.

Jurisdictional comparison

The power to set regular reporting obligations over and above the minimum annual report—as is the case in Western Australia—is rare. Almost all other Australian jurisdictions impose a requirement to report only once a year (in addition to the requirement to report any changes or travel plans).[55] Thus, in other states and territories, if offenders' personal circumstances (ie, residence, employment etc) remain stable and they do not travel or move around they will only have to present themselves to police once a year. The approach in other jurisdictions is consistent with the recommendations of the APMC working party. The option of requiring offenders to report more often than annually was rejected for a number of reasons including that regular reporting may amount to additional punishment; may 'interfere with the offender's ability to lead a normal life and to rehabilitate, and be so onerous as to reduce compliance'; and would increase police workloads.[56] The Commission notes that in the United Kingdom and Canada registered offenders are also only required to report annually (in addition to the requirement to make an initial report and to notify any changes and travel plans).[57]

However, there is a bill before the Queensland Parliament that proposes to increase the reporting frequency in that jurisdiction to once every three months.[58] The provisions appear to be designed to reduce the incidence of 'whereabouts unknown'. It was reported in Parliament that in 2009–2010 there were eight registered sex offenders who were missing and at least one of these offenders had been missing for more than nine months.[59] Even so, a requirement to report every three months is still less onerous than the obligations imposed on many Western Australian reportable offenders. For example, the Commission has been told that in one remote community in the Kimberley every reportable offender is required to report once a month. And as noted above, even though in one particular town every reportable offender is required to report at least every three months, the Commission was advised that some reportable offenders in this location are required (at least in the early stages) to report once a week, once a fortnight or once a month.[60]

Notification of Reporting Obligations

The CPOR Act provides that reportable offenders must be given written notice of their reporting obligations and the consequences of non-compliance.[61] This notice must be given as soon as practicable after the offender is sentenced or released from custody. Different agencies are responsible for serving the written notice depending on the circumstances. The Department of Corrective Services is responsible for notifying offenders who are in custody.[62] Offenders who are sentenced to non-custodial sentences by the Supreme Court, District Court and Children's Court are notified by court staff. The police are responsible for notifying other offenders

54. Email consultation with Martyn Clancy-Lowe (State Coordinator Sex Offender Management Squad), Western Australia Police (13 August 2010).
55. Section 18(1) of the *Community Protection (Offender Reporting) Act 2005* (Tas) provides that a reportable offender 'must report to the Registrar and provide his or her personal details to the Registrar each year'. Section 18(2) provides that a 'reportable offender must report to the Registrar and provide his or her personal details each year during the calendar month in which he or she first reported in accordance with this Act or a corresponding Act or at such other time as directed by the Registrar'. The Commission has been advised that in recent times Tasmania Police have been requiring high-risk reportable offenders to report every three or six months and this is done on the basis of s 18(2). This aspect of the legislation has not been tested and no offenders have yet been charged for breaching the requirement to report more frequently than once a year: telephone consultation with Sergeant Stephen Herbert, Tasmania Police (14 October 2010).
56. Inter-jurisdictional Working Party, *Child Protection Offender Registration with Police: A national approach,* Report to the Australasian Police Ministers' Council (2003) 106.
57. *Sexual Offences Act 2003* (UK) s 85; Canada Parliament, House of Commons, Standing Committee on Public Safety and National Security, *Statutory Review of the Sex Offender Information Registry Act*, Report (2009) 6.
58. Child Protection (More Stringent Offender Reporting) Amendment Bill 2010 (Qld).
59. Queensland, *Parliamentary Debates*, Legislative Assembly, 15 April 2010, 1345 (Mr Johnson).
60. Consultation with Nick Espie, Aboriginal Legal Service, Kununurra (23 July 2010).
61. *Community Protection (Offender Reporting) Act 2004* (WA) s 67.
62. Adult prisoners are provided with the Notification of Reporting Obligations on the day of their release as part of their discharge plan by a prisoner officer. Juvenile detainees who will be required to report are identified by the Case Planning Unit at Banksia Hill and they are advised of the obligation to report within seven days just prior to their release. No issues have been reported to the Commission by the Department of Corrective Services in relation to these processes: consultation with Lex McCulloch (Assistant Commissioner Youth Justice Services), Steve Robins (Assistant Commissioner, Adult Community Corrections), Angie Dominish, Marlene Hamilton and Alisha Edwards, Department of Corrective Services (7 September 2010).

(eg, offenders sentenced in the Magistrates Court and interstate offenders).[63]

The written notification form refers to the requirement to report to police within seven days of being sentenced or released from custody. It is also stated that failure to report is a criminal offence with a maximum penalty of a $12 000 fine and two years' imprisonment. The reportable offender is required to acknowledge receipt of the notice and the obligation to report. The back of the form includes details of the personal information that must be provided to police as well as the forms of identification that should be presented (eg, drivers licence, passport, citizenship document or birth certificate).[64] It is also stated that the offender should bring with them a passport-sized photograph and that, if the required documents are not presented, the police can confirm the offender's identity by taking fingerprints.[65] An information pamphlet is also handed to the offender. The police have the power under s 72 of the CPOR Act to detain a reportable offender if it is reasonably necessary to enable the offender to be given notice of his or her reporting obligations (if the police reasonably suspect that the offender has not been given notice or is otherwise unaware of the obligation to report).

Assistance and Support to Reportable Offenders

The written notification form is only provided in English, hence there is the potential for comprehension problems for non-English speaking offenders and illiterate offenders. Under the legislation an interpreter may be provided but there is no obligation to do so. If an interpreter is used, the interpreter must sign an undertaking not to disclose any information unless required to do so by a court or by law.[66] The Western Australia Police advised that interpreters are used and paid for when required.[67] The Commission was told by one regional police officer that he had used an interpreter on a couple of occasions.[68] On the other hand, it was suggested to the Commission that interpreters are not used often enough to explain reporting obligations and that the general lack of available interpreters in regional locations creates difficulties.[69]

Reportable offenders are entitled to take a support person with them when reporting to police and they are 'entitled to make the report out of the hearing of members of the public'.[70] A support person (eg, parent, guardian or carer) can make a report on behalf of a juvenile offender or an offender with a disability[71] who is unable to report on his or her own. If the report must be made in person under the provisions of the CPOR Act then the offender must accompany the support person to the police station.[72] The Western Australia Police advised that reportable offenders with mental health issues or intellectual disabilities are often accompanied by staff from the Disability Services Commission, the Public Advocate or the Transitional Program[73] and juvenile offenders invariably report in company of their parents or guardians.[74]

63. See *Community Protection (Offender Reporting) Regulations 2004* (WA) reg 19; consultation with Detective Inspector Paul Steel (Sex Crime Division) and Martyn Clancy-Lowe (State Coordinator Sex Offender Management Squad), Western Australia Police (28 June 2010).
64. See *Community Protection (Offender Reporting) Act 2004* (WA) s 38.
65. Section 38(2) of the *Community Protection (Offender Reporting) Act 2004* (WA) provides that the police can waive the requirement to present identification documents if the offender permits the police officer to take fingerprints or if the police officer is otherwise satisfied as the offender's identity. Section 40 of the Act authorises the police to take a photograph of the offender and s 41 provides that reasonable force can be used if necessary to enable fingerprints or a photograph to be taken.
66. *Community Protection (Offender Reporting) Act 2004* (WA) s 36(2)–(3).
67. Consultation with Detective Inspector Paul Steel (Sex Crime Division) and Martyn Clancy-Lowe (State Coordinator Sex Offender Management Squad), Western Australia Police (28 June 2010).
68. Consultation with Sergeant Kevin Hall, Family Protection Coordinator, Western Australian Police, Kimberley (20 July 2010).
69. Consultation with Mara Barone, Aboriginal Legal Service (25 May 2010); consultation with Norm Smith (Manager, Kimberley Community Justice Services) Department of Corrective Services (21 July 2010); consultation Magistrate Catherine Crawford (9 September 2010). The Commission was advised by Dee Lightfoot from Kimberley Interpreting Service that as far as she is aware an interpreter from that service has only been used once for the purpose of notification of reporting obligations under the CPOR Act: telephone consultation with Dee Lightfoot, Kimberley Interpreting Service (22 October 2010).
70. *Community Protection (Offender Reporting) Act 2004* (WA) s 36(1).
71. 'Disability' is defined in s 3 of the *Community Protection (Offender Reporting) Act 2004* (WA) to mean 'any defect or disturbance in the normal structure or functioning of the person's body' or 'any defect or disturbance in the normal structure or functioning of the person's brain'.
72. *Community Protection (Offender Reporting) Act 2004* (WA) s 35.
73. A program for people with mental health problems.
74. Consultation with Detective Inspector Paul Steel (Sex Crime Division) and Martyn Clancy-Lowe (State Coordinator Sex Offender Management Squad), Western Australia Police (28 June 2010).

Reporting by Remote Offenders

During the development of the proposed national model for sex offender registration concerns were raised about 'the ability of offenders in very remote areas to comply with their obligations to report at a police station within limited timeframes'.[75] The national working party recommended that police should have discretion to enable a registered offender to report outside the statutory timeframe if the offender resides more than 100km from the nearest police station.[76] Section 43 of the CPOR Act provides that if a reportable offender resides more than 100 km from the nearest police station, then he or she does not have to comply with the statutory reporting time limit in relation to reports that must be made in person as long as the offender contacts police before the time limit expires and is given permission to report at a later specified time and place.[77] The remote offender must also provide the required personal information by telephone (or other approved means) before the time limit expires.

Case Management and Monitoring of Offenders

The CPOR Act does not expressly provide for any proactive monitoring and management of registered sex offenders. The legislative scheme sets up the requirement for registered offenders to report and notify police of their personal details, and provides that if they fail to do so they can be charged with a criminal offence. There is nothing in the legislation authorising or requiring police to verify the details provided by offenders or to check their current whereabouts. Likewise, the legislation is silent on how police should manage offenders and respond to concerns about their behaviour or activities. In the Ombudsman's review of the New South Wales scheme in 2005 it was noted that the legislation does not cover how registered offenders are to be monitored nor does it impose any restrictions upon the 'activities or movements' of the registered persons.[78] Nonetheless, it was commented that registered persons 'should anticipate some degree of monitoring by police following registration, to ensure that they are complying with their obligations'.[79] It was further reasoned that it was 'clearly the intention of Parliament that the monitoring of registered persons was one of the purposes of the Act'.[80]

The national working party, in its recommendations for a national model scheme, suggested that responsibility for monitoring should rest with local police and that the degree of monitoring and 'proactive' actions would depend on the local commitment to the scheme, available resources and workloads.[81]

In Western Australia reportable offenders appear to be case managed and monitored by police to a degree. For high-risk offenders the police will actively seek to verify the details provided by reportable offenders but in the case of lower risk offenders the information provided is not routinely checked. However, all reportable offenders are recorded on the general database as a 'person of interest' to the Sex Offender Management Squad so police rely on regular information provided by ordinary police officers (eg, a reportable offender may be stopped by police in relation to a traffic infringement and it is discovered that the offender is driving a different vehicle from the one reported under the CPOR Act). The police also conduct random and non-random home visits to reportable offenders: they attend in plain clothes and in unmarked cars, aiming to be as discreet as possible. The police may also conduct both covert and overt surveillance of reportable offenders.[82] Regional police appear to visit remote communities as often as possible to check on reportable offenders (especially if they haven't reported as required).[83] In addition, police endeavour to liaise with other agencies as much as possible (eg, Department of Corrective Services, Disability Services Commission) to work together to increase compliance and reduce the risk of reoffending.[84]

The role of other agencies in the management and monitoring of registered offenders appears to be ad hoc and possibly restricted by the confidentiality provisions under the CPOR Act. For example, Department of

75. Inter-jurisdictional Working Party, *Child Protection Offender Registration with Police: A national approach,* Report to the Australasian Police Ministers' Council (2003) 105.
76. Ibid.
77. See also *Community Protection (Offender Reporting) Regulations 2005* (WA) reg 16.
78. Under the CPOR Act, restrictions can be imposed pursuant to a prohibition order.
79. New South Wales Ombudsman, *Review of the Child Protection Register: Report under s 25(1) of the Child Protection (Offenders Registration) Act 2000* (2005) 9.
80. Ibid 118.
81. Inter-jurisdictional Working Party, *Child Protection Offender Registration with Police: A national approach,* Report to the Australasian Police Ministers' Council (2003) 150.
82. Consultation with Detective Inspector Paul Steel (Sex Crime Division) and Martyn Clancy-Lowe (State Coordinator Sex Offender Management Squad), Western Australia Police (28 June 2010).
83. Consultation with Sergeant Kevin Hall, Family Protection Coordinator, Western Australian Police, Kimberley (20 July 2010).
84. Consultation with Detective Inspector Paul Steel (Sex Crime Division) and Martyn Clancy-Lowe (State Coordinator Sex Offender Management Squad), Western Australia Police (28 June 2010).

Corrective Services staff in Broome told the Commission that they assist both juvenile and adult offenders (who are subject to supervision by departmental staff) to comply with their reporting requirements (eg, remind them of dates, take them to the police station).[85] In contrast, department staff in Perth suggested that community corrections officers or juvenile justice officers would not routinely assist reportable offenders in complying with their obligations under the CPOR Act.[86] Department of Child Protection staff are provided with information about a person's child sexual offence convictions if police are concerned that there is a risk to a particular child but they are not told that the person is on the register. Department of Child Protection staff in the metropolitan area advised that if a person (who they believe would be subject to registration under the CPOR Act) applies for a Working with Children Check they advise the police because they believe police should know that a reportable offender is applying for clearance to work with children. However, if a registered sex offender tells the police that they are engaged in child-related employment the police do not advise the Working with Children Check unit.[87] Staff from the Department of Child Protection in Broome confirmed that they are not told who is on the sex offender register.[88]

The Commission notes that 'multi-agency child protection watch teams' have been established in New South Wales to manage 'high-risk' registered offenders.[89] In June 2008 the New South Wales Minister for Police announced that the pilot child protection watch teams would be expanded following a successful evaluation. He stated that the 'multi-agency program ensures swift reporting of registered child sex-offenders who display inappropriate behaviour and begin suspicious associations and living arrangements'. The teams involve New South Wales Police, Probation and Parole, the Department of Community Services, Housing, Health, Department of Education and Training, Juvenile Justice, and the Department of Ageing, Disability and Home Care.[90] The teams manage those registered child sex offenders who are considered to pose the greatest risk of reoffending.[91] As well as 'close supervision and monitoring' the teams provide support to offenders (eg, assistance accessing housing, employment, training and counselling) in order to assist in community reintegration.[92]

The New South Wales legislation was amended in 2008 to support this process by enabling better information sharing between government agencies.[93] Section 19BA of the *Child Protection (Offenders Registration) Act 2000* (NSW) enables a scheduled agency[94] to collect, use and disclose personal information about a registrable person if such disclosure is authorised by a senior officer of the agency. A senior officer is only entitled to authorise disclosure if there are 'reasonable grounds to suspect that there is a risk of substantial adverse impact'[95] on the registrable person or some other person or class of persons.

Breach of Reporting Obligations

Compliance with reporting requirements is supported by ensuring that non-compliant reportable offenders can be held to account. An offender who fails to comply with the reporting obligations, without reasonable excuse, commits an offence. The maximum penalty is a fine of

85. Consultation with Gaelyn Shirley (Team Leader, Youth Justice Services, Broome) and Norm Smith (Manager, Kimberley Community Justice Services), Department of Corrective Services (21 July 2010).
86. Consultation with Lex McCulloch (Assistant Commissioner Youth Justice Services), Steve Robins (Assistant Commissioner, Adult Community Corrections), Angie Dominish, Marlene Hamilton and Alisha Edwards, Department of Corrective Services (7 September 2010).
87. Consultation with Tara Gupta (General Counsel), Andy Gill, Kellie Williams and Sandie van Soelen, Department of Child Protection (12 July 2010).
88. Consultation with Cleo Taylor (Senior Practice Development Officer, Kimberley) and Kathryn Dowling (Team Leader Duty Intake, Broome), Department of Child Protection (19 July 2010).
89. New South Wales Ombudsman, *Review of the Child Protection Register: Report under s 25(1) of the Child Protection (Offenders Registration) Act 2000* (2005) ii.
90. Minister for Police, David Campbell, *Iemma Government to Roll-Out Child Protection Watch Teams*, Media Release (18 June 2008).
91. The Commission has been told by a clinical psychologist from New South Wales that in practice only registered offenders who are currently subject to an order (eg, probation or parole) are managed by the watch teams. This psychologist also expressed the view that the watch teams seldom provide 'therapeutic intervention': email consultation with Dr Katie Seidler, Clinical and Forensic Psychologist, LSC Psychology, Sydney (2 November 2010).
92. New South Wales, *Parliamentary Debates*, Legislative Council, 24 November 2009, 19669 (Lynda Voltz).
93. Previously the Child Protection Watch Teams could only manage 'consenting offenders'; ie, those who consented to the exchange of information between agencies: New South Wales, *Parliamentary Debates*, Legislative Council, 22 October 2008, 10310 (John Ajaka).
94. Scheduled agencies include the Police, Department of Ageing, Disability and Home Care, Department of Community Services, Department of Corrective Services, Department of Education and Training, Department of Health, Housing NSW, Department of Juvenile Justice, and various government health services.
95. 'Substantial adverse impact' is defined to include 'serious physical or mental harm, sexual abuse, significant loss of benefits or other income, imprisonment, loss of housing or the loss of a carer'.

$12 000 and two years' imprisonment.[96] It is also an offence (with the same maximum penalty) to knowingly provide false or misleading information.[97]

Section 63(3) of the CPOR Act also provides that it is defence to a charge of failing to comply with a reporting obligation if it is 'established that, at the time the offence is alleged to have occurred, the person had not received notice, and was otherwise unaware, of the obligation'. As discussed above, the CPOR Act requires certain agencies to provide written notice of the reporting obligations as soon as possible after the offender is sentenced or released from custody. However, there is no statutory requirement for notices to be given on an ongoing basis (eg, for the next annual report). During parliamentary debates it was observed that the failure to provide that police must notify a reportable offender of their next annual report may be problematic. It was noted that many people would not remember to renew their drivers licence or motor vehicle registration without a written reminder. It was suggested that there should be an automatic notification process that is sent to the reportable offender a month before they are due to report.[98] In response, it was stated that the police plan to issue renewal notices but that this would not be included in the legislation.[99] The Commission notes that the above defence provision squarely places the onus on the applicable notifying agencies to ensure that reportable offenders are notified of their reporting obligations. Otherwise, they will have a valid defence to any breaching charge.

In determining if a reportable offender has reasonable excuse for failing to comply, s 63(2) of the CPOR Act provides that a court must consider the offenders age; any disability that affects the offender's ability to understand and comply with the obligations; whether the form of notification was 'adequate' to inform the offender of the reporting obligations bearing in mind the offender's circumstances; and any other relevant matter. The specified factors for determining if a reportable offender has a reasonable excuse for non-compliance are consistent across most Australian jurisdictions.[100] The Western Australia Police argued that these factors are clearly in the offender's favour;[101] however, from the Commission's consultations it does not appear that s 63(2) of the CPOR Act has been relied on often. Discussions with various lawyers and judicial officers have failed to reveal any examples where a reportable offender has pleaded not guilty and successfully argued that he or she had a reasonable excuse for non-compliance.[102]

Statistics provided by Western Australia Police indicate that as at 31 December 2009 there had been a total of 233 reportable offenders charged with breaching the requirement to report; of these, 218 individual offenders were convicted of 400 offences.[103] Thus, some reportable offenders repeatedly breached their obligations and on the basis of these figures it appears that persons charged under s 63 of the CPOR Act are convicted in almost 94% of cases.

The 218 offenders who had been convicted for breaching their reporting obligations represented approximately 13% of the total number of reportable offenders at that time. The Western Australia Police also advised in June 2010 that the general compliance level is about 99% because only 4-5 offenders' whereabouts are unknown.[104] Hence, there may be reportable offenders

96. *Community Protection (Offender Reporting) Act 2004* (WA) s 63(1). In practice, penalties imposed for this offence have included 'no punishment', fines, supervision orders, suspended imprisonment and immediate imprisonment. The imposition of a fine appears to be the most common penalty although it is noted that by the end of 2009, 44 out of 400 (11%) individual offence convictions under s 63(1) resulted in a term of immediate imprisonment: email from Malcolm Penn, Executive, Manager Legislative Services, Legal and Legislative Services Unit, Western Australia Police attaching report from Sex Offender Management Squad (17 May 2010) 1.
97. *Community Protection (Offender Reporting) Act 2004* (WA) s 64. Only 12 persons were charged with this offence as at December 2009 and, of these, five persons were convicted: email from Malcolm Penn, Executive Manager Legislative Services, Legal and Legislative Services Unit, Western Australia Police attaching report from Sex Offender Management Squad (17 May 2010) 1.
98. Western Australia, *Parliamentary Debates*, Legislative Assembly, 21 October 2004, 7135c–7144a (MJ Birney).
99. Western Australia, *Parliamentary Debates*, Legislative Assembly, 28 October 2004, 7524b–7542a (MH Roberts. Minister for Police and Emergency Services).
100. In *Police v [name deleted to protect identity]* [2009] NTMC 037 a reportable offender was charged with breaching his reporting obligations. In determining if the offender had a reasonable excuse for his failure to report within seven days of his release from prison, the magistrate took into account that he had been advised of his reporting obligations some seven-and-a-half months prior to his release date. The magistrate found that the offender had a reasonable excuse for failing to comply because he did not properly understand his obligations and also noted that the particular circumstances (ie, being served with the notice some seven-and-a-half months prior to release from custody without any subsequent reminders is 'enough to enliven the "reasonable excuse"'.
101. Consultation with Detective Inspector Paul Steel (Sex Crime Division) and Martyn Clancy-Lowe (State Coordinator Sex Offender Management Squad), Western Australia Police (28 June 2010).
102. Although there have been examples mentioned where reportable offenders have been charged with an offence under s 63 but the charge has subsequently be withdrawn.
103. Email from Malcolm Penn, Executive Manager, Legislative Services, Legal and Legislative Services Unit, Western Australia Police attaching report from Sex Offender Management Squad (17 May 2010) 1.
104. Consultation with Detective Inspector Paul Steel (Sex Crime Division) and Martyn Clancy-Lowe (State Coordinator Sex Offender Management Squad), Western Australia Police (28 June 2010).

who are convicted for breaching specific reporting requirements (eg, failure to comply with periodic reporting) but the police are nevertheless aware of their current whereabouts.

Relatively speaking it appears that the frequency of breaching offences is much higher in regional Western Australia than it is in the metropolitan area. Regional reportable offenders represented approximately 33% of the total number of reportable offenders as at the end of December 2009; however, regional reportable offenders convicted for breaching their reporting obligations represented approximately 47% of all reportable offenders who had been convicted for breaching their reporting obligations.[105] It also appears that Aboriginal reportable offenders are considerably overrepresented in breaching offences. In June 2010, the Western Australia Police advised that Aboriginal reportable offenders were responsible for about 52% of offences for breaching reporting obligations.[106] This is concerning bearing in mind that Aboriginal reportable offenders represented about 15% of total reportable offenders at the end of 2009.[107] A similar observation can be made in relation to the sex offender registration scheme in New South Wales. In its first two years of operation almost 20% of persons breached for non-compliance were Aboriginal whereas Aboriginal reportable offenders constituted less than 4% of the total number of registered offenders at that time.[108]

The Ombudsman's review of the New South Wales scheme observed that breach cases involved both 'inability to comply' and 'deliberate refusal to comply'.[109] Aboriginal people from regional and remote Western Australia are clearly placed in a disadvantaged position – socio-economic difficulties, transport problems, and language and cultural barriers are all likely to cause problems for Aboriginal reportable offenders in terms of maintaining compliance with the registration and reporting scheme. The Commission's consultations suggest that deliberate or wilful breaches are far less common than breaches that are caused by inadvertence or practical difficulties in complying.[110] Moreover, as noted above, it was very clear from consultations that breaches were relatively speaking far more common in regional and remote areas than in the metropolitan area. Few lawyers/judiciary in Perth discussed problems in this regard, whereas the issue of breaching the CPOR Act was a common theme in regional consultations.

Western Australia Police both in Perth and in the Kimberley emphasised that warnings are given to reportable offenders in response to non-compliance before any formal charges are laid.[111] In particular, the Commission was told that, in order to assess reportable offenders' general attitude to reporting, police in the Kimberley will sometimes visit reportable offenders who have failed to report before deciding whether they should be charged. Offenders are encouraged to report and they are only charged with failure to comply for repeated non-compliance or obvious deliberate disregard of their obligations. On the other hand, the Commission was provided with anecdotal evidence to suggest that some reportable offenders have been unfairly charged with breaching the CPOR Act. Problems concerning the ability for reportable offenders to comply with reporting requirements and the resulting consequence of breach proceedings are discussed in Chapters Five and Six of this Paper.

105. For discussion about some of the difficulties faced by regional reportable offenders, see Chapter Five, 'Regional and remote juvenile reportable offenders' and Chapter Six, 'Problems for Aboriginal reportable offenders'.
106. Consultation with Detective Inspector Paul Steel (Sex Crime Division) and Martyn Clancy-Lowe (State Coordinator Sex Offender Management Squad), Western Australia Police (28 June 2010).
107. The Commission notes that between 1 July 2010 and 11 November 2010 there were 42 reportable offenders charged with breaching their reporting obligations. Nine of these offenders were recorded as Aboriginal; however, the Commission was advised that ANCOR does not facilitate the recording of ethnicity (instead Aboriginality is recorded based on the person's appearance): email consultation with Martyn Clancy-Lowe, State Coordinator, Sex Offender Management Squad, Western Australia Police (12 November 2010).
108. New South Wales Ombudsman, *Review of the Child Protection Register: Report under s 25(1) of the Child Protection (Offenders Registration) Act 2000* (2005) 96–97.
109. Ibid 105.
110. Consultation with Mara Barone, Aboriginal Legal Service (25 May 2010); telephone consultation with Dave Woodroffe, Aboriginal Legal Service, Kununurra (22 June 2010); consultation with Steve Begg, Ben White and Taimil Taylor, Aboriginal Legal Service, Broome (20 July 2010); consultation with Brianna Lonnie, Simon Holme and Matt Panayi, Legal Aid WA, Kununurra (22 July 2010); consultation with Nick Espie, Aboriginal Legal Service, Kununurra (23 July 2010); consultation with Chief Magistrate Seven Heath (2 August 2010); consultation with Magistrate Catherine Crawford (9 September 2010). However, the Commission was informed by staff from the Office of the Director of Public Prosecutions that prosecutions for breaching the CPOR Act are rare in the Perth Children's Court but those that were tended to involve more wilful or deliberate breaches: consultation with Matthew Bugg and Sean Stocks, Office of the Director of Public Prosecutions (28 June 2010).
111. Consultation with Detective Inspector Paul Steel (Sex Crime Division) and Martyn Clancy-Lowe (State Coordinator Sex Offender Management Squad), Western Australia Police (28 June 2010); consultation with Sergeant Kevin Hall, Family Protection Coordinator, Western Australian Police, Kimberley (20 July 2010); consultation with Detective Alan Goodger, Western Australia Police, Kununurra (22 July 2010).

Suspension of Reporting Obligations

A person's status as a reportable offender ends if the original finding of guilt in relation to the reportable offence is quashed or set aside. It also ends if the person is a reportable offender because of an offender reporting order or a past offender reporting order and that order has been quashed on appeal.[112] Otherwise there is no legislative mechanism to terminate or review a reportable offender's status.

However, there are two ways in which a reportable offender's reporting obligations can be suspended: upon application to the District Court (but only if the offender is subject to lifetime reporting and at least 15 years have elapsed) and discretionary suspension by the Commissioner of Police for certain juvenile offenders. If an offender's reporting obligations are suspended they will no longer be required to periodically report to police, notify changes to their personal details or notify any travel plans, but they will remain listed on the ANCOR register.

Application to District Court for offenders subject to lifetime registration

In general terms, if at least 15 years has passed since a reportable offender—who is subject to lifetime reporting—was sentenced or released from custody, he or she can apply to the District Court for an order suspending his or her reporting obligations.[113] The court can only make such an order if satisfied that the reportable offender 'does not pose a risk to the lives or the sexual safety of one or more persons, or persons generally'.[114] In deciding whether to make an order suspending an offender's reporting obligations, the court is to take into account the seriousness of the reportable offence(s); the period that has elapsed since those offences were committed; the age of the offender and the victim(s) at the time of the relevant offences; the difference in age between the offender and the victim(s); the offender's current age; the seriousness of the reportable offender's total criminal record; and any other relevant matter.[115] Because the CPOR Act only commenced in 2005 no such applications have yet been made.

As discussed in more detail in Chapter Three, there is no right of review under the scheme in the United Kingdom, even for registered offenders subject to lifetime registration. However, following a decision of the United Kingdom Supreme Court it has been announced that the legislation will need to be amended to introduce a review mechanism for lifetime registrants.[116] In contrast, in Canada an offender subject to registration for 10 years can apply for a termination order after five years, an offender subject to registration for 20 years can apply after 10 years and an offender subject to lifetime registration can apply after 20 years.[117]

Discretion of Commissioner of Police for juvenile offenders

Under s 61 of the CPOR Act the Commissioner of Police has limited discretion to suspend the reporting obligations of specified juvenile offenders (ie, offenders who were under the age of 18 years at the time they committed the reportable offence). The same test and criteria as for an application to the District Court (described above) applies. The power to suspend is restricted to prescribed offences and prescribed sentences. The offences prescribed under the regulations exclude sexual offences committed against children under the age of 13 years and the prescribed sentences exclude juvenile offenders sentenced to an Intensive Youth Supervision Order, a Conditional Release Order or a detention order under the *Young Offenders Act 1994* (WA).[118] Thus, on the face of it, the more serious sexual offences are excluded. In practice, the police review all juvenile offenders on an annual basis to reconsider whether they should be required to continue to report to police.[119] Any suspension of reporting obligations ends if the offender subsequently commits another reportable offence or is made subject to an offender reporting order, past offender reporting order or prohibition order.[120]

It appears that this provision was inserted in order to accommodate the situation of underage 'consensual

112. *Community Protection (Offender Reporting) Act 2004* (WA) s 6(6).
113. *Community Protection (Offender Reporting) Act 2004* (WA) s 52. A reportable offender who is subject to lifetime reporting in relation to murder is not entitled to apply for a suspension order, nor is an offender who is still subject to parole. The Commission notes that similar provisions exist in every other Australian jurisdiction, although the court or tribunal empowered to make the decision varies. In most jurisdictions it is the Supreme Court but in New South Wales it is the Administrative Decisions Tribunal.
114. *Community Protection (Offender Reporting) Act 2004* (WA) s 53(2).
115. *Community Protection (Offender Reporting) Act 2004* (WA) s 53(3).
116. United Kingdom, House of Commons Library, *Registration and Management of Sex Offenders under the Sexual Offences Act 2003*, Standard Note SN/HA/5267 (14 May 2010) 1.
117. *Criminal Code* (Can) s 490.015 (1).
118. *Community Protection (Offender Reporting) Regulations 2004* (WA) regs 17 & 18.
119. Consultation with Detective Inspector Paul Steel (Sex Crime Division) and Martyn Clancy-Lowe (State Coordinator Sex Offender Management Squad), Western Australia Police (28 June 2010).
120. *Community Protection (Offender Reporting) Act 2004* (WA) s 62.

sexual activity'. During parliamentary debates it was noted that juvenile child sex offenders should be treated differently because they are more likely to respond to treatment and are less likely to reoffend than adult child sex offenders and this is achieved by requiring juveniles to report for half of the period applicable to adults and by providing discretion for the Commissioner of Police to waive reporting obligations for juveniles convicted of having 'teenage sex'. It was also noted that other jurisdictions did not impose mandatory registration upon juveniles; instead, the decision as to registration is made by a court rather than the Commissioner of Police.[121]

By mid-2010 the Commissioner of Police had approved the suspension of reporting obligations for 50 of the 212 juvenile reportable offenders. The Western Australia Police informed the Commission that if the power to suspend reporting obligations was extended to cover all juvenile offenders (ie, including offenders who had committed offences against children aged less than 13 years) they would expect a much a higher number of approvals to be granted.[122] For example, presently the Commissioner of Police can suspend the reporting obligations of a 17-year-old offender who has been convicted of sexual penetration against a 13-year-old but the Commissioner cannot suspend the reporting obligations of a 12-year-old who is convicted of indecent dealing (eg, touching) against another 12-year-old.

121. Western Australia, *Parliamentary Debates*, Legislative Assembly, 22 September 2004, 6279b–6282a (MH Roberts, Minster for Police and Emergency Services).
122. Consultation with Detective Inspector Paul Steel (Sex Crime Division) and Martyn Clancy-Lowe (State Coordinator Sex Offender Management Squad), Western Australia Police (28 June 2010). They also indicated in principle support for an extension of the Commissioner of Police's power to suspend reporting obligations to also include a power to remove a juvenile offender from the register.

Access to register and confidentiality

As already explained in the Introduction to this Paper, access to the sex offender register is presently restricted in Western Australia. The information on the register is not accessible by members of the public nor is it available to all police officers. Section 81 of the *Community Protection (Offender Reporting) Act 2004* (WA) ('the CPOR Act') provides that only an authorised person can access the register and 'personal information' can only be disclosed in authorised circumstances. 'Personal information' is defined in s 3 to mean 'information about an individual whose identity is apparent or can reasonably be ascertained from the information'. In practice, the authority to access the Australian National Child Offender Register (ANCOR) is restricted on a 'need to know' basis: the Registrar has full access to the Western Australia register, the local district manager has access to information about all reportable offenders within his or her district, and a local case manager can access information about the reportable offenders that he or she manages. For those police who do have access to particular information on the register, disclosure of that information is also restricted. Section 82 of the CPOR Act provides that personal information from the register can only be disclosed in the following circumstances:

> (a) in the course of the person's duty;
>
> (b) as required or authorised by or under any Act or another written law;
>
> (c) for the purpose of proceedings for an offence under this Act;
>
> (d) with the written authority of the Minister or the person to whom the information relates; or
>
> (e) in other circumstances prescribed by the regulations.[1]

Failure to comply with this section is an offence and, depending on the circumstances, the maximum penalty ranges from a fine of $18 000 and three years' imprisonment up to $60 000 and 10 years' imprisonment.[2]

As noted earlier, an alert is currently placed on the general police database (Incident Management System) to say that a reportable offender is a 'person of interest' to the Sex Offender Management Squad. The Commissioner's Orders and Procedures (COPs) Manual states that:

> Any information obtained by a member about a registered offender as a result of an IMS check is NOT to be disclosed to any other person. The information may only be used for law enforcement purposes or as required under any other Act and must not be disclosed to any external body or personnel not involved in the purpose for which the information was obtained.[3]

The COPs Manual also provides that information can be disclosed to law enforcement bodies or any other authority if it appears that 'children may be at risk' but such information can only be disclosed by an officer above the rank of Inspector. The Commission understands that, in practice, police officers will exchange information about an offender's prior criminal history to the Department of Child Protection if there is a concern about a particular child but they do not reveal that the offender is on the sex offender register.

While members of the public are not presently entitled to access or search the sex offender register, it is important to highlight that a person's registrable status may become known to a member of the public in a number of ways. The fact that an offender is a reportable offender is often mentioned during the original sentencing proceedings so anyone present in court may be privy to that information (and may pass it on to other members of the public). Furthermore, Supreme Court sentencing decisions available on the court website may state that the offender is a reportable offender under the CPOR Act. In addition, breach proceedings under the CPOR Act for failing to comply with the reporting obligations may be dealt with in open court. There is nothing in the legislation requiring those proceedings to be dealt with in a closed court[4] and from the Commission's consultations it appears that there is an ad hoc practice

1. As at 17 January 2011, nothing was prescribed.
2. *Community Protection (Offender Reporting) Act 2004* (WA) s 82(1). The maximum penalty is higher if the person who disclosed the information gained a benefit and the applicable penalty varies depending on the value of the benefit gained.
3. COPs Manual, CR-12.3 *Community Protection (Offender Reporting) Act 2004*.
4. Pursuant to s 57 of the *Community Protection (Offender Reporting) Act 2004* (WA), proceedings in relation to an application for suspension of reporting obligations can be heard in the absence of the public if the District Court considers that there is a 'good reason' for doing so. Also, proceedings in relation to prohibition orders 'must be heard in the absence of the public': s 104.

of closing the court in some instances.[5] In relation to this issue the Ombudsman's review of the New South Wales sex offender registration laws reported that:

> One registered person contacted this office to complain about what he saw as an improper disclosure of his registered status, when a newspaper published details about him, including his name, following a court hearing in respect of a charge of failing to comply with registration obligations. However, there is nothing in the [New South Wales] Act that provides for court proceedings for breach offences not to be reported in the same way as any other court processes, including the proceedings for the original offence.[6]

There is also nothing in the legislation to prevent a third party from disclosing information once it has been obtained. For example, if police have disclosed information in accordance with the legislation to a government agency, a member of that agency may inadvertently reveal that information to others. Members of the public may also overhear discussions between court staff and offenders at the time they are being informed of their obligations to report or when they report to police. Although the police are required to ensure that reportable offenders can report in private that does not mean that a reportable offender will not announce his or her status at the front counter when reporting. One New South Wales parliamentarian raised the following issue:

> My one concern is with what might happen with the information that the police have. The intent of the legislation could be undermined if police reveal information on the paedophile register to unauthorised persons. The problems are easy to see: A police officer in a rural town may go home and tell his wife about a registration, and suddenly the information is all over town. Or, a paedophile may be seen going into a police station and giving information over the counter, rather than in the privacy of an office, and suddenly the information is out.[7]

The Commission is of the view that the potential for members of the public to become aware of an offender's reportable status is very real. This was particularly apparent during regional consultations where many of the people consulted noted that in small communities, information is easily and frequently disseminated.

5. Chief Magistrate Heath advised that he has closed his court on a few of occasions after being requested to do so by the prosecutor: consultation with Chief Magistrate Steven Heath (2 August 2010). Magistrate Crawford advised the Commission that she would close the court for breach proceedings if possible and if she had prior knowledge that the matter concerned the CPOR Act: consultation with Magistrate Catherine Crawford (9 September 2010). Lawyers from the Aboriginal Legal Service in Broome told the Commission that they had requested the court be closed during proceedings for breaching the CPOR Act: consultation with Steve Begg, Ben White and Taimil Taylor, Aboriginal Legal Service, Broome (20 July 2010).
6. New South Wales Ombudsman, *Review of the Child Protection Register: Report under s 25(1) of the Child Protection (Offenders Registration) Act 2000* (2005) 149.
7. New South Wales, *Parliamentary Debates*, Legislative Assembly, 8 June 2000, 6907 (Ms Moore).

Chapter Three

Sex Offender Registration in Context

Contents

Introduction 61

Sex offender registration schemes in other jurisdictions 62

The purpose of sex offender registration 62

United States 65

United Kingdom 67

Canada 69

Sex offender registration in Australia 72

Background 72

The APMC national model 73

The scope of the proposed registration scheme 73

Nationally consistent sex offender registration laws 74

The development of the Western Australian legislation 76

Introduction

Sex offender registration laws exist in a number of overseas jurisdictions[1] as well as in every Australian state and territory. In order to provide context for the Commission's examination of the Western Australian scheme and to adequately respond to its terms of reference, the fundamental components of other registration schemes are discussed in this chapter. Commonly, sex offender registration schemes require certain categories of offenders to provide their personal details to police on an ongoing basis and this information is collated into a database. The information is regularly updated and used by police for law enforcement purposes. Registration schemes place the onus on the offender to provide the required details to police, to report when required, and to notify the police of any changes in their personal circumstances. Failure to comply with these obligations is a criminal offence. However, sex offender registration laws differ between jurisdictions as to who must be included on the register and in relation to the specific obligations of registered offenders.

Further, in this chapter the Commission considers the development of nationally consistent child sex offender registration laws in Australia and considers the extent to which Western Australia's laws adhere to this national model. Examining the ambit of other schemes provides useful insights into alternative approaches and options that may be available to improve the effectiveness and fairness of Western Australia's laws.

1. Sex offender registration laws exist in the United States, England, Wales, Northern Ireland, Scotland, Ireland, Canada, France, Japan and South Korea: see Human Rights Watch, *No Easy Answers: Sex offender laws in the US* (2007) 10. A national sex offender register has also recently commenced in South Africa: see http://www.newstime.co.za/SouthAfrica/Radebe_Announces_National_Sex_Offenders_Register/10351/.

Sex offender registration schemes in other jurisdictions

The purpose of this overview is to briefly summarise the objectives of sex offender registration and the main components of registration schemes in the United States, United Kingdom and Canada.[1] These overseas schemes vary in their approaches to mandatory registration and also in the way in which they tackle registration for juvenile sex offenders. Hence, the summary below provides a useful starting point for assessing the current mandatory application of the *Community Protection (Offender Reporting) Act 2004* (WA) ('the CPOR Act') to both juvenile and adult child sex offenders.

The Purpose of Sex Offender Registration

The principal objective of sex offender registration is to protect the community; in those jurisdictions where registration is limited to child sexual offences the objective is to protect the safety of children. Various benefits of registration are put forward to explain how the registration of sex offenders will result in better protection for members of the public. These benefits include:

- Enhanced investigation and prosecution of sex offences

  By keeping records of the personal details of registered sex offenders, law enforcement agencies will be better equipped to investigate and prosecute new sex offences.[2] While some of the information contained in a register may already be available to police, a central register collates relevant information into one—easily accessible— database. Moreover, registration schemes require offenders to update their details and, therefore, assuming offenders comply with the requirements, police intelligence will be more accurate and current.[3] Notably, compliance rates for registration-only schemes appear to be reasonably high. For example, approximately 94% of registered offenders under the Canadian national scheme were found to be complying with the legislation.[4] In England and Wales the compliance rate was almost 97%.[5] The New South Wales Ombudsman reported that at the time of its review approximately 90–95% of registrable persons were complying with their initial registration, although the level of ongoing compliance was not known.[6] In contrast, schemes that combine registration with community notification appear to result in lower compliance levels.[7]

1. The Commission notes that the Sex Offenders Registry Bill 2003 was introduced into New Zealand Parliament in March 2003. The bill was drafted and developed by Deborah Coddington (who published the unofficial *The Australian Paedophile and Sex Offender Index*): New Zealand, *Parliamentary Debates*, House of Representatives, 30 July 2003, 7495 (D Coddington). The Bill was referred to the Justice and Electoral Select Committee and it recommended that the bill should not be passed: New Zealand House of Representatives, Justice and Electoral Select Committee, *Report on the Sex Offenders Registry Bill* 2003 (2006) 2.
2. See, eg, Wood JRT, *Royal Commission into the New South Wales Police Service*, Final Report (1997) vol V: The Paedophile Inquiry, [18.89]; New South Wales, *Parliamentary Debates*, Legislative Assembly, 8 June 2000, 6907 (Mr P Whelan); South African Law Commission, *Sexual Offences*, Project No 107, Report (2002) 267; McSherry B et al, 'Preventive Detention for "Dangerous" Offenders in Australia: A critical analysis of proposal for police development' (Criminology Research Council, 2006) 37–8; Western Australian Legislative Assembly Community Development and Justice Standing Committee, *Inquiry into the Prosecution of Assaults and Sexual* Offences, Report No 6 (2008) 195.
3. New South Wales, *Parliamentary Debates*, Legislative Assembly, 8 June 2000, 6907 (Mr P Whelan). In a recent New South Wales study one registered offender commented that 'there is a, perhaps flawed, assumption that offenders will be honest in their communication with police': Seidler K, 'Community Management of Sex Offenders: Stigma versus support' (2010) 2 *Sexual Abuse in Australia and New Zealand* 66, 69.
4. Canada Parliament, House of Commons, Standing Committee on Public Safety and National Security, *Statutory Review of the Sex Offender Information Registry Act*, Report (2009) 7. An audit of the Ontario register found that the compliance rate was 95%: Auditor General of Ontario, *Annual Report* (2007) 266.
5. Plotnikoff J & Woolfson R, *Where Are They Now?: An evaluation of sex offender registration in England and Wales,* Police Research Series Paper 126 (2000) 5–6.
6. New South Wales Ombudsman, *Review of the Child Protection Register: Report under s 25(1) of the Child Protection (Offenders Registration) Act 2000* (2005) 98.
7. One commentator has noted that in 1998 in Los Angeles 90% of the addresses on the sex offender register were found to be wrong and about 75% of offenders failed to register in California: Ronken C & Lincoln R, 'Deborah's Law: The effects of naming and shaming on sex offenders in Australia', *Bond University Humanities and Social Sciences Papers* [2001] 9. More recently it has been reported that about 100 000 (16%) of the 644 000 registered sex offenders in the United States had not complied with the registration requirements: Levenson J et al, 'Failure to Register as a Sex Offender: Is it associated with recidivism?' [2009] *Justice Quarterly* 1, 2.

- ## Deterrence of future sex offences

  It is argued that sex offender registration will deter registered sex offenders from committing new crimes because they are aware that they are being monitored and are therefore more likely to be caught.[8] Likewise it is suggested that potential (yet to be) registered offenders may also be deterred from committing sexual offences because they know that they will be monitored by police for a number of years if they are arrested and convicted.[9]

- ## Proactive intervention to prevent sexual offences

  Because police will have access to personal information about registered sex offenders they will be in a better position to monitor the offenders' whereabouts and behaviour.[10] If, as a result of monitoring an offender, the police become concerned about the offender's behaviour or circumstances (eg, a registered offender commences a new relationship with a single mother who has young children), the police may decide that it is necessary to inform child protection agencies. Access to up-to-date information about convicted child sex offenders is particularly useful for tracking offenders who move from one jurisdiction to another.[11] Moreover, registration schemes provide a legal foundation for police to arrest certain registered offenders.[12] For example, a non-compliant registered offender who is found in suspicious circumstances can be arrested and charged with an offence for failing to comply with the registration and reporting requirements. It is important to recognise that registration schemes do not provide therapeutic intervention (eg, counselling) to assist sex offenders to 'reduce or manage risks' which may lead to reoffending.[13]

Although not directly related to community safety, another objective of registration schemes is to provide a greater level of victim satisfaction. Victims of sexual crimes (and their families) may feel better protected and more satisfied with the overall outcome if they are aware that the perpetrator of the crime is under the close scrutiny of police.[14]

Underpinning sex offender registration laws is the view that the registration of convicted sex offenders with law enforcement authorities will reduce the incidence of sexual offence recidivism. As explained above, this is intended to be achieved by improved intelligence and monitoring of known sex offenders and by deterring registered (and possibly unregistered) offenders from committing future sexual crimes. There have been various studies in the United States in relation to the effectiveness of sex offender registration and community notification laws. Overall these studies suggest that sex offender registration and community notification laws do not significantly reduce the level of sexual offending in the community.[15] However, these studies must be viewed cautiously because in the United States sex offenders are simultaneously subject to registration and notification requirements. Thus it is difficult to extrapolate the extent to which, if any, community notification impacts upon the behaviour of registered (and unregistered) sex offenders. For example, one study (which examined

8. See Wood JRT, *Royal Commission into the New South Wales Police Service*, Final Report (1997) vol V: The Paedophile Inquiry, [18.89]; Swain M, 'Registration of Paedophiles' (1997) 12 *New South Wales Parliamentary Library Research Service Briefing Paper* 18. See also New South Wales, *Parliamentary Debates*, Legislative Assembly, 8 June 2000, 6907 (Mr P Whelan); South African Law Commission, *Sexual Offences*, Project No 107, Report (2002) 267; Western Australian Legislative Assembly Community Development and Justice Standing Committee, *Inquiry into the Prosecution of Assaults and Sexual* Offences, Report No 6 (2008) 195; *National Guidelines for Sex Offender Registration and Notification* (2008) 3: see <http://www.ojp.usdoj.gov/smart/pdfs/final_sornaguidelines.pdf>.
9. Swain, ibid 18. See also South African Law Commission, ibid 267.
10. See McSherry B at al, 'Preventive Detention for "Dangerous" Offenders in Australia: A critical analysis of proposal for police development' (Criminology Research Council, 2006) 37–8; New South Wales, *Parliamentary Debates*, Legislative Assembly, 8 June 2000, 6907 (Mr P Whelan).
11. One regional police officer told the Commission that the national scheme is very useful for dealing with convicted child sex offenders who move to Western Australia from another jurisdiction; prior to the scheme the Western Australia police would not have known that the person had moved to Western Australia.
12. See Wood JRT, *Royal Commission into the New South Wales Police Service*, Final Report (1997) vol V: The Paedophile Inquiry, [18.89]; Swain M, 'Registration of Paedophiles' (1997) 12 *New South Wales Parliamentary Library Research Service Briefing Paper* 18; South African Law Commission, *Sexual Offences*, Project No 107, Report (2002) 267.
13. See further, Seidler K, 'Community Management of Sex Offenders: Stigma versus support' (2010) 2 *Sexual Abuse in Australia and New Zealand* 66, 72.
14. See Wood JRT, *Royal Commission into the New South Wales Police Service*, Final Report (1997) vol V: The Paedophile Inquiry, [18.89]; Swain M, 'Registration of Paedophiles' (1997) 12 *New South Wales Parliamentary Library Research Service Briefing Paper* 18; New South Wales, *Parliamentary Debates*, Legislative Assembly, 8 June 2000, 6907 (Mr P Whelan).
15. See, eg, Tewksbury R & Jennings W, 'Assessing the Impact on Sex Offender Registration and Community Notification on Sex-Offending Trajectories' (2010) 37 *Criminal Justice and Behaviour* 570, 579; Letourneau E et al, 'Do Sex Offender Registration and Notification Requirements Deter Juvenile Sex Crimes?' (2010) 37 *Criminal Justice and Behaviour* 553, 564; Murphy L et al, 'Canada's Sex Offender Registries: Background, implementation, and social policy considerations' (2009) 18 *Canadian Journal of Human Sexuality* 61, 69; Tewksbury R & Lees B, 'Perceptions of Punishment: How registered sex offenders view registries' (2007) 53 *Crime and Delinquency* 380, 383–4.

the effects of registration and notification separately) found that registration appeared to reduce the level of future sexual offending by registered offenders; however, community notification increased recidivism.[16]

Outside of the United States there is little evidence in relation to the impact of sex offender registration on recidivism.[17] A 2005 review of the New South Wales sex offender registration laws concluded that the scheme appeared to be an effective tool for the investigation of child sexual assault. It was also noted that the scheme enabled police to respond proactively to specific concerns about registered offenders (eg, 'inappropriate housing and employment arrangements').[18] The New South Wales Police reported that one in seven registered offenders had been charged with a new offence following registration and that this figure was 'higher than would normally be anticipated'; however, less than 2% of registered offenders had been arrested for new sexual offences in the first 12 months following registration.[19] It was also observed that because registered offenders are 'subject to police targeting strategies' it is difficult to establish whether recorded reoffending rates are in fact evidence of increased recidivism or, alternatively, improved police enforcement.[20] Further, some registered offenders reported to the review that registration acts as a deterrent while others expressed concern that registration negatively impacted upon their rehabilitation.[21]

The Commission notes that some commentators have raised concerns about sex offender registration laws. However, it is emphasised that most of the literature emanates from the United States,[22] and therefore relates to schemes that simultaneously require registration and community notification. It has been argued that sex offender registration schemes may cause a false sense of community safety because they send a 'message that tells us we are safe because we know who the likely sexual predators are'.[23] For non-publicly accessible registers the community may well feel protected in the knowledge that police are regularly monitoring sex offenders. However, as canvassed in Chapter One, not all sex offenders are subject to registration. Only those who have been caught, charged and convicted, and who fit within the defined legislative criteria will be included on the register.[24] Hence the risk is that members of the public will fail to recognise danger signs or react to inappropriate behaviour because they believe that the police are monitoring those people who are likely to cause sexual harm.

It has also been contended that the requirement to regularly report and register with police may encourage offenders to move to a different jurisdiction where such requirements do not exist.[25] Nationally consistent schemes (such as those that exist in Australia and in the United States) reduce this risk although an offender may still move to an overseas location to avoid registration requirements. In addition, some offenders may disappear 'underground' in order to avoid registration (and notification) requirements.[26] In other words, an offender who is known to police in one location (eg, a small country town) may move to a city in the hope that he or she will not be recognised by authorities.

The potential for sex offender registration to discourage rehabilitation is another issue that has been raised. Sex offender registration (and to a greater extent, community notification) may discourage rehabilitation because offenders are labelled and mistrusted.[27] This is particularly relevant to juvenile offenders and is discussed in more detail in Chapter Five.

Sex offender registration schemes carry with them a risk of vigilantism although the potential for vigilantism is far greater in relation to publicly accessible registration schemes. In relation to non-public schemes there is a potential for vigilantism if information on the register

16. Prescott JJ & Rockoff J, *Do Sex Offender Registration and Notification Laws Affect Criminal Behaviour?,* John M Olin Center for Law & Economics Working Paper No 08–006 (University of Michigan Law and Economics, 2008) 33–4.
17. In Ontario, an audit found 'surprisingly little evidence' to demonstrate that the laws reduced sexual offending or assisted in the investigation of sex crimes: Auditor General of Ontario, *Annual Report* (2007) 272. In any early review of the sex offender registration laws in England and Wales, it was found that only 30% of the police interviewed 'described instances in which monitoring activity triggered by the register was thought to have contributed to crime prevention' and only 23% 'reported using register intelligence in investigations': Plotnikoff J & Woolfson R, *Where Are They Now?: An evaluation of sex offender registration in England and Wales,* Police Research Series Paper 126 (2000) vii.
18. New South Wales Ombudsman, *Review of the Child Protection Register: Report under s 25(1) of the Child Protection (Offenders Registration) Act 2000* (2005) 153–4.
19. Ibid 154–5.
20. Ibid.
21. Ibid 158.
22. Murphy L et al, 'Canada's Sex Offender Registries: Background, implementation, and social policy considerations' (2009) 18 *Canadian Journal of Human Sexuality* 61, 69.
23. Lincoln R & Ronken C, 'Civil Liberties and Sex Offender Notification Laws' (2001) 7(2) *National Legal Eagle* 6, 7. See also Swain M, 'Registration of Paedophiles' (1997) 12 *New South Wales Parliamentary Library Research Service Briefing Paper* 20.
24. See South African Law Commission, *Sexual Offences*, Project No 107, Report (2002) 268–9; Warner K, 'Sentencing Review 2005–2006' (2006) 30 *Criminal Law Journal* 373, 389.
25. See Ronken C & Lincoln R, 'Deborah's Law: The effects of naming and shaming on sex offenders in Australia', *Bond University Humanities and Social Sciences Papers* [2001] 9.
26. South African Law Commission, *Sexual Offences*, Project No 107, Report (2002) 268–9.
27. Ibid 268–9.

is 'leaked to the public'.[28] It is important to note that vigilante attacks may occur against innocent people due to mistaken identity or because family members of an offender are targeted.[29]

It has also been asserted that sex offender registration may discourage reporting of and admission of sexual offences. Bearing in mind that a considerable proportion of sexual offending against children is committed by family members or friends, the potential for registration (and, more particularly, community notification) may dissuade some victims from reporting the offence to authorities. Offenders may also be less likely to plead guilty to offences in order to seek to avoid registration and notification requirements.[30]

Finally, commentators have claimed that registration imposes obligations upon offenders to report to and provide personal information to police. It has been observed that these obligations intrude upon a person's civil liberties.[31] The Law Council of Australia has recently observed that registration 'brings with it onerous reporting obligations; ongoing police monitoring of, and involvement in, one's activities; and the risk of adverse community attention'.[32] In this regard, it is important to remember that other serious and dangerous offenders are not generally subject to registration or community notification requirements (eg, murderers, drug dealers and violent offenders are able to resume their lives without restriction after they have completed their sentence).[33]

28. McSherry B at al, 'Preventive Detention for 'Dangerous' Offenders in Australia: A critical analysis of proposal for police development' (Criminology Research Council, 2006) 37–8.
29. For example, in 2005 a man was murdered in the United Kingdom because the assailants believed he was a paedophile but it was his brother who had convictions for sexual offending: see <http://www.independent.co.uk/news/uk/crime/vigilante-violence-death-by-gossip-529624.html>. There have been numerous instances in the United States and the United Kingdom where innocent people have been attacked because they were mistakenly believed to be child sex offenders: Inter-jurisdictional Working Party, *Child Protection Offender Registration with Police: A national approach,* Report to the Australasian Police Ministers' Council (2003) 179. See also South African Law Commission, *Sexual Offences*, Project No 107, Report (2002) 268–9.
30. See Wood JRT, *Royal Commission into the New South Wales Police Service*, Final Report (1997) vol V: The Paedophile Inquiry, [18.90].
31. Swain M, 'Registration of Paedophiles' (1997) 12 *New South Wales Parliamentary Library Research Service Briefing Paper* 19.
32. Law Council of Australia, *Policy Statement on Registration and Reporting Obligations for Child Sex Offenders* (2010) 2.
33. South African Law Commission, *Sexual Offences*, Project No 107, Report (2002) 268–9. It is noted that in Western Australia a person who murders a child is covered by the *Community Protection (Offender Reporting) Act 2004* (WA); however, a person who murders an adult is not.

As canvassed at the start of this section, the primary objective of sex offender registration is to protect the community. Whether this objective is achieved appears difficult to substantiate. However, it is clear that if police have access to up-to-date and accurate information about sex offenders the monitoring and management of those offenders is likely to be more effective. Likewise, those registered offenders who do reoffend are more likely to be held to account because police will have improved intelligence when investigating crimes.[34]

While the Commission is not considering the merits of sex offender registration per se, it is important to appreciate in the context of this reference that registration schemes may have unintended consequences. For example, if police resources are under pressure, high-risk offenders may be overlooked. In addition, negative stigma associated with registration may be counterproductive in terms of rehabilitation – especially in relation to juvenile offenders. The challenge for the Commission in this reference is to ensure that the Western Australian legislation does not unnecessarily apply to too many offenders but at the same time ensure that any proposed reforms do not undermine the objectives of the scheme.

United States

Sex offender registration first commenced in the Unites States in California in 1947.[35] This initial scheme required certain sex offenders to provide their personal details to law enforcement agencies for the 'purpose of crime detection, investigation and prevention'.[36] By the 1990s a number of highly publicised crimes against children shifted the focus of sex offender registration policy.[37] From this time, registered sex offenders became increasingly subject to community notification. In 1990 the state of Washington introduced community notification laws in response to the 'sexual mutilation of a seven-year-old boy by a man with a long history of previous convictions for sex offences'.[38] In October 1994 New Jersey enacted legislation known as 'Megan's Law'

34. The APMC working party noted that the coordinator of the New South Wales registration scheme had advised that the register has 'proven to be an invaluable investigative tool': Inter-jurisdictional Working Party, *Child Protection Offender Registration with Police: A national approach,* Report to the Australasian Police Ministers' Council (2003) 45
35. See <http://www.meganslaw.ca.gov/sexreg.aspx?lang=ENGLISH>.
36. Law Reform Commission of Hong Kong, *Sexual Offences Records Checks for Child-related Work: Interim proposals*, Report (2010) [3.2].
37. Garfinkle E, 'Coming of Age in America: The misapplication of sex-offender registration and community-notification laws to juveniles (2003) 91 *California Law Review* 163, 164–5.
38. Hinds L & Daly K, 'The War on Sex Offenders: Community notification in perspective' (2001) 34 *Australian and New Zealand Journal of Criminology* 256, 264.

following the rape and murder of a seven-year-old girl (Megan Kanka) by her neighbour who was a convicted child sex offender.[39] Megan's Law also provided for public notification.[40]

In 1994 the United States Congress passed the *Jacob Wetterling Crimes against Children and Sexually Violent Offender Registration Act*. This law required all states to establish sex offender registers; however, it did not mandate community notification.[41] The purpose of this 1994 Act was to ensure that sex offenders could not escape registration by moving from one United States jurisdiction to another.[42]

A minimum level of community notification was established under the *Adam Walsh Child Protection and Safety Act of 2006* (US). Title I of this Act (commonly referred to as the 'federal Megan's laws' and also known as the *Sex Offender Registration and Notification Act* (SORNA)) stipulates that each state must provide for a minimum level of registration and public notification in order to obtain federal justice funding. However, states are free to provide for broader or more stringent registration and community notification requirements (eg, states can choose to introduce more frequent reporting requirements, to apply registration status to a broader range of offenders, to have longer registration periods, or to have more extensive public notification).[43] By the end of 1996 all states had passed some form of sex offender registration and community notification laws.[44] It has been observed that in 2009 there were more than 644 000 registered sex offenders in the United States.[45] The National Sex Offender Public Website collates information from all of the United States jurisdictions and enables law enforcement agencies and members of the public to search for information about registered sex offenders.[46]

In general terms, the minimum requirements established by the national SORNA are that:

- All sexual offence convictions (ie, against both adult and child victims) and kidnapping of a child (unless committed by a parent or guardian) are registrable offences.[47]

- Juvenile offenders are subject to registration if they have been prosecuted in criminal courts as adults or if they have been 'adjudicated as juvenile delinquents' and they are at least 14 years old and convicted of a serious sexual offence (eg, sexual offences involving force or violence, or sexual offences where the victim has been drugged).[48]

- Jurisdictions are to ensure that, at the very least, the name, address, vehicle details, physical description and current photograph of all registered sex offenders are available on a publicly accessible website.[49] The website must also enable members of the public to input zip codes and distances so that 'information about all of the posted sex offenders in the specified zip code or geographic area' can be obtained.[50] Publicly accessible websites cannot reveal the identity of any victim, social security numbers, arrests that have not resulted in a conviction and passport or other travel document numbers.[51]

- Registered sex offenders must report in person at least once a year (if they are a Tier I offender), every six months (if they are a Tier II offender) and every three months (if they are a Tier III offender).[52]

- Registration periods must be at least 15 years for a Tier I offender, 25 years for a Tier II offender and

39. Garfinkle E, 'Coming of Age in America: The misapplication of sex-offender registration and community-notification laws to juveniles' (2003) 91 *California Law Review* 163, 166.
40. Hinds L & Daly K, 'The War on Sex Offenders: Community Notification in Perspective' (2001) 34 *Australian and New Zealand Journal of Criminology* 256, 264.
41. Law Reform Commission of Hong Kong, *Sexual Offences Records Checks for Child-related Work: Interim Proposals*, Report (2010) [3.3]. See also Thomas T, 'The Sex Offender Register, Community Notification and Some Reflections on Privacy' in Harrison K (ed), *Managing High-Risk Sex Offenders in the Community: Risk management, treatment and social responsibility* (Uffculme: Willan Publishing, 2010) 62.
42. Hinds L & Daly K, 'The War on Sex Offenders: Community Notification in Perspective' (2001) 34 *Australian and New Zealand Journal of Criminology* 256, 261.
43. *National Guidelines for Sex Offender Registration and Notification* (2008) 6–7 <http://www.ojp.usdoj.gov/smart/pdfs/final_sornaguidelines.pdf>.
44. Garfinkle E, 'Coming of Age in America: The misapplication of sex-offender registration and community-notification laws to juveniles' (2003) 91 *California Law Review* 167.
45. Levenson J et al, 'Failure to Register as a Sex Offender: Is it associated with recidivism?' [2009] *Justice Quarterly* 1, 2.
46. See <http://www.nsopw.gov/Core/Conditions.aspx>.
47. *National Guidelines for Sex Offender Registration and Notification* (2008) 15 & 18.
48. Ibid 16. United States jurisdictions adopt different rules in relation to whether juveniles are prosecuted in adult criminal courts. Being 'adjudicated as a juvenile delinquent' means that a juvenile court has determined that the juvenile committed the offence. In general terms, a juvenile will be required to be prosecuted as an adult if there is a mandatory requirement to do so or if a juvenile court judge decides, based on past juvenile adjudications or the seriousness of the offence, that the juvenile is 'not amenable to treatment in the juvenile justice system': see United States Office of Juvenile Justice and Delinquency Prevention, *Delinquency Cases in Juvenile Court 2007*, Fact Sheet (2010) 3.
49. *National Guidelines for Sex Offender Registration and Notification* (2008) 33–4.
50. Ibid 34.
51. Ibid 34–5.
52. Ibid 54.

life for a Tier III offender (excluding any period spent in custody).[53]

- There is limited provision to be removed from the register for certain offenders if they can demonstrate a 'clean record' and if they have participated in a sex offender treatment program.[54] Tier I offenders can apply to have their names removed from the register after 10 years and those Tier III offenders who were convicted as a juvenile delinquent must wait 25 years before applying to be removed from the register.[55]

However, the minimum requirements under the SORNA do not apply to consensual sexual conduct if the victim was an adult (eg, prostitution offences) or if the victim was at least 13 years old and the offender was not more than four years older than the victim. The national guidelines state that:

> [U]nder the laws of some jurisdictions, an 18-year-old may be criminally liable for engaging in consensual sex with a 15-year-old. The jurisdiction would not have to require registration in such a case to comply with the SORNA standards, since the victim was at least 13 and the offender was not more than four years older.[56]

United States jurisdictions have until July 2011 to ensure that the minimum requirements are met in order to avoid the reduction in federal justice funding. As at the end of September 2010, South Dakota, Ohio, Delaware and Florida were the only states to have implemented the national requirements.[57]

In summary, the registration of convicted sex offenders is automatic under the United States national scheme. If a jurisdiction chooses to limit its registration scheme to the minimum national standards, not all juvenile offenders who have committed a sexually based offence will be subject to registration requirements.[58] For example, a 12-year-old offender who has not been dealt with in an adult criminal court is not liable to registration under the national scheme. Nevertheless, it has been commented that the national minimum standards remove discretion from the court and do not require any 'risk assessment' to be conducted in relation to juvenile offenders.[59] Furthermore, the existing national minimum standards require registrable juvenile offenders to comply with public notification requirements. However, recent proposed supplementary guidelines will enable individual jurisdictions to exempt 'juvenile delinquents' from the public notification requirements if they wish to do so. This shift in policy appears to have resulted from considerable reluctance by some jurisdictions to subject juvenile delinquents to community notification via publicly accessible websites.[60]

United Kingdom

The sex offender register in the United Kingdom was initially established under the *Sex Offenders Act 1997* (UK). The primary purpose of the register was to ensure that police had up-to-date information about convicted sex offenders.[61] It was envisaged that current and accurate information would facilitate the investigation of crime and may possibly assist in crime prevention.[62]

53. Ibid 57.
54. Ibid 58.
55. McPherson L, 'Practitioner's Guide to the Adam Walsh Act' (2007) 20(9) *National Center for the Prosecution of Child Abuse Update* 2. In this regard existing state laws vary. For example, juvenile offenders over the age of 15 years in Washington 'may be released from the requirement to register at any time if they can prove by clear and convincing evidence that future registration will not serve the purposes of the statute': Garfinkle E, 'Coming of Age in America: The misapplication of sex-offender registration and community-notification laws to juveniles' (2003) 91 *California Law Review* 163, 179. Juveniles under the age of the 15 years are also able to apply to be released from the requirement to register; however, they are subject to a lesser standard of proof.
56. *National Guidelines for Sex Offender Registration and Notification* (2008) 18.
57. See <http://www.ojp.usdoj.gov/smart/newsroom.htm>. The Confederated Tribes of the Umatilla Indian Reserve and the Confederated Tribes and Bands of the Yakama Nation have also complied with the national standards.
58. The New South Wales Ombudsman observed in 2005 (ie, before the national SORNA was enacted) that about half of the states in the United States require young people to register while others only require those young offenders who were tried as adults to register: New South Wales Ombudsman, *Review of the Child Protection Register: Report under s 25(1) of the Child Protection (Offenders Registration) Act 2000* (2005) 172. It has also been observed that New Mexico excludes juveniles from its sex offender registration laws: Garfinkle E, 'Coming of Age in America: The misapplication of sex-offender registration and community-notification laws to juveniles' (2003) 91 *California Law Review* 163, 178. The New Mexico sex offender website confirms that to be registered as a sex offender the person must be over 18 years: <http://www.nmsexoffender.dps.state.nm.us/>. In order to comply with the national minimum standards the law in New Mexico will clearly have to be changed.
59. McPherson L, 'Practitioner's Guide to the Adam Walsh Act' (2007) 20(9) *National Center for the Prosecution of Child Abuse Update* 3.
60. United States Federal Register, 'Supplemental Guidelines for Sex Offender Registration and Notification' (14 May 2010) 75(93) *Notices* 27363.
61. United Kingdom, *Parliamentary Debates*, House of Commons, 27 January 1997, vol 289, cols 23–72 (David Maclean, Minister of State, Home Office). See also Plotnikoff J & Woolfson R, 'Where Are They Now?: An evaluation of sex offender registration in England and Wales' (2000) 126 *Police Research Series Paper* 1-2.
62. Plotnikoff & Woolfson, ibid.

In July 2000, the abduction and murder of an eight-year old girl, Sarah Payne, led to calls for a public register.[63] In particular, the media strongly encouraged open access to the existing sex offender register. It has been observed that when such access was not forthcoming, one newspaper published the names and photographs of known sex offenders and vigilantism resulted.[64] Following this campaign legislation was introduced in order to strengthen the *Sex Offenders Act*. The *Criminal Justice and Court Services Act 2000* extended the registration requirements to offenders who left the United Kingdom for more than eight days and created Multi-Agency Public Protection Panels (MAPPPs). These panels (which included police and probation officers) were required to review and manage registered offenders and specific members of the public could be provided with relevant information if necessary.

An early evaluation of the scheme in 2000 noted that as at 31 August 1998 there were 8608 registered offenders and the scheme had a compliance rate of almost 97%.[65] It has been reported that the high level of compliance suggests that the registration scheme has been successful in terms of ensuring that police data is up-to-date; however, whether or not the scheme is an effective crime prevention tool is unproven because the extent to which registration may have contributed to changes in offending behaviour is difficult to assess.[66] Several police informed the evaluation that they did not use the register to prevent or investigate crime. However, the evaluation found that *some* police had proactively intervened in situations where registered offenders were living in close proximity to children or appeared to be behaving in a suspicious manner and registered information had been used to assist in the prosecution of cases involving paedophile networks and internet crimes.[67]

In 2003 the United Kingdom sex offender registration laws were reformed. As it currently stands, in relation to England and Wales, the scheme generally applies to offenders convicted of or cautioned for a relevant sexual offence (which includes sexual offences against adults and children).[68] As is the case in most jurisdictions, registration applies automatically; however, sentencing thresholds have been included so certain less serious offenders avoid registration. For example, the offence of indecent assault against an adult is not subject to registration unless the sentence imposed was imprisonment for at least 30 months. Most significantly, juvenile offenders are generally excluded unless they receive a sentence of at least 12 months' imprisonment. A juvenile is only automatically registrable irrespective of the sentence imposed if he or she has been convicted of 'rape' or assault by penetration (ie, without consent).[69]

Registration periods are also based on the sentence imposed.[70] For example, adult offenders sentenced to imprisonment for more than 30 months are subject to registration indefinitely. A sentence between 6–30 months' imprisonment results in registration for 10 years and those offenders sentenced to less than six months' imprisonment are required to register for seven years. Adult offenders who are sentenced to non-custodial dispositions or cautioned are subject to registration periods of between two and five years. Juvenile offenders can be subject to indefinite registration (ie, if they are sentenced to more than 30 months' imprisonment); however, where the registration period is a fixed term juveniles are subject to one-half of the period applicable to an adult.

For registered offenders (both adults and juveniles) who are subject to indefinite registration there is no right of review – hence registration lasts for life. In April 2010 the United Kingdom Supreme Court held that lifetime registration requirements—without any prospect for review—are incompatible with the right to privacy under the European Convention on Human Rights.[71] Following this decision, it was announced that the legislation will be amended to introduce a review mechanism.[72]

63. Thomas T, 'The Sex Offender Register, Community Notification and Some Reflections on Privacy' in Harrison K (ed), *Managing High-Risk Sex Offenders in the Community: Risk management, treatment and social responsibility* (Uffculme: Willan Publishing, 2010) 67.
64. Thomas T, 'When Public Protection Becomes Punishment? The UK Use of Civil Measures to Contain the Sex Offender (2005) 10 *European Journal on Criminal Policy and Research* 337, 341.
65. Plotnikoff J & Woolfson R, 'Where Are They Now?: An evaluation of sex offender registration in England and Wales' (2000) 126 *Police Research Series Paper* 5–6.
66. Thomas T, 'The Sex Offender Register, Community Notification and Some Reflections on Privacy' in Harrison K (ed), *Managing High-Risk Sex Offenders in the Community: Risk management, treatment and social responsibility* (Uffculme: Willan Publishing, 2010) 72–73.
67. Plotnikoff J & Woolfson R, 'Where Are They Now?: An evaluation of sex offender registration in England and Wales' (2000) 126 *Police Research Series Paper* 41-2.
68. *Sexual offences Act 2003* (UK) s 80. It also applies to offenders who have been found not guilty by reason of insanity or found unfit to plead provided that the alleged act has been proven. The legislation also applies to Scotland and Northern Ireland with some modifications.
69. *Sexual Offences Act 2003* (UK) sch 3.
70. *Sexual Offences Act 2003* (UK) s 82.
71. *R (on the application of F) and Thompson v Secretary of State for the Home Department* [2010] UKSC 17, [58] (Lord Phillips, Lady Hale and Lord Clarke concurring); [59] (Lord Hope); [66] (Lord Rodger).
72. United Kingdom, House of Commons Library, *Registration and Management of Sex Offenders under the Sexual Offences Act 2003*, Standard Note SN/HA/5267 (14 May 2010) 1.

In 2008 a pilot public disclosure program was introduced in four locations to formalise and extend the arrangements under the Multi-Agency Public Protection Arrangements (MAPPA). The pilot program was initially limited to parents, guardians and carers but in 2009 it was extended to any member of the public. Under the program, police have a legal duty to disclose information if they consider that the offender poses a risk of harm in the circumstances. A major change from the previous arrangements under MAPPA is that a member of the public could instigate an inquiry about a particular person with police.[73] The evaluation of the program in 2010 found that almost half of all applications by members of the public were made in relation to an ex-partner's new partner and a number of other applications were made in relation to neighbours and family members or friends. In just over 50% of the applications, the application was made because the applicant had heard something about the person from a third party.[74] During the pilot stage only 4% of applications resulted in any disclosure of information. Formal applications only represented 7% of all initial inquiries made with police.[75] A small number of registered sex offenders were interviewed and the most common concern was anxiety about the potential for community notification. There were no reports from offenders about any impact of the program on their behaviour; however, it is noted that none of the offenders who were interviewed had been subject to any public disclosure.[76]

On 2 August 2010 the United Kingdom Home Office issued a media release stating that the Child Sex Offender Disclosure Scheme would be rolled out nationally. Under this scheme members of the public (parents, guardians, carers and family members) can ask the police if a particular individual with access to their children has any prior convictions for child sexual offences. If so and if the person is considered to pose a risk to the child or children generally information can be disclosed.[77] It is noted that in early 2010 there were approximately 24 000 offenders subject to notification requirements under the United Kingdom scheme.[78]

73. Kemshall H et al, *Child Sex Offender Review (CSOR) Public Disclosure Pilots: A process evaluation* (2010) 1–2.
74. Ibid 9–10.
75. Ibid 10.
76. Ibid 17.
77. United Kingdom Home Office, *National Rollout of Scheme to Protect Children*, Press Release (2 August 2010).
78. *R (on the application of F) and Thompson v Secretary of State for the Home Department* [2010] UKSC 17, [51] (Lord Phillips, Lady Hale and Lord Clarke concurring).

Canada

Two, significantly different, sex offender registration schemes exist in Canada. The first, *Christopher's Law (Sex Offender) Registry Act 2000* commenced in Ontario in April 2001 and the second (the national scheme), established by the *Sex Offender Information Registration Act 2004* (Can), commenced in December 2004. The major difference between the two laws is that the national *Sex Offender Information Registration Act* provides for a limited form of judicial discretion when determining if a convicted sex offender should be required to comply with the registration requirements. Significantly, neither law generally applies to juvenile offenders. A young person can only be subject to registration if he or she has been dealt with in an adult court or sentenced to an adult disposition for a relevant designated offence.[79]

Under the Ontario scheme registration is automatic following conviction for a designated offence.[80] In contrast, s 490.012(1) of the *Criminal Code* (Can) states that as soon as possible after a sentence has been imposed for a designated offence the court shall, upon application by the prosecutor, make an order requiring the person to comply with the *Sex Offender Information Registration Act* for the relevant period.[81] Hence, the process must be initiated by the prosecutor. If an application is made, there is a presumption that a registration order will be made unless the offender can establish the statutory exception. Section 490.012(4) of the *Criminal Code* provides that a court is not required to make a registration order

79. See *Criminal Code* (Can) s 490.011(2). In order to receive an adult sentence a young person must be at least 14 years of age and must have been found guilty of an offence that carries a maximum penalty of more than two years' imprisonment. For specified serious offences (murder, attempted murder, manslaughter and aggravated sexual assault or a repeat serious violent offence) there is a presumption that an adult sentence will be imposed but for most offences the crown must apply for an adult sentence to be imposed: See *Youth Criminal Justice Act* (Can) ss 61–81.
80. Dupuis T, *Bill S-2: Protecting Victims from Sex Offenders Act: Legislative summary* (Canadian Parliamentary Information and Research Service, 2010) 4.
81. Under the national scheme registered offenders are required to register for 10 years (for offences with a maximum penalty of two or five years' imprisonment), 20 years (for offences with a maximum penalty of 10 to 14 years' imprisonment) or life (for offences with a maximum penalty of life imprisonment). If a second or subsequent registration order is made the offender will be subject to lifetime registration. In Ontario, registered offenders who have been convicted of an offence with a maximum penalty of 10 years or less are required to report for 10 years. If the offence has a maximum penalty of more than 10 years then the offender is required to report for life: Canada Parliament, House of Commons, Standing Committee on Public Safety and National Security, *Statutory Review of the Sex Offender Information Registry Act*, Report (2009) 7 & Appendix D.

> if it is satisfied that the person has established that, if the order were made, the impact on them, including on their privacy or liberty, would be grossly disproportionate to the public interest in protecting society through the effective investigation of crimes of a sexual nature, to be achieved by the registration of information relating to sex offenders under the *Sex Offender Information Registration Act*.

The decision to make or decline to make a registration order can be appealed by either the Crown or the offender.

The provision for judicial discretion under the Canadian law is unusual – in most jurisdictions the requirement to register arises automatically following conviction or sentence. During parliamentary debates difficulties with this approach were raised. It was argued that a system whereby a prosecutor must bring an application before a judge would be too 'cumbersome' and that this process would bring 'inequity into the system' because some judges may grant applications but others will not. Furthermore, some prosecutors will make an application while others will decline to do so.[82] It was reasoned that an automatic system would prevent these problems from occurring. As discussed below, it seems that some of these initial concerns may well have been valid.

The first statutory review of the *Sex Offender Information and Registration Act* found that only about 50% of offenders convicted of a designated offence are 'currently subject to an order for inclusion in the national registry'.[83] It was suggested that the low rate of registration was caused by a failure on the part of prosecutors to make an application and that this failure may be a result of excessive workloads or neglect.[84] The lower registration rate for the national register is apparent from a comparison between the number of registered offenders on each register in April 2009 (11 963 in Ontario compared to 19 000 on the national register).[85]

The review committee concluded that an automatic process would alleviate these problems but it was also suggested that a judge should have 'the ability to depart from an automatic ruling in *rare* circumstances'.[86] A supplementary opinion expressed by the New Democratic Party highlighted that the evidence heard by the committee demonstrated that the main problem was the failure of prosecutors to seek a registration order and that judicial discretion was generally working well.

> In fact, the Committee heard from a Department of Justice official who stated that 'right now it is working fully as intended, whereby probably 90% of applications that are brought before the courts result in an order of the court for the individual to register.[87]

The New Democratic Party proposed that instead of requiring the prosecutor to make an application, registration should be automatic with a provision to enable the offender to apply to the court for an order that he or she is not to be included on the register.[88]

In response to this review the Protecting Victims from Sexual Offenders Bill was introduced into the Canadian Senate on 17 March 2010.[89] This Bill provides for, among other things, automatic registration without any exceptions.[90] The Bill was passed by the Senate and introduced into the House of Commons in May 2010. It was referred to the Standing Committee on Public Safety and National Security on 15 June 2010.[91]

Another important feature of the Canadian sex offender registration laws is that registered offenders can apply for a 'termination order' after specified periods of time. If a termination order is granted the offender will no longer be required to comply with the reporting obligations but the personal details previously collected will remain on the register.[92] An offender subject to registration for 10 years can apply for a termination order after five years; an offender subject to registration for 20 years can apply after 10 years; and an offender subject to lifetime registration can apply after 20 years.[93] Section 490.016(1) of the *Criminal Code* (Can) provides that:

82. Canada, *Parliamentary Debates*, Senate, 1 April 2004 (Hon Consiglio Di Nino).
83. Canada Parliament, House of Commons, Standing Committee on Public Safety and National Security, *Statutory Review of the Sex Offender Information Registry Act*, Report (2009) 8.
84. Ibid.
85. Dupuis T, *Bill S-2: Protecting Victims from Sex Offenders Act: Legislative summary* (Canadian Parliamentary Information and Research Service, 2010) 3–4. Ontario has approximately 38% of Canada's total population but well over half the number of total registered offenders that appear on the national register: see <http://www.statcan.gc.ca/daily-quotidien/100628/dq100628a-eng.htm>.
86. Canada Parliament, House of Commons, Standing Committee on Public Safety and National Security, *Statutory Review of the Sex Offender Information Registry Act*, Report (2009) 9.
87. Ibid 36.
88. Ibid 36–7.
89. Dupuis T, *Bill S-2: Protecting Victims from Sex Offenders Act: Legislative summary* (Canadian Parliamentary Information and Research Service, 2010) 1.
90. Ibid 4–5.
91. See <http://www2.parl.gc.ca/Sites/LOP/LEGISINFO>. During the committee stage an amendment to enable very limited discretion was proposed and rejected: Canada, House of Commons, Standing Committee on Public Safety and National Security, 40th Parliament, 3rd Session, *Evidence*, 6 October 2010, 1–2. At the time of writing the Bill had not yet been again debated in the House of Commons.
92. Murphy L et al, 'Canada's Sex Offender Registries: Background, implementation, and social policy consideration' (2009) 18 *Canadian Journal of Human Sexuality* 61, 66.
93. *Criminal Code* (Can) s 490.015 (1).

> The court shall make a termination order if it is satisfied that the person has established that the impact on them of continuing the order or orders and any obligation, including on their privacy or liberty, would be grossly disproportionate to the public interest in protecting society through the effective investigation of crimes of a sexual nature, to be achieved by the registration of information relating to sex offenders under the *Sex Offender Information Registration Act*.

If the court refuses the application the offender can, if applicable, reapply after another five years have elapsed.

Under both the Ontario and national schemes, members of the public are not permitted to access information on the register. Further, the authority for police to access the register varies in each jurisdiction. Under the national laws police can only consult the register if they are investigating a crime that is reasonably suspected of being of a sexual nature.[94] In contrast, the Ontario scheme allows police to access the register to prevent sexual offences and to check the accuracy of information on the register.[95]

The national approach has been criticised because police do not always know whether an offence is of a sexual nature at the start of an investigation.[96] The review committee observed that the national register was accessed by police only an average of 165 times per year whereas the Ontario register was accessed approximately 475 times a day.[97] While agreeing that the registration scheme should endeavour to protect the privacy of registered offenders as much as possible, the review committee recommended that the legislation should be amended to enable police to access the information on the register for the purpose of investigating and preventing crime and to apply the *Sex Offender Information and Registration Act*.[98] This proposed amendment has been included in the Protecting Victims from Sexual Offenders Bill (Can).[99]

94. Dupuis T, *Bill S-2: Protecting Victims from Sex Offenders Act: Legislative summary* (Canadian Parliamentary Information and Research Service, 2010) 2.
95. Ibid 4. Also in Ontario police are authorised to disclose information to other people if necessary for the purpose of protecting the public or a victim of crime: Canada Parliament, House of Commons, Standing Committee on Public Safety and National Security, *Statutory Review of the Sex Offender Information Registry Act*, Report (2009) Appendix D.
96. Dupuis T, *Bill S-2: Protecting Victims from Sex Offenders Act: Legislative summary* (Canadian Parliamentary Information and Research Service, 2010) 3.
97. Canada Parliament, House of Commons, Standing Committee on Public Safety and National Security, *Statutory Review of the Sex Offender Information Registry Act*, Report (2009) 5.
98. Ibid, recommendation 1.
99. Dupuis T, *Bill S-2: Protecting Victims from Sex Offenders Act: Legislative summary* (Canadian Parliamentary Information and Research Service, 2010) 5 (emphasis omitted).

Sex offender registration in Australia

Every Australian state and territory presently has legislation that establishes a sex offender register and imposes reporting obligations upon registered offenders. However, as mentioned in the Introduction to this Paper, no Australian jurisdiction is yet to extend its registration scheme to include community notification.[1] This section discusses the development of sex offender registration in Australia and specifically the development of a nationally consistent model, upon which Western Australia's laws are largely based. As will be seen in the discussion below, many of the issues to be examined by the Commission in this reference were raised throughout the development process. However, unlike those responsible for developing the legislation, the Commission is able to consider the issues with the benefit of knowing how the scheme has actually operated in practice.

Background

The first sex offender registration scheme in Australia was introduced in Queensland in 1988. This scheme was discretionary – a court could make an order requiring a convicted child sex offender to report his or her personal details to police if the court was satisfied that there was a substantial risk that the offender would commit a further offence against a child under the age of 16 years.[2] Over the following decade there were calls for the establishment of sex offender registration schemes in Australia. For example, in 1993 the Australian Bureau of Criminal Intelligence recommended the establishment of a national paedophile register.[3] In 1995 the Victorian Parliament Crime Prevention Committee recommended that all adult offenders convicted of an indictable sexual offence should be registered on a sex offender register for life.[4] It was also proposed that juvenile offenders convicted of an indictable sexual offence should be registered until the age of 21 years.[5] The Wood Royal Commission recommended in 1997 that a national non-public sex offender register should be established to ensure that offenders cannot cross state borders to avoid registration and to respond effectively to the increasing use of online services by paedophiles.[6]

The *Child Protection (Offenders Registration) Act 2000* (NSW) commenced on 15 October 2001 in response to the recommendation of the Wood Royal Commission. This legislation created the first mandatory sex offender registration scheme in Australia. However, although registration was automatic for most convictions, the legislation excluded specific categories from the mandatory rules. For example, an offender would not *automatically* be required to register if a conviction was not recorded by the sentencing court or if the offender was convicted of a single Class 2 (ie, less serious) offence and did not receive imprisonment or a supervision order.[7] Nonetheless, the New South Wales legislation did not provide for any appeal or review mechanism to 'exclude people who might be considered to be inappropriately caught by the Act'.[8] The review of the first two years of the New South Wales scheme's operation suggested that such people may include juveniles convicted of underage consensual sexual activity and women convicted of murdering a child in circumstances involving post-natal depression.[9]

In June 2002, CrimTrac (an Australian government agency that provides national information sharing processes for state and territory law enforcement agencies) began to develop a National Child Sex Offender System. This system was designed to improve information sharing in relation to child sex offenders but it did not create a national register.[10] At the end of 2002 the Australasian Police Ministers' Council (APMC) established an inter-jurisdictional working party to develop a national uniform approach to child sex offender registration.

1. See Introduction, 'Community notification'.
2. Inter-jurisdictional Working Party, *Child Protection Offender Registration with Police: A national approach,* Report to the Australasian Police Ministers' Council (2003) 34.
3. Ibid 6.
4. Victorian Parliament Crime Prevention Committee, *Combating Child Sexual Assault: An integrated model,* Inquiry into Sexual Offences against Children and Adults, First Report (1995) 260.
5. Ibid 260–2.
6. Wood JRT, *Royal Commission into the New South Wales Police Service*, Final Report (1997) vol V: The Paedophile Inquiry, [18.96] & [18.136].
7. New South Wales Ombudsman, *Review of the Child Protection Register: Report under s 25(1) of the Child Protection (Offenders Registration) Act 2000* (2005) 17.
8. Ibid 18.
9. Ibid 20–1.
10. Inter-jurisdictional Working Party, *Child Protection Offender Registration with Police: A national approach,* Report to the Australasian Police Ministers' Council (2003) 7.

The APMC National Model

In June 2003 the working party reported to the APMC with its recommended national approach for the registration of child sex offenders. The working party's report explained that the rationale for a child sex offender registration scheme is the 'extremely serious nature of sex and sex-related offences against children, and the recidivist risks associated with such offending',[11] but it also warned that the establishment of a sex offender registration scheme should not be seen as a 'child abuse panacea'.[12] Underpinning the proposed national scheme is the need to ensure that registered child sex offenders in one jurisdiction cannot avoid registration requirements by moving to a jurisdiction that does not have child sex offender registration laws or that has a weaker scheme.

The working party expressed its preference for the name 'child protection register' rather than 'sex offender register' because it was planned that the scheme would extend beyond contact sexual offences committed against children to include other offences such as murder (of children), child pornography and certain prostitution offences. In reaching this view the working party took into account a submission by the Western Australia Police that the 'labelling of all persons subject to the scheme as "child sex offenders" may discourage some of the "hands off" offenders from participating in the registration process'.[13]

The scope of the proposed registration scheme

The working party's report recommended that registration should be restricted to offences committed against persons under the age of 18 years[14] and that mandatory registration should apply to offences involving sexual intercourse with a child; acts of indecency against a child; child prostitution offences (except for those committed by the child prostitute); child pornography offences; child murders; other sexual offences against children (eg, procuring a child to engage in a sexual act); and offences involving an intention, an attempt, incitement or a conspiracy to commit any of the abovementioned offences.[15] The more serious of these offences would be classified as Class 1 offences and the less serious as Class 2 offences. For all other offences, it was recommended that a court should have the discretion to order registration if the offender 'poses a risk to the sexual safety or life of a child'.[16]

Thus, the approach taken reflects the view that certain sexual offences and other serious offences against children demonstrate a clear risk to child safety and, therefore, demand automatic registration. In contrast, the view was reached that other offences (such as burglary and kidnapping) should be assessed on a case-by-case basis. However, the apparent severity of the automatic application of the scheme was moderated by the provision for 'minimum sentencing thresholds'. Following the position in New South Wales, it was recommended that mandatory registration should not apply if the sentencing court has decided that no conviction should be recorded. It was envisaged that excluding such cases from the ambit of the scheme would adequately deal with exceptional cases (eg, two 15-year-olds involved in a consensual sexual relationship).[17] Likewise, it was proposed that offenders convicted of a single Class 2 offence, where the sentence does not include imprisonment or supervision, should not be subject to automatic registration. It was argued that the imposition of a fine or a good behaviour bond would suggest that the offender does not pose a significant risk to the community because the court has determined that custody or supervision is unnecessary.[18]

Interestingly, despite the apparent faith in courts to take into account the offender's risk of future offending when determining the appropriate sentence, one of the arguments relied on by the working party in favour of its mandatory approach was that courts are not necessarily in the 'best position to determine future risk'.[19] Other arguments included that a discretionary scheme (where the court must decide if the offender should be subject to registration) would add to the workload of the prosecution and to the courts. Also, it would place an unacceptable burden on police (or the prosecution) because they would be criticised if they failed to apply for a registration order and the offender subsequently harmed a child. It was also noted that a court-based system could lead to unnecessary delays and cause additional stress to victims.[20] The potential impact

11. Ibid 35.
12. Ibid 52.
13. Ibid 56. The Commission notes that despite this valid concern, the Western Australia Police brochure handed to registrable offenders in Western Australia refers to the 'Australian National Child (Sex) Offender Register' and includes the contact details for the Sex Offender Management Squad on the front page. The official heading is the 'Australian National Child Offender Register' (ANCOR): see http://www.crimtrac.gov.au/systems_projects/AustralianNationalChildOffenderRegisterANCOR.html.
14. Ibid 57.
15. Ibid 60–7.
16. Ibid 67 & 70.
17. Although it was noted that such cases would rarely be prosecuted: ibid 80–1.
18. Ibid 81.
19. Ibid 60. Consistent with this approach it was also recommended that there should be no right of appeal against an offender's registrable status imposed mandatorily by statute but there should be a right of appeal against a discretionary order made by court (at 87).
20. Ibid.

upon the justice process (both in terms of resources and timeframes) appears to be the working party's central justification for mandatory registration laws.[21]

The working party acknowledged the potential difficulties of registration and reporting requirements for offenders with mental health problems or intellectual disabilities. Nonetheless, it determined that such offenders should not be excluded from the scheme because of the potential risk of reoffending. In order to overcome any difficulties that such offenders may have in understanding and complying with the requirements, it was suggested that special notification procedures should be developed.[22]

Likewise it was recognised that imposing registration upon juvenile offenders is a difficult issue but, on the whole, it was decided that juvenile offenders should not be exempt from mandatory registration.[23] The working party did, however, support the approach in New South Wales whereby juvenile offenders are excluded from the mandatory provisions if they are sentenced for a single offence of pornography or indecency because 'such young offenders may have their behaviour negatively influenced by being labelled as "sex offenders" and being required to register'.[24] It was also recommended that reporting periods for juveniles should be half of the reporting period for adult offenders and juveniles should not be subject to lifetime registration because

> it is appropriate to apply a differential response to juvenile offenders, given research that suggests juvenile sex offenders are generally more responsive to treatment, and have lower rates of recidivism, than adult offenders, with some offending attributed to a lack of understanding of sexual relationships or sexual experimentation (rather than ongoing paedophilic tendencies).[25]

Nationally Consistent Sex Offender Registration Laws

In June 2004 the APMC announced its agreement for 'nationally consistent child sex offender registers in all states and territories'.[26] CrimTrac reformulated its National Child Sex Offender System to operate as a national register which is now known as the Australian National Child Offender Register (ANCOR). ANCOR commenced on 1 September 2004;[27] it is a web-based system which enables authorised police in each Australian jurisdiction to share information about registered child sex offenders.[28]

By 2007 every Australian jurisdiction had enacted legislation to support the national scheme.[29] According to CrimTrac the following table represents the number of registered child sex offenders in each state and territory as at 17 June 2009.[30]

Jurisdiction	No of registered offenders
Australian Capital Territory	59
New South Wales	2558
Northern Territory	161
Queensland	2476
South Australia	763
Tasmania	169
Victoria	1935
Western Australia	1495
Total	9616

Almost a year later, the total number of registered offenders in Australia had increased to 11 400.[31] The

21. In enabling courts to exercise their discretion in relation to offences such as kidnapping and burglary, it was noted that it would be very uncommon for an application to be made for registration in such cases and hence there would not be 'a significant impact on justice system workloads and timeframes': ibid 70.
22. Ibid 82–3.
23. Ibid 84.
24. Ibid 85.
25. Ibid 127.
26. New South Wales Ombudsman, *Review of the Child Protection Register: Report under s 25(1) of the Child Protection (Offenders Registration) Act 2000* (2005) 5.
27. CrimTrac, *Annual Report* (2004–2005) 31.
28. CrimTrac, *Overview* (2009) 23.
29. *Child Protection (Offenders Registration) Act 2000* (NSW); *Sex Offenders Registration Act 2004* (Vic); *Child Protection (Offender Reporting) Act 2004* (Qld); *Community Protection (Offender Reporting) Act 2004* (WA); *Crimes (Child Sex Offenders) Act 2005* (ACT); *Child Protection (Offender Reporting and Registration Act* (NT); *Community Protection (Offender Reporting) Act 2005* (Tas); *Child Sex Offenders Registration Act 2006* (SA).
30. See CrimTrac, *Overview* (2009) 23. It is noted that for some jurisdictions higher numbers of registered offenders have been quoted elsewhere at an earlier time. For example, it was stated that the number of registered offenders recorded on the database in South Australia was 822 (South Australia Police, *Annual Report* (2008–09) 46); however, in the above table the number as at 17 June 2009 is 763. On 16 July 2008, it was stated in the Queensland Parliament that there were just in excess of 2700 people on the ANCOR register; however, the above table states that as at 17 June 2009 (almost a year later) there were 2476 registered offenders: see Queensland Parliament, Estimates Committee *Hansard*, 16 July 2008, 75 (Ms Spence). It is possible that there are differences in the way that agencies count the number of registered offenders; for example, some may include all persons who are or will be required to register but others may exclude registrable offenders who are still in custody.
31. See <http://www.crimtrac.gov.au/systems_projects/AustralianNationalChildOffenderRegisterANCOR.html>.

number of registered offenders continues to rise – as at 6 December 2010 there were a total of 12 264 registered offenders in Australia.[32]

Each jurisdiction has adopted nationally *consistent* child sex offender registration laws insofar as they contain provisions to recognise child sex offences committed in other jurisdictions and provisions requiring registered offenders to maintain registration even after moving interstate. However, the Commission emphasises that the laws in each Australian state and territory are not identical. Of primary significance for the Commission's reference, four jurisdictions (Victoria, South Australia, the Northern Territory and Tasmania) do not impose mandatory registration on juvenile offenders; instead, the sentencing court has discretion to make a registration order.[33] In line with the national model discussed above, New South Wales, Queensland and the Northern Territory include minimum sentencing thresholds. This means that if an offender is sentenced to a specific type of non-conviction order[34] he or she will avoid automatic registration.[35] Also following the national model, Queensland, South Australia and the Australian Capital Territory exclude from mandatory registration offenders sentenced for a single Class 2 offence if the sentence did not include imprisonment or supervision.[36] Uniquely, South Australia provides for a special exclusion category: 18- and 19-year-olds convicted of an offence involving consensual sexual activity with an underage person are not subject to mandatory registration so long as the victim is not more than three years younger than the offender.[37]

In contrast, the Western Australian legislation does not provide any discretion for courts to determine registration status[38] and does not include minimum sentencing thresholds. The only exclusionary category under the *Community Protection (Offender Reporting) Act 2004* (WA) ('the CPOR Act') applies to juvenile offenders convicted of a single prescribed offence (currently the only prescribed offences relate to child pornography).[39] New South Wales, Queensland and the Australian Capital Territory also provide for a similar exclusion for juvenile offenders, but this is in addition to the minimum sentencing threshold condition that applies to both adult and juvenile offenders discussed above.[40] However, it is noteworthy that unlike other jurisdictions, the Western Australian legislation enables the Commissioner of Police to suspend the reporting obligations of a limited class of juvenile offenders.[41]

Also of significance, in terms of considering the extent of an offender's registration obligations, is that as far as the Commission understands Western Australia is one of only two jurisdictions that enable the police to order periodic reporting obligations over and above the requirement to report annually. The working party deliberately rejected this approach because regular reporting may amount to additional punishment and 'may interfere with the offender's ability to lead a normal life and to rehabilitate, and be so onerous as to reduce compliance'.[42] It was also argued that allowing police to determine the frequency of reporting may cause police

32. Ibid.
33. Tasmania has limited discretion for both adult and juvenile offenders: see *Community Protection (Offender Reporting) Act 2005* (Tas) s 6. See also *Sex Offenders Registration Act 2004* (Vic) s 6(3); *Child Protection (Offender Reporting and Registration Act* (NT) s 11; *Child Sex Offenders Registration Act 2006* (SA) s 6.
34. In New South Wales this exemption covers non-conviction orders made under s 10 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) and under s 33(1)(a) of the *Children (Criminal Proceedings) Act 1987* (NSW) (eg, dismissal without recording a conviction, good behaviour bond without recording a conviction, and order to participate in an intervention program without recording a conviction). In Queensland if the sentencing court decides not to record a conviction the offender will avoid mandatory registration: see *Penalties and Sentences Act 1992* (Qld) s 12 and *Youth Justice Act 1992* (Qld) s 183. The relevant non-conviction orders in the Australian Capital Territory cover dismissals and good behaviour bonds and in the Northern Territory an offender sentenced to a good behaviour bond is excluded from the mandatory registration provisions: see *Crimes (Sentencing) Act 2005* (ACT) s 17 and *Child Protection (Offender Reporting and Registration Act* (NT) s 11.
35. *Child Protection (Offenders Registration) Act 2000* (NSW) s 3A; *Child Protection (Offender Reporting) Act 2004* (Qld) s 5(2); *Crimes (Child Sex Offenders) Act 2005* (ACT) s 9; *Child Protection (Offender Reporting and Registration Act* (NT) s 11.
36. *Child Protection (Offender Reporting) Act 2004* (Qld) s 5(2); *Crimes (Child Sex Offenders) Act 2005* (ACT) s 9; *Child Protection (Offender Reporting and Registration Act* (NT) s 11; *Child Sex Offenders Registration Act 2006* (SA) s 6. New South Wales previously contained a similar provision; however, this section was repealed in 2007: see *Child Protection (Offender Registration) Amendment Act 2007*. During parliamentary debates it was stated that 'the nature of [Class 2] offences—such as possession of child pornography—are still serious offences that potentially endanger children and warrant monitoring by police through the registration process irrespective of the sentence received': New South Wales, *Parliamentary Debates*, Legislative Council, 5 December 2007, 5024 (Tony Kelly). An early amendment to the New South Wales legislation clarified that a registrable person included a person sentenced to suspended imprisonment for a single Class 2 offence: *Child Protection (Offenders Registration) Amendment (Suspended Sentences) Act 2007* (NSW).
37. *Child Sex Offenders Registration Act 2006* (SA) sch 1, pt 1.
38. Except for non-scheduled offences.
39. *Community Protection (Offender Reporting) Regulations 2004* (WA) reg 8.
40. *Child Protection (Offenders Registration) Act 2000* (NSW) s 3A; *Child Protection (Offender Reporting) Act 2004* (Qld) s 5(2); *Crimes (Child Sex Offenders) Act 2005* (ACT) s 9.
41. See further Chapter Two, 'Discretion of the Commissioner of Police for juvenile offenders'.
42. Inter-jurisdictional Working Party, *Child Protection Offender Registration with Police: A national approach,* Report to the Australasian Police Ministers' Council (2003) 106.

to feel compelled to order more frequent reporting than would otherwise be justified in order to avoid criticism if the offender subsequently reoffends. The working party recommended that a registered offender should only be required to report once a year unless their registration information has changed.[43] All other jurisdictions (other than, arguably, Tasmania) followed this recommendation.[44]

The Development of the Western Australian Legislation

As noted above, the CPOR Act departs materially from the national model and is considerably stricter than the legislation in other Australian jurisdictions. There are no exceptions for adult offenders and only a very limited statutory exception for juvenile offenders (ie, certain child pornography offences). Instead of providing for minimum sentencing thresholds (or court discretion), the former Western Australian government opted for a specific power vested in the Commissioner of Police to waive the reporting requirements for certain juvenile offenders in limited circumstances.[45] It was anticipated that this power would accommodate cases involving 'teenage sex'.[46]

During parliamentary debates in Western Australia it was claimed that 'no other Australian jurisdiction has taken such a strong stand' in relation to the registration of convicted child sex offenders' and the Bill 'provides the most stringent and toughest reporting requirements for convicted paedophiles and serious sex offenders in the country'.[47] On the other hand, the need to maintain national consistency was relied on by the government to justify many aspects of the legislation. For example, it was stated that:

> [T]his is a national model Bill. It has been worked on for more than a year and has been considered by the Australasian Police Ministers' Council, which includes the Commonwealth and all state jurisdictions ... As a minister, I have not tried to rearrange things and do things in a different manner from every other State and depart in a major way from the national Bill.[48]

When quizzed about this apparent contradiction, the former Minister for Police clarified that it is important for the legislation to be consistent with the national model administratively but it does not matter if Western Australia includes a wider range of registrable offences.[49]

The need to maintain national consistency was again relied on in 2008 when the then opposition sought to amend the CPOR Act to provide for limited judicial discretion in relation to juvenile offenders. Briefly, the amendment sought to enable a juvenile offender sentenced to 'no punishment' to argue before the Children's Court that he or she did not pose a risk to the safety of children and hence should not be required to register. The then Minister for Police argued that if this proposed amendment was passed, Western Australia would be 'out of step' with the rest of the nation. He further asserted that:

> [A] judge might get it wrong or the evidence may not have been fully presented. If that person moved interstate and another agency that was seeking to protect its community accessed ANCOR, believing it to be a comprehensive collection of people convicted of these types of crimes from all around Australia, and that name did not clock up, that offender might get away with committing other offences because his name did not appear on ANCOR.[50]

In fact, this proposed amendment would have brought Western Australia closer to the position in other Australian jurisdictions.

The development of the national scheme for child sex offender registration and the Western Australian legislation demonstrate that the potential for sex offender registration to operate unfairly or inappropriately was canvassed by policy-makers at the national level and in this state. Some Australian jurisdictions have taken a more liberal approach than was contemplated under the national model; however, Western Australia rejected the national working party's suggested insertion of minimum sentencing thresholds. The need to appear tough on sex offenders and thereby protect children appears to be the justification for this approach. However, the Commission is of the view that it is possible to maintain the efficacy of the registration system but at the same time ensure that offenders who do not pose any significant risk to children are not unnecessarily included within the scheme. Bearing in mind the discussion above, it seems that there are viable alternatives to automatic registration for all child sex offenders.

43. Ibid.
44. See further Chapter Two, 'Periodic reporting'.
45. Also, it appears that juvenile offenders referred to the juvenile justice team are not placed on the register; however, it is noted that there are few reportable offences that can be referred to the juvenile justice team in any event: see further Chapter Two, 'Mandatory registration'.
46. Western Australia, *Parliamentary Debates*, Legislative Assembly, 22 September 2004, 6279b–6282a (MH Roberts, Minster for Police and Emergency Services).
47. Ibid.
48. Western Australia, *Parliamentary Debates*, Legislative Assembly, 28 October 2004, 7524b–7542a (MH Roberts. Minister for Police and Emergency Services).
49. Ibid.
50. Western Australia, *Parliamentary Debates,* Legislative Assembly, 8 April 2008, 1975b–1993a (JC Kobelke).

Chapter Four

The Impact of the General Criminal Law on Registration Status

Contents

Introduction 79

Overview of child sexual offences in Western Australia 80

Historical background 80

The current provisions 80

Underage consensual sexual activity 83

The age of consent 83

'Similarity of age' defence 84

The impact in Western Australia 85

Mistaken belief about age 89

Historical background 89

Current provisions 90

Impact in Western Australia 91

Alternative approaches 93

Prosecutorial policy 95

The position in Western Australia 95

Alternative approaches 96

Introduction

As discussed in Chapter Two, a person's status as a reportable offender under the *Community Protection (Offender Reporting) Act 2004* (WA) ('the CPOR Act') is contingent upon being sentenced for a specified reportable offence. And, as noted, the vast majority of reportable offences are child sexual offences. In this chapter the Commission describes certain criminal laws that impact on the determination of guilt for child sexual offences in order to understand the circumstances in which people can be held criminally responsible for such offences. This, in turn, assists in understanding the types of behaviour that may lead to sex offender registration.

The criminal laws discussed in this chapter vary considerably between Australian jurisdictions. In this regard, it has been argued that in terms of assessing sex offender registration laws it is important to consider differences between jurisdictions because a person may be 'labelled as criminal for committing what in one jurisdiction is described as an unlawful act, which may have been legally permissible elsewhere'.[1] In other words, a person may be included on the Western Australian sex offender register as a consequence of certain prohibited sexual conduct while a person who engages in exactly the same conduct in another jurisdiction may not even be charged with an offence. Finally, in this chapter the Commission examines different prosecutorial policies that impact upon the decision to charge a person with a child sexual offence – the decision to charge being the first step in potential sex offender registration.

1. Swain M, 'Registration of Paedophiles' (1997) 12 *New South Wales Parliamentary Library Research Service Briefing Paper* 15.

Overview of child sexual offences in Western Australia

The *Criminal Code* (WA) ('the Code') creates a number of sexual offences. Some of these sexual offences have general application and therefore can involve either an adult or a child victim (eg, sexual penetration without consent and indecent assault). There are also a number of child-specific sexual offences (eg, sexual offences committed against a child under the age of 13 years;[1] sexual offences committed against a child of or over the age of 13 years but under the age of 16 years;[2] and sexual offences committed against a child under the age of 18 years by a person who has the care or supervision of the child[3]). For these child-specific offences, the presence or absence of consent by the child is irrelevant for determining criminal responsibility.[4] Generally, a person is guilty by engaging in sexual conduct with a child under the relevant age.[5]

The rationale underpinning child-specific sexual offences is that 'children, due to their dependency and immaturity, cannot give consent to sexual activity in the same way as adults' and that sexual activity can be 'both psychologically and physically very harmful to children'.[6] The prohibition against engaging in sexual conduct with children is designed to protect children from themselves because it is 'undesirable that young people should embark upon sexual activity at an age at which they may be unable to fully comprehend or to cope with the social and emotional consequences of that activity'.[7] However, far more critically, child-specific sexual offences are intended to protect children from sexual abuse by more mature persons.[8]

1. *Criminal Code* (WA) s 320.
2. *Criminal Code* (WA) s 321.
3. *Criminal Code* (WA) s 322.
4. Although it may be relevant for sentencing purposes.
5. The defence of an honest and reasonable mistake as to the age of the child may exculpate an accused in specified and limited circumstances: see below, 'Mistake as to age'. It is also a defence to sexual offences under ss 321 and 322 of the Code for the accused to prove that he or she was lawfully married to the child: see *Criminal Code* (WA) s 321(10). The defence of marriage is available in other jurisdictions (eg, *Crimes Act 1914* (Vic) s 45(3); *Criminal Law Consolidation Act 1935* (SA) s 49(8).
6. Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code,* Report (1999) ch 5, 117.
7. *Deering v The State of Western Australia* [2007] WASCA 212 [17] (Wheeler JA; Owen & Miller JJA concurring).
8. See ibid [18]. During parliamentary debates in 1992 it was observed that that the purpose of child-specific sexual offences is not to target 'sexual activity as such, but sexual activity involving some element of abuse': Western Australia, *Parliamentary Debates*, Legislative Council, 14 May 1992, 2361 (Attorney General, JM Berinson).
9. *Acts Amendment (Lesbian and Gay Law Reform) Act 2002* (WA).
10. *Riggall v The State of Western Australia* [2008] WASCA 69 [23]–[29] (Wheeler JA).
11. Ibid [31].
12. *Criminal Code* (WA) s 320(1).

Historical Background

When initially enacted, the Code included a distinction (which continues to exist) between offences committed against children under the age of 13 years and offences committed against children under the age of 16 years. For example, it was an offence to commit unlawful carnal knowledge of a girl under the age of 13 years and the penalty was life imprisonment. In contrast, unlawful carnal knowledge of a girl under the age of 16 years was a less-serious offence with a penalty of two years' imprisonment with hard labour. The Code also contained sexual offences against boys; however, the law was not gender neutral. It wasn't until 2002 that the offence of sexual penetration of a male between the ages of 16 and 21 years was abolished.[9]

Prior to a series of reforms to the criminal law that commenced in 1985 it was difficult to successfully prosecute a person for committing a sexual offence against a child. Although, as noted above, child-specific offences have always existed, successful prosecutions were hindered by procedural and evidentiary rules (eg, a prosecution for carnal knowledge of a girl under the age of 16 years had to commence within six months of the offence being committed).[10] As a result, offenders were often convicted of less-serious offences and 'received punishments which were hopelessly inadequate'.[11]

The Current Provisions

In summary, the Code now provides for child-specific sexual offences that carry the same or a higher penalty as sexual penetration without consent. A person who sexually penetrates a child under the age of 13 years is liable to a maximum of 20 years' imprisonment.[12] The penalty applicable to sexual penetration without consent

is a maximum of 14 years' imprisonment.[13] Sexual penetration of a child of or over the age of 13 years but under the age of 16 years also carries a maximum of 14 years' imprisonment. Therefore, if a person has sexually penetrated a child under the age of 16 years the prosecution can charge the child-specific offence without needing to prove an absence of consent.

The penalty provisions reflect the view that sexual conduct with younger children is more serious than sexual conduct with older children.[14] Like most jurisdictions, the Western Australian Code has a lower age limit category that attracts a higher penalty.[15] This lower age limit, which is 13 years in Western Australia, is also sometimes referred to as the 'no defence age' because 'no defence whatsoever will be available with regard to a sexual offence' committed against a child below this age.[16] The lower age limit varies across Australian jurisdictions. For example, the lower age limit (or 'no defence age') is 12 years in Victoria[17] and Queensland[18] but it is 10 years in New South Wales,[19] the Northern Territory[20] and the Australian Capital Territory.[21] In contrast, the lower age limit in South Australia is 14 years.[22] In Tasmania there is no lower age limit; it is an offence to engage in sexual activity with a child under the age of 17 years and there is no higher penalty stipulated for offences committed against younger children.[23]

The Western Australian Code also provides that it is an offence for a person to engage in sexual conduct with a child of or over the age of 16 years if the child is under the care, supervision or authority of the person.[24] If the sexual conduct involves penetration the maximum penalty is 10 years' imprisonment. The justification for this specific offence is that where the older person has the care or supervision of or authority over the child the power imbalance is so great that a higher age of consent is warranted.[25] Previously, this offence was restricted to guardians, employers or teachers. In the early 1990s the law was amended so that this offence would apply to anyone who had 'the child in their care or supervision, or under their authority, so that baby-sitters, scout masters, camp supervisors and the like are included in this category'.[26]

The distinction between child sexual offences committed by adults and child sexual offences committed by children is recognised under the Western Australian Code. An adult who sexually penetrates a child of or over the age of 13 years and under the age of 16 years is liable to a maximum penalty of 14 years' imprisonment. The maximum penalty applicable for the same offence committed by a minor is seven years' imprisonment. The provision of a lesser penalty reflects the reduced culpability in cases where the age disparity between the offender and the victim is relatively close.[27]

13. In 2002 the Home Office expressed the view that any sexual activity with a child under 13 years should be charged as rape because children of that age are incapable of consenting and hence the behaviour is similar to sexual penetration without consent: United Kingdom Home Office, *Protecting the Public: Strengthening protection against sex offenders and reform the law on sexual offences* (2002) 17.
14. See Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code,* Report (1999) ch 5, 125.
15. The Model Criminal Code Officers Committee proposed that there should be a 'no defence' age where defences (such as those based on similarity of age, mistake about age and marriage) would not be available at all. It was also recommended that offences committed against children below the 'no defence age' should attract a higher penalty: ibid.
16. Simpson R, 'The Age of Consent: An update' (1999) 21 *New South Wales Parliamentary Library Research Service Briefing Paper* 2. For example, in Western Australia a defence based on an honest and reasonable mistake about age and the defence of marriage are not available to a charge of committing a sexual offence against a child under the age of 13 years. It is also noted that s 319(2)(c) of the Code expressly provides that a child under the age of 13 years is incapable of consenting to sexual activity.
17. In 2009, the Victorian Sentencing Advisory Council recommended that the 'lower age' limit for when a child cannot legally consent to sexual relations be increased from 10 years to 12 years: Victorian Sentencing Advisory Council, *Maximum Penalties for Sexual Penetration with a Child Under 16 Years*, Report (2009) 79. This recommendation was implemented in 2010: see *Crimes Act 1914* (Vic) s 45.
18. See, eg, *Criminal Code* (Qld) ss 208 & 215.
19. *Crimes Act 1900* (NSW) s 66A. Section 66C also distinguishes, in terms of penalty, offences committed against children aged between 10 and 14 years and offences committed against children aged between 14 and 16 years.
20. See *Criminal Code Act* (NT) s 127 where a higher penalty applies to sexual offences committed against a child under the age of 10 years. However, the defence of honest and reasonable but mistaken belief about the age of the victim is only available if the victim is 14 years or older.
21. *Crimes Act 1900* (ACT) s 55.
22. *Criminal Law Consolidation Act 1935* (SA) s 49(1).
23. Se, eg, *Criminal Code Act 1924* (Tas) s 124. However a 'similarity of age' defence exists in defined circumstances but only if the victim was of or over the age of 12 years.
24. *Criminal Code* (WA) s 322.
25. Simpson R, 'The Age of Consent: An update' (1999) 21 *New South Wales Parliamentary Library Research Service Briefing Paper* 2.
26. Western Australia, *Parliamentary Debates*, Legislative Council, 6 May 1992, 1804 (Attorney General, JM Berinson).
27. During parliamentary debates it was argued that where two young people engage in sexual activity it would generally be accepted 'that a penalty at the lower end of the range would be appropriate': Western Australia, *Parliamentary Debates*, Legislative Council, 6 May 1992, 1803 (Attorney General, JM Berinson). Similarly, in the United Kingdom there is a separate offence of sexual activity between minors with a lesser maximum penalty: *Sexual Offences Act 2003* (UK) s 13 (the applicable maximum penalty for an adult engaging in sexual activity with a child is 14 years' imprisonment but for a juvenile offender it is five years' imprisonment). In 2002, the United Kingdom Home Office recommended that a separate offence

should be created to provide for a lesser penalty for sexual activity between minors. It was recognised that while 'much sexual activity involving children under the age of consent might be consensual and experimental and that, in such cases, the intervention of the criminal law may not be appropriate, the criminal law must make provision for an unlawful sexual activity charge to be brought where the sexual activity was consensual but was also clearly manipulative': United Kingdom Home Office, *Protecting the Public: Strengthening protection against sex offenders and reform the law on sexual offences* (2002) 25.

Underage consensual sexual activity

The impact of the *Community Protection (Offender Reporting) Act 2004* ('the CPOR Act') upon juveniles who engage in consensual sexual activity is a key topic to be examined in this reference. The initial submission from Legal Aid WA (which instigated the reference) emphasised that:

> Young people have relationships with other young people and are therefore more likely to be at risk of breaching the 'age of consent' in the course of their relationship.[1]

The issue of sexual activity between two young people was raised in Parliament as recently as April 2008. The Hon Rob Johnson (who was then in opposition) proposed amendments to the CPOR Act which were designed to accommodate low-level sexual offending by juveniles. The amendments were precipitated by a letter received from a lawyer who had represented a 17-year-old male in the Children's Court for indecent assault against a 16-year-old female.[2] The offender, who had no prior record, was released without penalty but was nonetheless a reportable offender.[3] It was proposed that if a juvenile is found guilty of a Class 2 offence and receives no penalty, the court should have the power to declare that the juvenile is not a reportable offender. It was argued that this amendment 'would correct an unintended consequence of the original' legislation.[4] However, the former government did not support the proposed amendment on the basis that if the court was given discretion to determine reportable offender status other more serious offenders may avoid registration.[5]

1. Youth Law Team, Legal Aid WA, submission (24 February 2009).
2. In this case, the young male and the female victim had apparently been involved in consensual intimate relations in a car. The offender attempted to pull down her pants and she said 'no'. Sometime later he tried again and she again said 'no'.
3. The Commissioner of Police had indicated that he would suspend this offender's reporting obligations but he would still be recorded on the register.
4. Western Australia, *Parliamentary Debates*, Legislative Assembly, 2 April 2008, 1663b–1671a (RF Johnson).
5. It was also argued that if an offender was declared not to be a reportable offender (for a Class 2 offence) and then subsequently reoffended he or she would not be subject to the longer reporting period that is applies for a second conviction for a reportable offence: Western Australia, *Parliamentary Debates*, Legislative Assembly, 8 April 2008, 1975b–1993a (JC Kobelke).

This section examines laws which criminalise consensual sexual activity between two young people and also discusses alternative approaches that provide a limited defence for young people who are close in age.

The Age of Consent

When defining child-specific sexual offences the law stipulates an age under which it is deemed inappropriate for children to engage in sexual activity, and under which it is determined that a child does not have the maturity and capacity to provide meaningful consent to sexual relations (the 'age of consent'). It has been observed that setting the age of consent is necessarily arbitrary because the capacity to provide meaningful and informed consent to sexual activity will vary among children.[6]

> The age of consent, above which no offence is committed if sexual contact is engaged in with a consenting young person, but below which a serious offence is committed, will always be difficult and controversial. It effectively amounts to a determination about when young people should be allowed to exercise autonomy and freedom of choice in sexual relationships.[7]

It is clear that divergent opinions exist in relation to the appropriate age of consent. It has been noted that the 1977 Royal Commission on Human Relationships recommended that the general age of consent should be 15 years because that age is a 'more realistic reflection of the sexual behaviour of young people and of their ability to make personal decisions'.[8] After initially proposing that the age of consent should be 16 years, the Model Criminal Code Officers Committee (MCCOC) declined to recommend an exact age of consent because the 'issue is a moral as well as a legal one'.[9] In 2006, a child protection advocacy group (Bravehearts Inc) called for the general age of consent to be raised to 18 years noting that people under the age of 18 years are

6. *Riggall v The State of Western Australia* [2008] WASCA 69 [21] & [43] (Wheeler JA).
7. Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code,* Report (1999) ch 5, 119.
8. *Royal Commission on Human Relationships*, Final Report (Canberra: AGPS: 1977) vol 5, 210 as cited in Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, ibid 121.
9. Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, ibid 123.

still usually at school and they are not entitled to vote, drink alcohol, smoke cigarettes, join the armed forces or change their name.[10] Presently in Western Australia, like in the majority of Australian jurisdictions, the age of consent is 16 years. However, in South Australia and Tasmania the age of consent is 17 years.

The Commission observes that fixing an 'age of consent' does not necessarily mean that children under the stipulated age will refrain from engaging in sexual conduct nor does it mean that they will not willingly participate in it. As noted in Chapter One, a sizeable proportion of children under the age of consent engage in sexual conduct.[11] In particular, a national survey of Australian secondary-school students in 2008 found that over 50% of Year 10 students (of whom many would be under 16 years) had engaged in sexual touching, 33% had engaged in oral sex and over 25% had engaged in sexual intercourse.[12] For those Year 10 students who reported that they were sexually active, in over 50% of cases the student's most recent sexual partner was described as their 'steady boyfriend or girlfriend'.[13]

It has recently been argued by Wheeler JA that:

> Parliament plainly recognised that, in attempting to ensure that sexual abuse of children was appropriately prosecuted and punished, the law technically brought within its scope consensual activity which was engaged in by a significant number of young people. Parliament was, however, confident that prosecuting authorities and, where relevant, the courts, would deal appropriately with behaviour which did not fall within the mischief at which the legislation was aimed.[14]

Prosecuting authorities may exercise their discretion and decide not to charge a young person who has engaged in consensual sexual activity with a peer.[15] Alternatively, if a young person is prosecuted and convicted, the sentencing court may take into account the circumstances and impose a lenient or nominal sentence. Nevertheless, if a young person is charged with and found guilty of a sexual offence in these circumstances he or she will be subject to the requirement to register under the CPOR Act. As discussed below, the law in other Australian jurisdictions differs in its approach to consensual sexual activity between two young people.

'Similarity of Age' Defence

In some Australian and overseas jurisdictions, consensual sexual activity between two young people who are relatively close in age is not unlawful. In Victoria, so long as the complainant is at least 12 years old and the accused is not more than two years older, consent is available as a defence.[16] Similarly, in the Australian Capital Territory consent is a defence if the complainant is 10 years or older and the age disparity between the complainant and the accused is no more than two years.[17] The Tasmanian Criminal Code provides that consent is available as a defence if the complainant is at least 15 years of age and the accused is not more than five years older than the complainant. Alternatively, if the complainant is of or above 12 years of age the accused cannot be more than three years older than the complainant in order to rely on this defence.[18] Thus in Tasmania, consensual sexual activity between, say, a 20-year-old and a 15-year-old or between a 16-year-old and a 13-year-old is not unlawful.[19] Likewise, the Canadian Criminal Code provides for a 'similarity of age' defence: if the complainant is aged between 12 and 14 years consent is available as a defence if the accused is less than two years older than the complainant, but if the complainant is 14 years or more the defence applies if the accused is less than five years older than the complainant.[20] A similarity of age defence exists in some, but not all, jurisdictions in the United States.[21]

10. Bravehearts Inc, *Age of Consent in Australia*, Position Paper (2006) 2. It also recommended that children aged 16 or 17 years should be legally permitted to consent to sexual activity so long as the other person is not more than 10 years older (at 5).
11. See Chapter One, 'Sexual activity between young people'.
12. Smith A et al, *Secondary Students and Sexual Health 2008: Results of the 4th national survey of Australian secondary students, HIV/ AIDS and sexual health* (Melbourne: Australian Research Centre in Sex, Health & Society, La Trobe University, 2009) 26.
13. Ibid 33.
14. *Riggall v The State of Western Australia* [2008] WASCA 69 [41] (Wheeler JA).
15. See below, 'Prosecutorial policy'.
16. *Crimes Act 1914* (Vic) s 45(3).
17. *Crimes Act 1900* (ACT) s 55(3).
18. *Criminal Code Act 1924* (Tas) s 124(3).
19. The Criminal Code Amendment (Child Sexual Offence) Bill 2009 (NT) proposed that it would be a defence to an offence involving underage sexual activity if the complainant is at least 14 years old and the accused is not more than two years older than the complainant and that there was 'no coercion' involved. This Bill was rejected in 2010. It appears that the underlying purpose of this Bill was to enable health practitioners and others to be relieved of the mandatory obligation to report consensual sexual activity with a child under the age of 16 years if the child was at least 14 years and the other person was not more than two years older than the child: Northern Territory, *Parliamentary Debates*, Legislative Assembly, 5 May 2010 (Ms Lawrie, Attorney General). Instead, the *Care and Protection of Children Act* (NT) was amended.
20. Criminal Code (Can) ss 150.1(2) & 150.1(2.1).
21. Human Rights Watch, *No Easy Answers: Sex offender laws in the US* (2007) 73. The Commission notes that a very limited 'similarity of age' defence exists in South Australia. Consent is available as a defence if the victim is aged between 16 and 17 years (the general age of consent being 17 years in South Australia) and the accused is younger than 17 years: *Criminal Law Consolidation Act 1935* (SA) s 49.

The provision for a 'similarity of age' defence has been supported by past inquiries and law reform bodies. For example, in 1997 the Wood Royal Commission concluded that a 'similarity of age' defence should be available where the complainant is at least 14 years old and the accused is no more than two years older. It was argued that this would 'overcome the current anomaly that an adolescent engaging in prohibited behaviour with a person under age is theoretically in the same position as a mature adult engaging in a relationship with that person'.[22] The MCCOC also recommended a 'similarity of age' defence with a maximum two-year age differential.[23] The committee acknowledged that sexual relationships between two young people can be abusive and that prosecuting authorities can exercise discretion in determining if consensual sexual activity should be prosecuted.[24] However, it was also observed that 'young people, in certain limited circumstances, should be allowed to take part in sexual activity together without the threat of being arrested and charged'.[25] In conclusion, the committee reasoned that the provision of a 'similarity of age' defence would ensure that child-specific sexual offences are 'used for their main purpose, aimed at paedophiles and other adults having sex with children'.[26]

The impact in Western Australia

The Commission concedes that the introduction of a 'similarity of age' defence in Western Australia is not expressly or directly within its terms of reference; however, the absence of such a defence in this state should not be overlooked when assessing the impact of the CPOR Act on juvenile offenders (and some very young adults).[27] Each of the three Western Australian case examples provided below involve a juvenile offender who was convicted of committing a sexual offence against another child and hence became a reportable offender under the CPOR Act. In each of these cases, if the conduct had occurred in Tasmania, the offender would have been able to rely on the 'similarity of age' defence and possibly would have been acquitted of the charge.

22. Wood JRT, *Royal Commission into the New South Wales Police Service*, Final Report (1997) vol V: The Paedophile Inquiry, [14.29] & [14.39].
23. Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code,* Report (1999) ch 5, 148.
24. Ibid 151.
25. Ibid 149.
26. Ibid 151.
27. In Chapter Six the Commission provides a number of case examples where young males (eg, aged approximately 18–21 years) have been convicted and sentenced (and hence subject to registration) for engaging in consensual sexual activity with girls under the age of 16 years.

Case example 1

The offender pleaded guilty to four offences of indecent dealing of a child under the age of 13 years. All the offences occurred during one incident that took place at school. The offender was 15 years and 9 months of age and the complainant was 12 years and 9 months (so there was a three year age disparity). The offender asked the complainant to go into the girls toilets to 'hook up for a pash'. They entered the toilets and started kissing. The offender touched the complainant's breast and the complainant masturbated the offender at his request. It was accepted by the state that the complainant was a willing participant (the complainant having indicated that she willingly participated in order to make another person jealous).

The offender had no prior convictions. He was sentenced to a Youth Community Based Order for four months with a condition to attend psychological counselling.[28] As a result of this conviction the offender would be subject to the CPOR Act for a period of seven-and-a-half years; he will be approximately 24 years of age before his reporting obligations cease. Because the offences involved a child under the age of 13 years the Commissioner of Police has no discretion to suspend his reporting obligations. It was reported in the newspaper that the parents of the complainant considered that it was 'ridiculous' for the offender to be placed on the sex offender register.[29]

Case example 2

A 15-year-old boy was sentenced for two offences of sexual penetration of a child under the age of 13 years and one count of indecent dealing of a child under the age of 13 years. The complainant was 12 years old. The offender and the complainant had begun a relationship as boyfriend and girlfriend. After about one month, the offender asked the complainant if she wanted to have sex and she agreed. They had sexual intercourse in the toilets at a local park. A few days later they met at the park and again had sexual intercourse.

At the time of these offences the offender had one prior conviction (assault of a public officer for which he was placed on a good behaviour bond). For the sexual offences, he was sentenced to a Conditional Release Order for 10 months. As a result of these matters the offender was required to comply with the CPOR Act for a period of seven-and-a-half years.[30]

28. *ABW v The State of Western Australia* [2009] WACC 4.
29. Banks A, 'Sex Register Laws for Review', *The West Australian*, 14 April 2009, 5.
30. Information obtained from the Statement of Material Facts

Case example 3

The offender, who was 17 years of age, pleaded guilty to two counts of indecent dealing of a child of or over the age of 13 years but under the age of 16 years. The complainant was 14 years old at the time of the offence. The offender and the complainant had been drinking alcohol with a group of other people. The offender went into a bedroom of the house, where the complainant and her friend were talking. The friend left, leaving the offender and the complainant alone. The complainant was very intoxicated. He began kissing the complainant and the complainant reciprocated although she did mention that she shouldn't be kissing him because she had a boyfriend. The offender placed his hands over her breasts and then undid her jeans and rubbed her vagina over her underwear. After some time, the complainant's friend entered the room and told the complainant that her father was at the house. The offender left. The prosecution accepted that the complainant factually consented to the behaviour. The offender was sentenced to an adult Intensive Supervision Order for nine months. The offender's previous convictions (if any) are unknown. As a result of this conviction, the offender would be subject to the CPOR Act for seven-and-a-half years.[31]

The Commission acknowledges that the 'similarity of age' defence is, more often than not, restricted to an age disparity of two years.[32] The Commission's consultations and research have not revealed any cases where a juvenile was convicted of an offence involving consensual sexual activity with a child where the child was no more than two years younger than the offender. It may be that such cases exist but the Commission has not be informed of them[33] or it could be that police and the prosecution do not generally charge young people in these circumstances. For example, one regional police officer informed the Commission that, as a general rule, police in that district do not charge juveniles for engaging in underage consensual sexual activity if the age difference is no more than three years.

Just as selecting an age of consent is somewhat arbitrary so too is setting the age differential for a 'similarity of age' defence. While an age difference of two years may seem reasonable, it does not accommodate cases where the age difference is marginally greater (eg, two years and one week) or where differences in intellectual and emotional maturity between the two parties renders a strict two-year age gap problematic. In *The State of Western Australia v SJH*,[34] Wheeler JA observed that a chronological age difference is not necessarily indicative of abuse. She stated:

> Abuse is not established – is not proved – by mere disparity in age. As a general rule, the greater the disparity in age, the more likely it is that there will also be disparity in power (physical, social and emotional), in understanding, in intellect and so on, and the more likely it is therefore that any consent to sexual activity will have been the result in whole or in part of use of that greater power. However, this is not a matter of simple mathematical calculation. To take an obvious example, a 16-year-old is plainly likely to be vastly stronger and relevantly more sophisticated than an 8-year-old, but the same eight-year gap between a 24-year-old and a 16-year-old will result in a narrower imbalance (and in some cases no imbalance at all), while in relation to a 24-year-old and a 32-year-old one could assume, in the context of many relationships, that the age difference would be irrelevant. Further … there are a range of views in the community about whether, for example, young men are generally less mature than young women and about the likely maturity of young people at different chronological ages ... Disparity in age is, then, a relevant factor, but its significance may vary considerably between cases.[35]

It has recently been contended that an age disparity of five years or more 'could reasonably be construed to indicate that a power imbalance was operating or

and lawyer. It is noted that this offender has subsequently breached the Conditional Release Order as a result of further, but not sexually related, offending. He has also been repeatedly convicted for failing to comply with his reporting obligations under the CPOR Act (at least seven times). It appears that he suffers from mental health problems and finds it difficult to comply with the reporting requirements.

31. Information obtained from the Statement of Material Facts and lawyer.
32. This is the position in Victoria and the Australian Capital Territory and is what was recommended by the MCCOC. It was also recommended in Western Australia in 2001: Ministerial Committee, *Lesbian and Gay Law Reform*, Report (2001) 122.
33. In a submission to a recent inquiry in New South Wales, the Office of the Director of Public Prosecutions in that state advised that they were able to identify eight matters in the past five-and-half years where there was a consensual sexual relationship between a 14- to 16-year-old female and a 16- to 17-year-old male. In half of these cases, the matter was reported to the police by a parent or guardian rather than by the complainant. In all of these cases the matter was either withdrawn, dismissed or a bond without conviction was imposed: New South Wales Office of the Director of Public Prosecutions, *Submission to the New South Wales Legislative Council's Standing Committee on Law and Justice: Inquiry into Spent Convictions for Juvenile Offenders* (27 January 2010) 3.
34. [2010] WASCA 40.
35. Ibid [54].

grooming was being undertaken'.[36] The Commission is aware of a number of cases where the age difference between the two parties is greater than two years but the circumstances indicate that the younger person either initiated the sexual activity or willingly participated in it.[37] The Commission is of the view that the mandatory registration of such offenders—without any consideration of the individual circumstances—is not appropriate.

One option to alleviate the harshness of mandatory sex offender registration upon young people who have engaged in consensual underage sexual activity is to introduce a 'similarity of age' defence. Arguably, one benefit of this option is that it would not impact upon the operation of the CPOR Act or be seen to undermine its strict approach to child sex offenders. However, the introduction of a 'similarity of age' defence has wider policy implications[38] and may be rejected on moral grounds.

Significantly, in terms of this reference, a 'similarity of age' defence is unlikely to capture all of the juvenile and young adult offenders who should not be subject to mandatory registration because whatever age differential is chosen, there is always the possibility that there will be deserving cases that fall outside that range. Moreover, it is vital to recognise that there is an essential difference between being prosecuted and sentenced for a sexual offence and being made subject to sex offender registration. In some instances, it is entirely appropriate that a young person is charged with an offence and held to account. However, it does not follow that in all such cases sex offender registration is necessary.

Consider, for example, the case below.

Case example 4

The offender pleaded guilty to three charges of sexual penetration of a child under the age of 13 years. At the time of the offences the offender was just under 17½ years old and the complainant was about 12½ years old.[39] Hence, there was an age disparity of just less than five years. The offender was aware the complainant was 12 years of age. The offender said that he met the complainant at local parties and school socials where he had acted as a disc jockey. At these parties he said that the complainant would approach him and talk to him. Following this, the complainant initiated contact via an internet chat room. The offender explained that the complainant had sent messages to him inviting him to have sex.

The offences occurred on two separate occasions. On the first occasion, the complainant contacted the offender by text and asked him to meet her at a park. After they met, and drove around in the offender's car, the complainant performed oral sex on the offender at his request. When her phone rang she stopped of her own accord. Sometime later the offender picked up the complainant from her address and took her to his house. After kissing, the offender again asked the complainant to perform oral sex on him, to which she agreed. After about 10 minutes, the complainant ceased because she was tired. They continued kissing and then went outside to a pool area. The complainant took off her clothes and asked the offender to put on a condom. While in the spa they had sexual intercourse. They were interrupted by the complainant's father who had driven to the offender's home looking for his daughter.

The offender was sexually inexperienced and he was aware that the complainant had previously engaged in sexual activity. The state did not dispute that the complainant was a willing sexual partner and that she had in the past engaged in consensual sexual intercourse with other young males. The psychologist's report presented for sentencing observed that the offender was a 'gentle and well-adjusted young man' and his motivation for the offences was to 'access sexual experience'. The report also noted that his inclusion on the ANCOR register was 'unfortunate' and would be 'detrimental' to him. The psychologist recommended psycho-sexual education. By the time of sentencing the offender had commenced an age-appropriate relationship with a 17-year-old girl. The offender had no prior record or any previous contact with the justice system. The sentencing judge stressed to the offender that just because the complainant

36. D Kenny D & Lennings C, *Submission to the New South Wales Legislative Council Standing Committee on Law and Justice Inquiry into Spent Convictions for Juvenile Offenders* (2010) 5.
37. See, eg, Chapter Five, case examples 9–11 and Chapter Six, case examples 21–24.
38. In a submission to a recent inquiry, the New South Wales Youth Justice Coalition submitted that the *Crimes Act 1900* (NSW) should be amended to provide that for a charge of sexual intercourse with a child under 16 years consent should be available as a defence if the accused is not more than two years older than the child. It observed that criminalising young people for engaging in consensual underage sexual activity discourages young people from accessing health services and professional advice (eg, in relation to pregnancy, contraception and STDs): Youth Justice Coalition, *Submission to the New South Wales Standing Committee on Law and Justice Inquiry into Spent Convictions for Juvenile Offenders* (11 February 2010) 5 & 17. These sentiments were echoed by the National Children's and Youth Law Centre: submission from the National Children's and Youth Law Centre (September 2010).
39. The exact date of the alleged offences was unknown; the offences occurred when the offender was between 17 years and 3 months to 17 years and 5 months. At the time the complainant was between 12 years and 6 months to 12 years and 8 months.

appeared to be willing to engage in sexual activity with a number of people, that did not mean that she would not be damaged by the offender's actions and that just because she thinks she is old enough does not mean that she is. He also noted that she appeared to be 'engaging in a lifestyle beyond her years'. The judge also commented that bearing this in mind, and taking into account that the offender was relatively shy and sexually naive the age disparity is not as significant as it may first appear to be. He said that there is 'nothing to suggest that there is any predatory behaviour' or 'any sexual deviancy'. The offender was placed on a Youth Community Based Order for eight months. As a result of this matter, the offender was required to register for seven-and-a-half years (and because the offences involved a child under the age of 13 years, the Commissioner of Police could not waive his reporting requirements). The offender will be over 24 years before his reporting obligations cease.[40]

In this case, there is a strong argument that it was appropriate that the offender was held to account for engaging in a sexual relationship with a 12-year-old. However, he was not considered to be a sexual predator and it appears very unlikely that he would repeat this behaviour. In these circumstances, sex offender registration for seven-and-a-half years appears excessive and arguably unnecessary. Even if there was a 'similarity of age' defence (ie, with a two year age disparity) in Western Australia, this offender would still have been convicted and subject to mandatory registration.[41]

40. Information obtained from Sentencing Transcript.
41. The Commission's proposals to alleviate the harshness of mandatory registration are dealt with in Chapters Five and Six. At this stage, it is noted that when debating the South Australian sex offender registration laws the issue of underage consensual sexual activity was raised. The Attorney General mentioned that possibly the problem 'lies in the substantive criminal law governing the offences rather than in this bill which accepts the criminal law as we find it': South Australia, *Parliamentary Debates*, House of Assembly, 29 August 2006, 733 (MJ Atkinson, Attorney General). Subsequently, the Attorney General stated that he had instructed parliamentary counsel to draft an amendment 'to put the matters of "young love" beyond doubt'. It was clarified that juvenile offenders engaging in consensual sex with children of a similar age would not be subject to automatic registration (ie, because the sentencing court would have discretion to determine registration status for all juvenile offenders). For young adults, the bill was amended to exclude from mandatory registration an 18- or 19-year-old offender who had engaged in consensual sexual activity with a person below the age of consent provided that the victim was not more three years younger than the offender: South Australia, *Parliamentary Debates*, House of Assembly, 16 November 2006, 1303–1304 (MJ Atkinson, Attorney General). See also *Child Sex Offenders Registration Act 2006* (SA) sch 1.

Mistaken belief about age

The Commission's terms of reference envisage that sex offender registration may not be appropriate for an offender who has engaged in consensual sexual relations with a person while acting under an honest and reasonable belief that the person was of or above the age of consent.

As a general rule, in order to be held criminally responsible for an act or omission the law requires that an accused has a 'guilty mind'. A person will not usually be considered to have a 'guilty mind' if they were acting under an honest and reasonable but mistaken belief about the existence of a relevant factual circumstance. For example, if a person picks up a handbag from a table genuinely believing it to be theirs (eg, because it is same style and colour) they would not be criminally responsible for stealing. Hence, criminal responsibility is determined on the basis that the true position is the same as the mistaken person believes it to be. This principle is recognised in s 24 of the *Criminal Code* (WA) ('the Code') which provides that:

> A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he believed to exist.
>
> The operation of this rule may be excluded by the express or implied provisions of the law relating to the subject.

Section 24 makes it clear that the 'defence' of mistake can be excluded in certain circumstances.[1]

The defence of honest and reasonable mistake of fact has historically been available for child-specific sexual offences because when an age of consent is set by the law, it is 'impossible to ignore the case of an alleged offender who honestly and reasonably believes' that the child is above the stipulated age.[2] It has also been observed by the High Court that it would be 'absurd to suggest that honest and reasonable mistakes of that kind are never made'.[3] The defence of honest and reasonable mistake, which generally applies without restriction, has been limited in Western Australia in respect to child-specific sexual offences.

Historical Background

Prior to reforms in 2002, it was a defence to a charge involving prohibited sexual conduct with a child aged 13 years or over but under the age of 16 years for the accused to prove that he or she believed on reasonable grounds that the child was of or over 16 years.[4] Likewise, it was a defence to a charge of engaging in prohibited sexual conduct with a child of or over 16 years where the child was under the care, supervision or authority of the person to prove that the accused believed on reasonable grounds that the child was of or over the age of 18 years. There was no restriction attached to the defence so that any accused, whatever his or her age, could rely on the defence if applicable in the circumstances.

In 2002 a three-year age gap restriction was introduced so that an accused could not rely on the defence of mistake if he or she was more than three years older than the complainant. This amendment was part of a package of reforms that included measures to ensure that the criminal law regarding sexual offending was gender neutral (in particular, the age of consent for sexual penetration of a male was lowered from 21 years to 16 years). These reforms were based on the 2001 report of the *Western Australian Ministerial Committee on Lesbian and Gay Law Reform*. This report recommended that the defence of mistake be limited so that it is only available if the accused is not more than five years older than the child. It has been commented that the purpose of this proposal was to address 'predatory behaviour' against

1. The term 'defence' is not strictly correct because pursuant to s 24 the prosecution must prove beyond a reasonable doubt that the accused was not mistaken so long as the accused has raised sufficient evidence of the mistake.
2. See *CTM v The Queen* [2008] HCA 25, [15] (Gleeson CJ, Gummow, Crennan and Kiefel JJ).
3. Ibid.
4. The defence operated as a true defence because the burden of proof rested on the accused to prove the defence on the balance of probabilities. In 2002 the Victorian Law Reform Commission recommended that the onus of proof for the equivalent defence in Victoria should fall on the accused (ie, the accused should prove on the balance of probabilities that he or she held a reasonable belief that the child was of or over 16 years) because 'standards should be set particularly high for people who engage in sexual activity with children and young people over 10 and under 16': Victorian Law Reform Commission, *Sexual Offences*, Final Report (2004) [9.34].

boys and girls.[5] An examination of Hansard supports this contention; the proposed restriction to the defence was designed to address concerns that had been raised in regard to reducing the age of consent for sexual penetration of a male.

> An argument that is commonly raised in opposition to the equalising of the age of consent is that it exposes young boys, under the age of 16 years, to paedophilic behaviour from older men. This argument relies upon the fact that currently, it is a defence to criminal prosecutions of certain sexual offences committed against a child under 16 years of age, that the accused person believed on reasonable grounds that the child was of or over the age of 16 years. In order to protect minors from the risk of paedophilia, the situations in which this defence applies should be limited.[6]

Also, it was observed that the proposed amendment 'should allay some concerns about equalising the age of consent and extend greater protection to young girls at the same time'.[7] As far as the Commission is aware, the maximum age gap restriction of five years, as suggested by the Ministerial Committee, was reduced to three years earlier in the parliamentary reform process.[8] These reforms also precluded reliance on the defence of mistake for offences committed against a child who was under the care, supervision or authority of the accused. The reason being that if someone is supervising or given authority over a child he or she would presumably know that child's age.[9]

Current Provisions

The current status of the law in relation to the availability of the defence of mistake for child-specific sexual offences reflects the abovementioned reforms. Pursuant to s 331 of the Code a lack of knowledge or a mistake about the child's age is irrelevant for determining criminal responsibility for sexual offences committed against children under the age of 13 years. For offences involving children of or over the age of 13 years and under the age of 16 years the defence is available but its availability is restricted to accused who are no more than three years older than the complainant. Section 321(9) of the Code provides that it is a defence if the accused proves that he or she:

> (a) believed on reasonable grounds that the child was of or over the age of 16 years; and
>
> (b) was not more than 3 years older than the child.

Hence, in practical terms, the defence is only potentially available to an accused who is younger than 19 years.

The defence is not available if the child (aged between 13 and 16 years) was under the care, supervision or authority of the accused.[10] It is also not available in relation to a charge of engaging in sexual conduct with a child of or over the age of 16 years if the child was under the care, supervision or authority of the accused (ie, an honest and reasonable but mistaken belief that the child was of or over 18 years is irrelevant for determining criminal responsibility).[11]

The applicability of the defence of mistake to child-specific sexual offences varies across Australian jurisdictions. The availability of the defence is unlimited in respect to the age of the accused (as was previously the position in Western Australia) in Victoria,[12] Queensland,[13] the Northern Territory,[14] the Australian Capital Territory[15] and Tasmania.[16] In contrast, while the defence is available in South Australia its scope is very restricted. As noted above, the general age of consent is 17 years in South Australia and an accused is able to rely on a defence of mistake so long as the complainant is actually aged between 16 and 17 years and the accused believed on reasonable grounds that the complainant

5. Dharmananda M & Kendall C, 'Report of the Western Australian Ministerial Committee on Lesbian and Gay Law Reform' (2001) 8(4) *Murdoch University Electronic Law Journal* [107].
6. Western Australia, *Parliamentary Debates*, Legislative Assembly, 2 August 2001, 1982b–1987a (Mr J McGinty, Attorney General).
7. Ibid.
8. The Explanatory Memorandum refers to the defence of mistaken belief only being available if the accused is not more than five years older than the child. The second reading speech simply noted that the defence would only be available if the accused and the child were of a similar age: Western Australia, *Parliamentary Debates*, Legislative Assembly, 14 November 2001, 5520–5525 (Attorney General, Mr J McGinty). By 5 December 2001 the age gap of three years was referred to during parliamentary debates: Western Australia, *Parliamentary Debates*, Legislative Assembly, 5 December 2001, 6495–6532 (Ms Guise).
9. Western Australia, *Parliamentary Debates*, Legislative Council, 14 March 2002, 8320–8325 (Peter Foss).
10. *Criminal Code* (WA) s 321(9a).
11. *Criminal Code* (WA) s 322(7). The MCCOC recommended that the defence of mistake about age should not be available where the child was under the supervision or authority of the accused because in such cases where the accused is 'directly responsible' for the person the accused should make certain that the person 'is above the higher age of consent': Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code,* Report (1999) ch 5, 173.
12. *Crimes Act 1914* (Vic) s 45(4).
13. *Criminal Code* (Qld) s 215(5).
14. *Criminal Code* (NT) s 127(4).
15. *Crimes Act 1900* (ACT) s 55(3)
16. *Criminal Code Act 1924* (Tas) s 124(2). It is noted that a similar defence (ie, unrestricted as to the age of the accused) is available under s 272.16 the *Criminal Code Act 1995* (Cth) and is also available in the United Kingdom: *Sexual Offences Act 2003* (UK) s 9.

was 17 years or older.[17] The position is New South Wales is somewhat unusual. Prior to 2003 a limited statutory defence of mistake was available if the child was at least 14 years and the accused reasonably believed that the child was of or over 16 years. In 2003 this defence was repealed as part of wider reforms to child sexual offences; in particular, the introduction of a uniform age of consent.[18] In *CTM v The Queen,*[19] the High Court of Australia held that, despite the repeal of the statutory defence, the pre-existing common law defence of honest and reasonable mistake of fact was available in New South Wales to a charge of sexual intercourse with a child between the ages of 10 and 16 years.[20] Thus, overall, the Western Australian law in this area is more restrictive than all other Australian states and territories other than South Australia.

Impact in Western Australia

In relation to the Commission's terms of reference, it is important to bear in mind that prior to 2002 an accused who believed that the child complainant was of or over 16 years would have been permitted to argue the defence of mistake. The accused would have been acquitted if able to prove on the balance of probabilities that he or she was genuinely and reasonably mistaken about the child's age in the circumstances. However, the position now is that unless the accused is no more than three years older than the child he or she is guilty of the offence and accordingly becomes a reportable offender.

The Commission's research has revealed a number of cases in this state where the offenders did not know that they were engaging in sexual activity with an underage person and hence did not know that they were committing an offence – mandatory registration does not appear to be appropriate in these circumstances.[21]

Case example 5

A 22-year-old male pleaded guilty to two offences of indecent dealing and two offences of sexual penetration of a child of or over the age of 13 and under the age of 16 years. The complainant was 14 years old. Although the offender admitted the offences, a trial of the issues was held to determine if the offender held an honest and reasonable but mistaken belief that the complainant was 16 years or over.[22] The offender maintained that at the time of the offences he was not aware of the complainant's true age, believing him to be 19 years old. The relationship between the offender and the complainant was instigated by the complainant. When the complainant met the offender at a cafe, he asked the offender for his phone number. The complainant telephoned the offender and a relationship between the two began. The complainant lied to the offender about his age and also lied to one of the offender's friends. He had also stated that he was about to commence study at a particular tertiary institution. The offender did not engage in any sexual activity with the complainant after he became aware of the complainant's true age. It was determined following the trial of the issues that the offender honestly and reasonably believed that the complainant was 19 years of age.[23]

The offender was open about their relationship and the offender's mother had met the complainant. As soon as the offender became aware of the complainant's true age he arranged for the complainant's parents to come and collect him. The offender was considered to be a low risk of reoffending and it was also considered that he was not a person who was attracted to young people. The offender had no criminal record.

He was originally sentenced to a Community Based Order with 100 hours community service for a period of 12 months. The sentencing judge formed the view that the seriousness of the offence precluded a spent conviction order. However, the offender appealed to the Supreme Court arguing that a spent conviction order should have been made and, further, that 'no punishment' should have been imposed. Wheeler JA observed that there were 'no circumstances which might have alerted the appellant to the need to make any inquiry at all about the [complainant's] age'.[24]

17. *Criminal Law Consolidation Act 1935* (SA) s 49.
18. New South Wales, *Parliamentary Debates*, Legislative Assembly, 21 May 2003, 898 (Mr Debus, Attorney General).
19. [2008] HCA 25.
20. See also *Johnston v R* [2009] NSWCCA 82, [8].
21. In addition to the case examples discussed below, it is noted that one regional police officer advised the Commission that cases do arise from time-to-time where the offender believed that the child was over the age of consent: Detective Alan Goodger, Western Australia Police, Kununurra (22 July 2010). Another police officer told the Commission that an adult had been charged for engaging in sexual relations with a 13-year-old girl. The offender was a bouncer at a nightclub and the complainant had provided the offender with fake ID showing that she was 18 years old: Sergeant Kevin Hall, Family Protection Coordinator, Western Australia Police, Kimberley (20 July 2010).
22. Because the offender was more than three years older than the victim he could not rely on the defence of honest and reasonable mistake about age; however, his belief about the victim's age is relevant for sentencing purposes.
23. [Case name deleted to protect identity of offender] [2007] WADC 87.
24. [Case name deleted to protect identity of offender] [2008] WASCA 69 [15].

Further, she stated that it 'is difficult to imagine these offences being committed in circumstances less worthy of blame and, therefore, less deserving of a sentence which has an element of retribution'.[25] On appeal, a sentence of 'no punishment' under s 46 of the *Sentencing Act 1995* (WA) was imposed and a spent conviction order was made. Despite the making of a spent conviction order the offender was required to comply with the requirements of the CPOR Act for 15 years.

Case example 6

A 21-year-old male was sentenced in the District Court after pleading guilty to two counts of sexual penetration of a child over the age of 13 years and under the age of 16 years. The offender was 20 years at the time of the offences and the complainant was 15 years. Thus, there was an approximate age disparity of five years. The offences occurred on a single occasion and the sexual activity was described as consensual. The complainant and the offender had sent various text messages to each other prior to any sexual activity taking place. It was contended by the offender (and not disputed by the state) that the complainant had sent semi-naked photographs of herself to the offender and that she sent messages inviting the offender to engage in sexual activity.

It was submitted by the offender that he held an honest and reasonable but mistaken belief that the victim was 16 years of age and that he held this belief because the victim told him that she was 16 in response to his inquiry as to her age; because the victim was living with an older brother and not with her parents; because the victim appeared (as a result of sexually suggestive text messages) to be sexually experienced or aware; and because the offender had first met the victim in the company of a 17-year-old friend. The state did not dispute that the offender believed the victim was 16 years of age but suggested that he was somewhat reckless about her age and that he may have had a suspicion that she was younger than 16 years. The state did not submit that imprisonment should be imposed but argued against the making of a spent conviction order because of the serious nature of the offences. The pre-sentence report did not indicate any 'improper sexualised behaviours' and the sentencing judge commented that there was 'nothing to suggest that he is at risk of sexually re-offending in the future'. The judge noted that the age disparity of five years was considerable but the offences did not involve any perversion, deviance or force; there was no abuse of trust and no grooming behaviour.

The offender's criminal history consisted of three traffic convictions. He had previously had a problem with alcohol and at the time of sentencing had an ongoing daily cannabis habit. For that reason the sentencing judge imposed a Community Based Order for 18 months but he also made a spent conviction order. As a consequence of being sentenced for this offence the offender is a reportable offender and required to report pursuant to the CPOR Act for 15 years.[26]

Case example 7

The offender pleaded guilty to two counts of sexual penetration of a child of or over the age of 13 years but under the age of 16 years. At the time of the offences the offender was 22 years of age and the complainant was 13 years of age. The offender and the complainant met at the local football ground and the offender asked the complainant if she wanted to have sex, to which she agreed. The second count occurred in a similar way. The offender claimed that he believed the complainant was 16 or 17 years of age but it was accepted that he didn't make any positive inquiries in regard to her age. The sentencing judge commented that although he may not have actually known that she was under 16 years of age he must have realised that he was in 'dangerous territory'.

The complainant did not make a complaint to the police in relation to this matter; the offences were discovered following a medical examination when she was asked to reveal the names of those persons with whom she had engaged in sexual relations. The offender had no prior record other than one traffic conviction. The state did not seek a term of immediate imprisonment. The sentencing judge referred to the need for general deterrence but also noted the offender's excellent background and the fact that he is unlikely to commit such an offence again. The offender was sentenced to a 12-month Community Based Order. When sentencing the offender, the judge informed the offender that if he successfully completes the Community Based Order he will be able to put the matter behind him. However, as a result of this conviction the offender was required to report to police pursuant to the CPOR Act for a period of 15 years.[27]

25. Ibid [50].

26. Information obtained from Sentencing Transcript.
27. Information obtained from Sentencing Transcript.

Case example 8

A 19-year-old male was sentenced for 11 counts of sexual penetration of a child of or over 13 but under the age of 16 years. The offences occurred over an 18-day period. The offender met the complainant on MySpace and she told him that she was 18 years old. They then met in person and commenced a sexual relationship. Subsequently, he became aware that she attended school and the offender questioned her again about her age and she then replied that she was 17 years old. The offender believed that the complainant was over the age of consent. The offender had no criminal history. The sentencing judge imposed 'no sentence' under s 46 of the *Sentencing Act 1995* and a spent conviction order was made. Although the Commission has not had access to the sentencing transcript in this case, the sentencing disposition would clearly suggest that the circumstances of these offences were considered to be at the lower end of the scale. The offender in this case will be subject to the CPOR Act for 15 years.[28]

Alternative approaches

Reform to the defence of honest and reasonable mistake of fact would potentially alleviate the harshness of automatic sex offender registration for young adults who engage in sexual activity with an underage child believing that the child is of or over the age of consent. However, the Commission acknowledges that the changes made to restrict the availability of the defence of mistake were made relatively recently. The policy underpinning this change is the need to protect vulnerable children from abuse[29] and to ensure that adults who choose to embark in sexual relationships with younger persons make genuine and adequate efforts to find out the person's age.

However, in case example 5 above, Wheeler JA commented on the changes to the law in 2002 and stated that:

> If the belief held by the accused was, in truth, both honest and reasonable, it is difficult to see, with respect, how making it available only to those within three years of the age of the complainant would provide additional protection for the young. A person who was genuinely mistaken about his or her sexual partner's age, believing them to be over 16, would, by definition, believe that they were engaging in conduct which was not proscribed by the criminal law and would, therefore, be unlikely to be deterred by s 321(9). The answer to that apparent difficulty may lie in the observation that the question of whether a belief was reasonable was a matter for a jury to decide. It may be that, in relation to this particular offence, Parliament considered that juries might be unduly gullible and sought, therefore, to limit their role.[30]

Likewise, the Model Criminal Code Officers Committee reasoned that a defence of honest and reasonable mistake about the age of a child should be a defence to child-specific sexual offences because

> It seems that some form of defence of this nature is necessary in the interests of justice. It would be wrong to punish automatically as a sexual offender against children a person who believes that he or she is having sexual contact with an adult and that therefore he or she is doing nothing legally or morally wrong.[31]

A simple example illustrates this point – a 60-year-old male who engages in a sexual relationship with a 16-year-old girl is not committing an offence. In contrast, under Western Australian law, a 20-year-old male who engages in a sexual relationship with a 15-year-old girl genuinely believing her to be 18 years old is guilty of a sexual offence.

In other jurisdictions, conditions have been imposed on the defence of honest and reasonable mistake but these conditions do not restrict the availability of the defence to a particular age group. As noted above, in Western Australia anyone aged 19 years or over is precluded from relying on the defence. In Canada, the defence of mistake is not available 'unless the accused took all reasonable steps to ascertain the age of the complainant'.[32] Similarly, in New Zealand in relation to the offence of sexual conduct with 'young person' under the age of 16 years[33] it is a defence to prove that the accused had 'taken reasonable steps to find out whether the young person was of or over the age of 16 years' and the accused reasonably believed that the young person was of or over the age of 16 years.[34] In both these jurisdictions the law requires that the accused has made inquiries in relation to the age of the child rather than simply requiring that the accused held a reasonable belief.

28. Information obtained from lawyer.
29. The Ministerial Committee on Lesbian and Gay Law Reform concluded that limiting the availability of the defence is important to ensure that a sexual relationship is 'one where the younger party is not at risk of being coerced and that consent was voluntarily given': Ministerial Committee, *Lesbian and Gay Law Reform*, Report (2001) 122. Of note, this committee recommended that the defence should only be available if the accused is not more than *five* years older than the child.
30. [Case name deleted to protect identity] [2008] WASCA 69, [45].
31. Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code,* Report (1999) ch 5, 159.
32. *Criminal Code* (Can) s 150.1(4).
33. *Crimes Act 1961* (NZ) s 134.
34. *Crimes Act 1961* (NZ) s 134A.

In 2002 the South African Law Commission recommended that it should be a defence in relation to an offence involving sexual activity with a child aged between 12 and 16 years for the accused to prove that he or she reasonably believed that the child was over 16 years and that the child 'deceived the accused into believing that such child was over the age of 16 years at the time of the alleged commission of the offence'.[35] This recommendation was implemented in 2007.[36] This law is stricter than the law elsewhere because it requires the accused to prove that the victim actually lied or misled the accused in relation to his or her age.

Whether the defence of honest and reasonable but mistaken belief as to the age of the child complainant in child-specific sexual offences should be reformed is not directly within the Commission's terms of reference.[37] In any event, as will be apparent from the case examples referred to in the following chapters, reform of this defence will not overcome the potential for the CPOR Act to operate unfairly because there are other 'exceptional circumstances' in which mandatory registration is inappropriate. However, it is important for the Commission to take into account the impact of the limited availability of that defence when assessing the range of persons who may be subject to mandatory registration and reporting under the CPOR Act.

35. South African Law Commission, *Sexual Offences*, Report, Project 107 (2002) 55.
36. *Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007* (South Africa) s 56(2)(a).
37. This was noted during consultations: Matthew Bugg and Sean Stocks, Office of the Director of Public Prosecutions (28 June 2010).

Prosecutorial policy

The earlier sections of this chapter have examined the impact of substantive criminal laws upon a person's potential status as a reportable offender under the *Community Protection (Offender Reporting) Act 2004* (WA) ('the CPOR Act'). However, before charges are determined by a court in accordance with those laws, discretionary decisions are made by police and prosecutors about whether an alleged offender should be prosecuted in the first place. These decisions clearly have repercussions in terms of whether a person will be subject to sex offender registration.

As noted earlier in this Paper, concerns were raised during the development of nationally consistent sex offender registration laws, that certain types of offenders may unnecessarily be captured by an automatic registration process (eg, consensual sexual activity between two teenagers).[1] One possible response to these concerns is that the police and the prosecution are unlikely to charge young people in those circumstances.[2] A decision to prosecute is made in accordance with prosecutorial guidelines and the application of these guidelines has the effect that not every instance of unlawful behaviour is prosecuted – in some instances a decision is made that a prosecution is not in the public interest. The interplay between these guidelines (in both Western Australia and elsewhere) and the decision to prosecute a young person for engaging in underage consensual sexual activity is discussed below.

The Position in Western Australia

In general terms, the Western Australia Office of the Director of Public Prosecutions (DPP) *Statement of Prosecution Policy and Guidelines 2005* provides that a person should not be prosecuted for an alleged offence unless there is a prima facie case and reasonable prospects of conviction. Nonetheless, even if this standard is met, it may be considered that a prosecution is not in the public interest. Guideline 31 lists of number of factors to be considered when determining whether a prosecution would be in the public interest. These factors include that the offence is trivial or technical; the personal circumstances of the alleged offender, the complainant or a witness; the staleness of the alleged offence; the degree of culpability of the alleged offender; whether the alleged offence is of 'minimal public concern'; and the attitude of the complainant. Special rules apply to the prosecution of juveniles. Guideline 34 states:

> Special considerations may apply to the prosecution of juveniles. The longer term damage which can be done to a juvenile because of an encounter with the criminal law early in his or her life should not be underestimated. Consequently, in some cases prosecution must be regarded as a severe measure with significant implications for the future development of the juvenile concerned. The welfare of the child must therefore be considered when prosecutorial discretion is exercised.

Guideline 35 requires that, when determining whether a juvenile should be prosecuted for an alleged offence, regard should be had to additional factors such as the seriousness of the alleged offence; the age and apparent maturity of the juvenile; whether a prosecution would be likely to be harmful to the juvenile or be inappropriate; and the interests of the complainant and his or her family.[3]

In assessing whether a prosecution is in the public interest the guidelines also require consideration of factors that suggest a prosecution is appropriate, such as the need to maintain the rule of law and public confidence in the Parliament and the courts; the need

1. Hence, the national working party recommended that certain low-level sentences should be excluded from the ambit of mandatory registration.
2. In New South Wales it was noted during parliamentary debates that it would 'be extremely rare for offences involving children engaging in consensual sexual activity to result in charges': New South Wales, *Parliamentary Debates*, Legislative Council, 4 July 2001, 16221 (Ian MacDonald). The Ombudsman's review of the New South Wales scheme in 2005 noted that the government's position was that 'it was very unlikely that young people would be charged with registrable offences in relation to consensual underage sex': New South Wales Ombudsman, *Review of the Child Protection Register: Report under s 25(1) of the Child Protection (Offenders Registration) Act 2000* (2005) 19.
3. For a full list of the relevant guidelines, see <http//www/dpp.wa.gov.au/content/statement_prosecution_policy2005.pdf>.

for punishment and deterrence; and the entitlement of the state or other person to criminal compensation. The guidelines explicitly refer to the CPOR Act – Guideline 32(da) provides that one factor to be weighed in assessing whether a prosecution should proceed in the public interest is the 'need to secure appropriate convictions to compliment the operation' of the CPOR Act. Therefore, it appears that when determining if a person should be prosecuted the DPP can have regard to the need to obtain convictions for child sexual offences in order to support the sex offender registration scheme.

However, during consultations the Commission was informed that the potential consequence of sex offender registration plays no part in the decision-making process. In other words, the fact that an accused may be subject to the CPOR Act does not influence the decision to proceed or otherwise because Parliament has stipulated that being sentenced for a registrable offence triggers registration and it would be inappropriate for the DPP to substitute a different charge or dismiss charges in order to enable the accused to avoid registration. Equally, it was maintained that the DPP do not proceed with a prosecution for the purpose of ensuring that an accused will be subject to sex offender registration.

The DPP acknowledged that Guideline 32(da) is arguably inconsistent with the current approach. At the same time, the DPP noted that when considering all of the other relevant factors that are included in the guidelines, it is difficult to imagine a case where the need to obtain a conviction 'to compliment' the CPOR Act would override all other considerations and demand a prosecution that was otherwise not in the public interest.[4] Others consulted by the Commission agreed that the DPP do not take into account the potential for sex offender registration during negotiations with defence counsel. However, this approach was not supported.[5]

During consultations the Commission was also told that police and the DPP tend not to prosecute juveniles for engaging in consensual sexual activity. The Western Australia Police stated that in many instances a complaint is lodged by the parents of one party and if the parents insist that charges are laid, the police have no choice other than to charge the alleged offender. However, if both parties are underage they will inform the parents that both parties can be charged with an offence and this will usually mean that the matter does not proceed any further.[6] The DPP advised that they do not proceed with a prosecution against a juvenile for engaging in sexual activity with an underage person unless there is an element of abuse (eg, age disparity or lack of consent). It was acknowledged that there have been a few instances where juveniles have been required to comply with the CPOR Act as a consequence of engaging in consensual underage sexual activity. However, it was emphasised that the consensual nature of the relationship is not necessarily apparent from the evidence available when the decision is made to proceed. For example, a child complainant may initially allege that she did not consent to having sex with the accused; however, during cross-examination she may admit that she did in fact willingly participate.[7] This approach is consistent with what acting DPP Bruno Fiannaca told a parliamentary committee in 2009 (ie, that the DPP would 'usually only prosecute cases of sexual acts between teenagers where there is a lack of consent on the part of one of those children').[8]

Alternative Approaches

In most Australian jurisdictions prosecution polices are silent on the issue of consensual underage sexual activity and such policies do not refer to sex offender registration laws. However, in Victoria there is a specific policy in relation to sexual offences in 'boyfriend/girlfriend' cases. Policy 2.9.2 provides that:

> One circumstance in which careful attention must be given to the 'public interest' test is in 'boyfriend/girlfriend' cases involving sexual offences, in which, typically, it is clear upon the admissible evidence that an offence has technically been committed, but that the objective circumstances of the offending itself in combination with the personal circumstances of the complainant and offender, do not satisfy the 'public interest' test. When assessing the 'public interest' test in such cases, close attention should be given to the following factors:
>
> - the relative ages, maturity and intellectual capacity of the complainant and the offender;
> - whether the complainant and offender were in a relationship at the time of the offending and if so, the length of the relationship;
> - whether the offending was 'consensual', in the sense that (despite consent being irrelevant to the primary issue) the complainant was capable of consenting and did in fact consent;

4. Consultation with Matthew Bugg and Sean Stocks, Office of the Director of Public Prosecutions (28 June 2010).
5. Consultation with Claire Rossi and Sarah Dewsbury, Legal Aid WA (8 June 2010); consultation with Mara Barone, Aboriginal Legal Service (25 May 2010).
6. Consultation with Detective Inspector Paul Steel (Sex Crime Division) and Martyn Clancy-Lowe (State Coordinator Sex Offender Management Squad), Western Australia Police (28 June 2010).
7. Consultation with Matthew Bugg and Sean Stocks, Office of the Director of Public Prosecutions (28 June 2010).
8. Standing Committee on Uniform Legislation and Statutes Review, *Child Exploitation Material and Classification Legislation Amendment Bill 2009*, Transcript of Evidence, Perth (16 September 2009) 16.

- whether the offending to any extent involved grooming, duress, coercion or deception;
- whether, at the time of considering whether the matter should proceed, the complainant and the offender are in a relationship;
- the attitude of the complainant and her family or guardians toward the prosecution of the offender;
- whether the offending resulted in pregnancy and if so, the sequelae of the pregnancy; and
- any other circumstance which might be relevant to assessing the 'public interest' in these circumstances.[9]

In a recent Australian parliamentary inquiry in relation to Commonwealth child sexual offences, the importance of prosecutorial discretion was raised.

> [P]olice and prosecutorial discretion is an important element of ensuring that the new and existing child sex offences will not operate to unduly capture young people who may be involved or participate in the practice of 'sexting'. While the committee acknowledges that the practice may be undesirable, it agrees with arguments that young people engaged in such behaviour should not be exposed to the grave consequences and stigma that attach to allegations of, and convictions for, child sexual offences.[10]

The parliamentary committee concluded that the requirement to obtain the consent of the Attorney General in order to commence a prosecution of a person under the age of 18 years for a child sexual offence (committed outside Australia) should be extended to the offences involving child pornography or child abuse material (outside Australia). It was considered that this approach is sufficient to ensure that young people are not unnecessarily charged with offences involving the practice of 'sexting'.[11] Sections 272.31 and 273.2A of the *Criminal Code Act 1995* (Cth) provide that:

> (1) Proceedings for an offence against this Division must not be commenced without the consent of the Attorney-General if the defendant was under 18 at the time he or she allegedly engaged in the conduct constituting the offence.
>
> (2) However, a person may be arrested for, charged with, or remanded in custody or on bail in connection with, such an offence before the necessary consent has been given.

Similarly, the Western Australian parliamentary committee which examined proposed child pornography laws in 2009 recommended that to 'ensure that charges against a child are only preferred in appropriate cases after careful consideration, the Committee is of the view that a senior officer from the Sex Crime Division of the Western Australia Police should approve any charge against a child'.[12]

The information available to the Commission does not establish that the police or the DPP are unnecessarily charging or prosecuting young people for child sexual offences. The Commission understands that in many cases the information initially provided to the police may justify the decision to proceed even if it is later established that the sexual activity was consensual and there was in fact no abuse or coercion. Nevertheless, concerns have been raised during consultations in relation to juveniles being charged for consensual sexual activity and practices such as 'sexting'.[13] It is also noted that in a letter to the editor of *The West Australian* a lawyer referred to a case in the Children's Court where a young teenager had been convicted of an offence for sending an explicit photo text message to his girlfriend and accordingly was placed on the sex offender register.[14]

Another concerning case was raised during a Commonwealth parliamentary committee inquiry into the involvement of Indigenous juveniles and young adults in the criminal justice system. A representative from the Aboriginal Legal Service provided the following account while giving evidence to the inquiry:

> The young man, who was 17 at the time, discovered his girlfriend hanging from a tree, which must have been incredibly distressing. He showed great courage to give a statement to investigating police for the purposes of a coronial inquiry but made an ill-fated comment to the effect that he had been in a sexual relationship with the young woman. He was subsequently, several years later,

9. Victoria Office of Public Prosecutions, *Prosecution Polices and Guidelines* (2008–10).
10. Commonwealth Legal and Constitutional Affairs Legislation Committee, *Crimes Legislation Amendment (Sexual Offences Against Children) Bill 2010* (2010) 34.
11. Ibid 35.
12. Standing Committee on Uniform Legislation and Statutes Review, *Child Exploitation Material and Classification Legislation Amendment Bill 2009*, Report No 41 (2009) 57. The MCCOC recommended that proceedings for a child-specific offence should not be commenced against a child under the age of 14 years unless the Director of Public Prosecutions has provided consent: Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code,* Report (1999) ch 5, 162.
13. Consultation with Claire Rossi, Legal Aid WA (17 August 2010); consultation with Gerald Xavier, Youth Legal Service (21 June 2010); telephone consultation with Dave Woodroffe, Aboriginal Legal Service, Kununurra (22 June 2010); consultation with Nick Espie, Aboriginal Legal Service, Kununurra (23 July 2010). In particular, the Commission was told that during the taskforce in the Kimberley some young Aboriginal males were charged following investigations where young girls were questioned about whether they had ever had sex before and, if so, they were asked to reveal the names of anyone involved. In such cases, the prosecutions were not instigated by a complaint from the complainant.
14. Letter to the editor, *The West Australian* (4 February 2009) 22.

> interviewed by police in relation to that comment and charged with having a sexual relationship with a child under the age of 16—in my submission, a completely inappropriate exercise of prosecutorial power.[15]

Bearing in mind these concerns, the Commission is interested to hear views about whether prosecutorial guidelines in Western Australia should include specific criteria for charging young people with child sexual offences and/or whether the decision to charge a juvenile should be overseen by a senior police officer.

QUESTION A

Prosecutorial policies

(a) Should the Director of Public Prosecutions *Statement of Prosecution Policy and Guidelines 2005* be amended to provide specific criteria to be considered when determining if a juvenile should be prosecuted for a child sexual offence?

(b) Should the decision to charge a juvenile with a child sexual offence be overseen by a senior police officer?

15. House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Inquiry into the High Level of Involvement of Indigenous Juveniles and Young Adults in the Criminal Justice System*, Transcript of Evidence (30 March 2010) 43–44.

Chapter Five

The Impact of Sex Offender Registration on Juvenile Offenders

Contents

Introduction 101

Special provisions for juvenile offenders 102

The characteristics of juvenile reportable offenders 104

Statistical overview of sexual offences in the Children's Court 104

Behaviour that may result in sex offender registration 106

- 'Consensual' sexual activity 106
- Non-consensual sexual activity 109
- Other non-consensual behaviour 110
- More serious sexually abusive behaviour 111
- Non-sexually motivated conduct 111

The impact of sex offender registration on juveniles 112

Labelling and rehabilitation 112

Practical consequences 115

- Reporting requirements 115
- Community reintegration 119
- Accessing health services and other assistance 120
- Implications for the justice system 120

A discretionary approach 122

The position elsewhere 122

Alternative approaches 123

- Limit mandatory registration to particular offences 123
- Limit mandatory registration to certain sentences 124
- Exclude certain sentencing dispositions from mandatory registration 124
- Extend the power of the Commissioner of Police to waive reporting obligations 125
- Court discretion 125

The Commission's view 129

- Discretion at time of sentencing 130
- Court review of registration status 134
- Retrospective right of review 135
- An alternative scheme for juveniles 136

Introduction

The Commission's terms of reference require it to examine the application of the *Community Protection (Offender Reporting) Act 2004* (WA) ('the CPOR Act') to reportable offenders who are children when they commit the relevant reportable offence.[1] This covers both reportable offenders who are presently under the age of 18 years as well as reportable offenders who are now adults, having turned 18 years since the commission of the offence. In contrast to adult reportable offenders, the Commission's terms of reference in relation to juveniles are not limited to 'exceptional' cases – consideration of the potential impact of the CPOR Act on *all* juvenile reportable offenders is contemplated by those terms.[2]

In examining the application of the CPOR Act to juvenile offenders, two of the key issues impacting on reform in this area are highly relevant. These issues are that the best interests of the child should be a primary consideration and that children should be differentiated from adults.[3] As explained in Chapter One, the best interests of the individual juvenile offender are clearly not the only relevant consideration. The Commission appreciates that the interests of children generally cannot be overlooked. In this regard, during preliminary consultations the Commissioner for Children and Young People expressed the view that the principle of 'the best interests of the child' is clearly relevant to both the need to protect children from sexual abuse and to the appropriate treatment of young offenders.[4] Hence, there may be instances where the registration of juvenile sex offenders is entirely appropriate in order to enhance the protection of children from sexual abuse.

The Commissioner for Children and Young People also referred to the general principles of juvenile justice noting that, as a general rule, the focus for juvenile offenders should be on diversion and early intervention.[5] Diversionary strategies are often designed to direct juvenile offenders away from the formal justice system into therapeutic and rehabilitative processes, and to avoid the negative impacts of labelling. As reported by the Australian Human Rights Commission:

> If a young person can be diverted from formal criminal justice systems they are less likely to be labelled as an 'offender' and in turn take on this criminal identity and offend further.[6]

Diversion, early intervention and rehabilitation are not as prominent in the adult criminal justice system.

Despite the separation of and different approach to dealing with juveniles and adults in the criminal justice system, the Western Australian sex offender registration scheme imposes the same reporting obligations on juvenile reportable offenders as it does on adult reportable offenders. Moreover, the scheme does not feature rehabilitative principles, nor does it divert juvenile offenders away from formal justice process and agencies – under the legislation juvenile reportable offenders are required to interact with police on a regular and ongoing basis. Nonetheless, the CPOR Act contains a limited number of special rules for juveniles[7] and hence the Commission is required to consider if the existing scheme sufficiently recognises that children should be treated differently from adults.

1. Generally, a reportable offence is either a Class 1 or Class 2 offence; these offences are listed in schedules 1 and 2 of the *Community Protection (Offender Reporting) Act 2004* (WA) and reproduced in this Paper: see Chapter Two, 'Mandatory registration'.
2. See Introduction, 'Terms of reference'.
3. See Chapter One, 'Key issues impacting on reform'.
4. Consultation with Michelle Scott, Commissioner for Children and Young People (8 June 2010).
5. Ibid.
6. Australian Human Rights Commission, *Preventing Crime and Promoting Rights for Indigenous Young People with Cognitive Disabilities and Mental Health Issues*, Report No 3 (2008) 32.
7. The manner in which the *Community Protection (Offender Reporting) Act 2004* (WA) differentiates between juveniles and adults is discussed in the next section.

Special provisions for juvenile offenders

Before examining the impact of the *Community Protection (Offender Reporting) Act 2004* (WA) ('the CPOR Act') on juvenile reportable offenders, it is useful to examine the way in which the legislation currently distinguishes between juvenile and adult offenders:[1]

- ## Limited exclusion from the mandatory provisions

  All adult offenders sentenced for a Class 1 or Class 2 offence[2] are automatically subject to reporting obligations under the CPOR Act. Generally, the same rule applies for juvenile offenders. However, there is a limited exclusion for juvenile offenders sentenced for a single prescribed offence (ie, child pornography offences).[3] Also, in practice, a juvenile offender who is referred by a court to a juvenile justice team (ie, rather than being sentenced by the court) is not treated as a reportable offender.[4]

- ## Different reporting periods

  Juvenile reportable offenders are required to report for half of the reporting period that applies to adults (eg, if an adult would be subject to reporting obligations for 15 years, a juvenile is required to report for seven-and-a-half years). Significantly, juvenile reportable offenders are not subject to lifetime reporting.

- ## Suspension of reporting by the Commissioner of Police

  As explained in Chapter Two, the Commissioner of Police has discretion to suspend the reporting obligations of juvenile reportable offenders who have been sentenced for a prescribed reportable offence (prescribed offences are, for the most part, sexual offences relating to children aged between 13 and 16 years).[5]

- ## Recognition of the vulnerability of children

  The CPOR Act recognises that juvenile offenders are generally more vulnerable than adult offenders. A parent or guardian can report on behalf of a reportable offender who is a child; however, if the report is required under the legislation to be made in person the reportable offender must still accompany the parent or guardian to the police station.[6] Also, when assessing whether a reportable offender has a reasonable excuse for failing to comply with his or her reporting obligations, the court is required to take into account, among other things, the offender's age.[7]

Special provisions for juveniles were inserted in recognition of the differences between juvenile child sex offenders and adult child sex offenders. The former Minister for Police (Michelle Roberts) explained in Parliament that the reduced reporting periods for juveniles were included because 'research suggests that

1. Some of these provisions were referred to in a submission from the National Children's and Youth Law Centre (NCYLC) (September 2010) 5–6. The NCYLC mentioned that the CPOR Act took into account the age of the reportable offender in other ways; for example, when determining if a reportable offender's obligations should be suspended by a court (under s 53) or by the Commissioner of Police (under s 61) the offender's age at the time the offences were committed and the offender's present age are matters to be considered. The power of the court to suspend reporting obligations is only available if the offender is subject to lifetime reporting and hence it is not applicable to juvenile reportable offenders. The power of the Commissioner of Police to suspend reporting obligations is only applicable to juvenile reportable offenders and is noted below.
2. See Chapter Two, 'Mandatory registration'.
3. See Chapter Two, 'Exception to mandatory registration'.
4. There are only a limited number of reportable offences that can be referred to a juvenile justice team pursuant to the *Young Offenders Act 1994* (WA). As far as the Commission is aware this interpretation of the definition of sentence under s 3 of the CPOR Act (ie, that 'sentence' excludes referrals to a juvenile justice team) has not been tested. In *ABW v The State of Western Australia* [2009] WACC 4 [36], Reynolds J observed that 'it seems arguable to me that if a young person is charged with an offence and the Court refers the matter for consideration by a juvenile justice team pursuant to s 28 of the [*Young Offenders* Act] and the charge is ultimately dismissed pursuant to s 33(2) of the [*Young Offenders* Act] then that would amount to a disposition of the charge by the Court but not necessarily a sentence by the Court for the offence as provided in s 6(1) of the [CPOR] Act'.
5. See Chapter Two, 'Suspension of Reporting Obligations'.
6. *Community Protection (Offender Reporting) Act 2004* (WA) ss 35(4) & (5).
7. *Community Protection (Offender Reporting) Act 2004* (WA) s 63(2)(a).

juvenile sex offenders are generally more receptive to treatment and have lower rates of recidivism than adult offenders'.[8] Furthermore, it was observed that the power of the Commissioner for Police to suspend reporting obligations for some juvenile offenders was 'aimed at juveniles convicted of what might be considered teenage sex'.[9]

It appears that policy-makers have grappled with how sex offender registration should apply to juvenile offenders. The national working party acknowledged that it was a difficult issue but recommended that juvenile offenders should not be exempt from mandatory registration.[10] Notwithstanding that decision, it was recommended that a single offence of child pornography or indecency should be beyond the scope of mandatory registration because 'such young offenders may have their behaviour negatively influenced by being labelled as "sex offenders" and being required to register'.[11] In contrast, and as noted in the Western Australian Parliament, other Australian jurisdictions have chosen to exempt all juvenile reportable offenders from automatic registration.[12]

8. Western Australia, *Parliamentary Debates*, Legislative Assembly, 22 September 2004, 6279b–6282a (MH Roberts, Minster for Police and Emergency Services).
9. Ibid.
10. Inter-jurisdictional Working Party, *Child Protection Offender Registration with Police: A national approach,* Report to the Australasian Police Ministers' Council (2003) 84.
11. Ibid 85. The working party also recommended 'minimum sentencing thresholds' that would apply to both adult and juvenile offenders (eg, a juvenile offender who receives a non-conviction order for any reportable offence or a juvenile offender who receives a sentence that does not include imprisonment or supervision for a single Class 2 offence should be excluded from mandatory registration). Western Australia only adopted the exclusion for a juvenile sentenced for a single child pornography offence.
12. Western Australia, *Parliamentary Debates*, Legislative Assembly, 22 September 2004, 6279b–6282a (MH Roberts, Minster for Police and Emergency Services).

The characteristics of juvenile reportable offenders

In Chapter One, the general characteristics of child sex offenders were discussed. As explained in that chapter, there is evidence to suggest that a significant proportion of child sexual offences are committed by juveniles; however, juvenile child sex offenders appear to be different from adult child sex offenders in a number of ways.[1] Most importantly, juvenile child sex offenders appear to be less likely to commit further sexual offences than adult child sex offenders and most do not become adult child sex offenders in later life.[2] Furthermore, it has been contended that juvenile sex offenders are more likely to be assisted by treatment-focussed intervention than adults. In relation to the United Kingdom sex offender registration scheme it was observed that:

> The research has increasingly pointed towards the often transient nature of this behaviour in children and young people which is amenable to intervention and not an inevitable progression into adult sexual offending.[3]

This view was confirmed to the Commission by clinical psychologist, Christabel Chamarette, who argued that juvenile child sex offenders are more likely to benefit from treatment in comparison to adults because adults may 'already have established an entrenched pattern of offending thoughts if not behaviours'.[4] In addition to the general principle that juveniles should be distinguished from adults, these differences support a distinct approach to juvenile child sex offenders under the registration scheme.

Statistical Overview of Sexual Offences in the Children's Court

The table opposite provides the number of case lodgements[5] in the Children's Court of Western Australia during 2009–10 for various sexual offences under the *Criminal Code* (WA) and for the offence of child pornography.[6]

On the basis of these figures it appears that a considerable proportion of sexual offences dealt with in the Children's Court involve offending against children under the age of 13 years (approximately 44%).[7] Under the *Community Protection (Offender Reporting) Act 2004* (WA) ('the CPOR Act') the Commissioner of Police is currently not empowered to suspend reporting obligations for these offences even if the juvenile is considered to be a low risk of reoffending and the circumstances do not warrant registration and reporting.

1. See Chapter One, 'Are they likely to reoffend?' and 'Key issues impacting on reform: The law generally treats children differently'.
2. See, eg, Allan A et al, 'Recidivism Among Male Juvenile Sexual Offenders in Western Australia' (2003) 10 *Psychiatry, Psychology and Law* 359, 372; Nisbet I et al, 'A Prospective Longitudinal Study of Sexual Recidivism Among Adolescent Sex Offenders (2004) 16 *Sexual Abuse: A Journal of Research and Treatment* 223, 232; Letourneau E & Minder M, 'Juvenile Sex Offenders: A case against the legal and clinical status quo' (2005) 17 *Sexual Abuse: A Journal of Research and Treatment* 293, 300; Stone N, 'Children on the Sex Offenders Register: Proportionality, prospect of change and Article 8 Rights' (2009) 9 *Youth Justice* 286, 288; National Centre of Sexual Behaviour of Youth, *What Research Shows About Adolescent Sex Offenders*, Fact Sheet No 1 (2003) 1; New South Wales Ombudsman, *Review of the Child Protection Register: Report under s 25(1) of the Child Protection (Offenders Registration) Act 2000* (2005) 35; New South Wales Legislative Council Standing Committee on Law and Justice, *Spent Convictions for Juvenile Offenders* (2010) 54; Finkelhor D et al, *Juveniles Who Commit Sexual Offenses against Minors* (Washington: Office of Juvenile and Delinquency Prevention, 2009) 3; Nisbet I, 'Adolescent Sex Offenders: a life sentence?' [2010)] *Southern Cross University ePublications, Centre for Children and Young People* 1.
3. Myers S, 'The Registration of Children and Young People under the Sex Offenders Act (1997): Time for a change?' (2001) 1(2) *Youth Justice* 40, 41. See also Tomison A, 'Update on Child Sexual Abuse' (1995) 5 *National Child Protection Clearinghouse Issues in Child Abuse Prevention* 14 <http://www.aifs.gov.au/nch/pubs/issues/issues5/issues5.html>; United Kingdom Home Office, *Review of the Protection of Children from Sex Offenders* (2007) 19.
4. Chamarette C, 'Opinion provided to the Law Reform Commission of Western Australia' (10 October 2010). See also Victorian Government Department of Human Services, *Adolescents with Sexually Abusive Behaviours and Their Families* (2010) 13.
5. A case lodgement refers to an individual offender with one or more charges lodged in court on the same day (therefore the total number of case lodgements may include offenders who have had cases lodged on different days in the same reporting year).
6. Children's Court of Western Australia, *Sexual Assault Report 2005/06–2009/10* (2010) 1–2.
7. In the preceding year (2008–09) about 40% of the case lodgements in the Children's Court involved offences relating to children aged less than 13 years. It is noted that the proportion of sexual offences involving children under the age of 13 years may be even higher because some of the offence descriptions do not refer to the age of the victim (eg, indecent assault and sexual penetration without consent).

Offence	2009–10
Child pornography	14
Attempted sexual penetration of a child under 13 years	2
Indecent dealing of a child under 13 years	24
Aggravated indecent dealing of a child under 13 years	1
Sexual penetration of a child under the age of 13 years	36
Aggravated sexual penetration of a child under the age of 13 years	2
Aggravated indecent dealing with a child aged between 13 and 16 years	11
Sexual penetration of a child aged between 13 and 16 years	11
Aggravated sexual penetration of child aged between 13 and 16 years	2
Persistent sexual conduct with a child under 16 years	1
Indecent assault and aggravated indecent assault	21
Sexual penetration without consent	6
Attempted sexual penetration without consent	1
Aggravated sexual penetration without consent	2
Indecent dealing of a relative	3
Sexual penetration of relative	7
Indecent dealing of an incapable person	1
Total	145

Although not shown in the above table, the figures provided to the Commission reveal a notable increase in the number of child pornography case lodgements in the past year. In 2006–07, 2007–08 and 2008–09 there was either one or two case lodgements each reporting year compared to 14 case lodgements for child pornography in 2009–10. It is possible that this is a reflection of the increasing prevalence of practices such as 'sexting'.[8] However, the Western Australia Police maintained that juveniles are not usually charged with child pornography offences unless the child depicted in the material is clearly pre-pubescent.[9] An article in the *Sunday Times* reported that 13 'teenagers' had been charged with child pornography by mid-2010 (compared to eight at the same time last year) and that some of these had been charged in relation to 'sexting'. In the same article it was reported that 'charges were only laid in extreme cases'.[10] Even so, a recent article in *The Weekend West* reported that a 14-year-old boy had been convicted of possession of child exploitation material after he was found with a 30-second video showing a 14-year-old engaging in sexual activity with older teenagers. It was stated that the offender was sent the images on his phone (he was not present when the sexual activity took place) and subsequently downloaded the images onto his computer.[11]

The statistics provided by the Children's Court also show that in 2009–10, there were a total of 54 finalised cases of sexual assault[12] where the Children's Court imposed

8. The practice of 'sexting' involves the exchange or distribution of sexually explicit images via mobile phones or the internet.
9. Consultation with Detective Inspector Paul Steel (Sex Crime Division) and Martyn Clancy-Lowe (State Coordinator Sex Offender Management Squad), Western Australia Police (28 June 2010).
10. Deceglie A & Cox N, 'Sexting Kids New Police Concern', *The Sunday Times*, 20 June 2010, 6.
11. According to the article the offender was referred to the juvenile justice team and, therefore, he would have avoided registration: Loney G & Hiatt B, 'Parents Warned as Boy Convicted Over Teen Video', *The Weekend West*, 20–21 November 2010, 1. In another article it was reported that a 13-year-old girl received a juvenile caution for distributing child pornography after she sent a text message with a nude photograph of herself to a 17-year-old boy. The boy also received a juvenile caution for being in possession of child pornography: Nyman J & Porter J, 'Children in Strife for Nude Sexting' *The Weekend West,* 15–16 January 2011, 27.
12. The Commission notes that it is not possible to compare the figure of 54 finalised cases where a sentence was imposed by the Children's Court with the total number of 145 case lodgements because different counting rules have been used for different aspects of the statistical report. The purpose of the above information is to show the types of sentencing dispositions given for sexual assault matters.

a sentence. Of these 54 cases, five juveniles (9%) received an immediate custodial sentence;[13] 16 (30%) were sentenced to either suspended imprisonment or a conditional release order; 27 (50%) were sentenced to a community based sentence;[14] and six (11%) received a good behaviour bond or no punishment.[15]

Behaviour that May Result in Sex Offender Registration

The Commission's research and consultations for this reference have revealed that there is a wide range of conduct that may potentially result in a juvenile becoming a reportable offender in Western Australia. Some of this conduct is likely to be considered serious sexually abusive behaviour (eg, a sexual assault without consent accompanied by violence or the sexual penetration of a young child by a significantly older child).[16] On the other hand, there are other examples which are less easy to categorise: some may be viewed as experimental behaviour or consensual underage sexual activity.[17] It has recently been observed that '[u]nderstanding the differences between what is sexually abusive behaviour and what is age-appropriate behaviour can be challenging'.[18] Generally, three main factors are used to assess if certain behaviour is considered sexually abusive – consent, coercion and inequality.[19]

The Commission acknowledges that there are juvenile reportable offenders who have committed very serious sexual offences. However, the Commission has found that there are a number of examples that are less serious and arguably do not call for mandatory registration. In particular, it is the Commission's view that juveniles who have been dealt with for 'consensual' sexual activity or age-appropriate experimentation should not be liable to sex offender registration and reporting obligations. Even in less clear cases the automatic application of sex offender registration laws to juvenile offenders may produce inappropriate results. The following discussion provides case examples to demonstrate the inherent difficulties with a 'one-size-fits all' approach.

'Consensual' sexual activity

As canvassed in detail in Chapter Four, consensual sexual activity between two children (ie, where at least one of the parties is under the age of 16 years) is unlawful in Western Australia, irrespective of any similarity in age. So, for example, two 15-year-olds who willingly commence a sexual relationship are guilty of a criminal offence. The Commission explained in Chapter Four that the police or the prosecution may exercise their discretion not to proceed with charges in such circumstances. However, if they do proceed and one of the parties is found guilty by the court he or she will be subject to sex offender registration.[20]

Information obtained by the Commission during consultations strongly suggests that a significant number of juveniles have been dealt with by the court for consensual underage sexual activity and are, therefore, subject to the CPOR Act.[21] The President of the Children's Court advised the Commission that:

13. Of the five cases resulting in detention, four were for sexual penetration of a child under the age of 13 years and one was for aggravated sexual penetration without consent: Children's Court of Western Australia, *Sexual Assault Report 2005/06–2009/10* (2010) 12.
14. A community-based sentence includes an Intensive Supervision Order or Community Based Order under the *Sentencing Act 1995* (WA) and an Intensive Youth Supervision Order or Youth Community Based Order under the *Young Offenders Act 1994* (WA).
15. Children's Court of Western Australia, *Sexual Assault Report 2005/06–2009/10* (2010) 11.
16. The term 'sexually abusive behaviours' is often used in relation to 'offenders' aged between 10 and 18 years: see O'Brien W, *Australia's Response to Sexualised or Sexually Abusive Behaviours in Children and Young People* (Canberra: Australian Crime Commission, 2010) 13.
17. A South Australian study which examined 55 cases involving the sentencing of a juvenile for a sexual offence found that the cases could be categorised into three main groups. The first category consisted of 32 offenders who were considered by the court to be a risk of future sexual offending and whose sexual offending behaviour was viewed by the court as serious or deviant. The second category consisted of 13 juvenile offenders who were considered by the court to be at risk of future offending but not necessarily future sexual offending. These offenders 'were viewed as antisocial and persistent offenders, who caused judicial concern not because of their sexual offending, but their criminogenic lifestyle'. In the final category there were 10 juvenile offenders who were viewed by the judicial officer as 'adolescent experimenters, who were likely to mature out of their offending, and whose offending was perceived as least serious'. In this category all of the victims were 12 years or over and all of the offences involved acquaintances or friends and the offending behaviour was generally described by judicial officers as 'consensual underage sex'. This group was not considered to be a risk of future offending: Bouhours B & Daly K, 'Youth Sex Offenders in Court: An Analysis of Judicial Sentencing Remarks' (2007) 9 *Punishment and Society* 371, 379–82.
18. Victorian Government Department of Human Services, *Adolescents with Sexually Abusive Behaviours and Their Families* (2010) 6 & 9–11.
19. Ibid 9–11. Informed consent requires, among other things, an understanding of the nature of the conduct and voluntary participation. Inequality may exist if there is a large age gap between the parties or if one party has an intellectual disability. Coercion may include threats, bribery and violence.
20. Unless the matter is referred to a juvenile justice team.
21. See, eg, Chapter Four, case examples 1, 2, 3 & 4. The Commission also notes that recently it was reported that two 16-year-old boys will be placed on the sex offender register as a result of engaging in sexual activity with a 14-year-old girl. The boys received community-based sentences and, according

> The Children's Court deals with young persons who have committed sex offences of various kinds, of various levels of seriousness, and committed in varying sets of circumstances. Included in the cases dealt with are cases of sexual activity between 14, 15 and 16 year olds that are consensual as between them but cannot be so according to law. These cases become the subject of complaint for a variety of reasons ... Whilst that conduct may well be unlawful, the particular offender and the circumstances of the particular offence may not fit the individual and the type of cases that the Act was intended to catch. There may be no sign at all of sexual deviancy, force, power imbalance or paedophilia. Further to all of that the psychological report on the offender could be very positive.[22]

Some more detailed case examples obtained by the Commission are provided below.

Case example 9

The offender pleaded guilty to an offence of sexual penetration of a child under the age of 13 years. At the time of the offence the offender was aged 14 and the complainant was aged 11. They were known to each other (either from school or from the local park). The offender contacted the complainant on a number of occasions via social networking sites and asked her if she wanted to have sex with him. The complainant initially declined. On one occasion the offender asked the complainant to meet him at the local park. She met him at the park at 11:30 pm and, after talking for a short time, they both removed their shorts and underpants and engaged in 'consensual' sexual intercourse. After they both got dressed the offender walked the complainant home. The offender told police that he thought the complainant was 13 years old. The offender was placed on a Conditional Release Order with supervision, counselling and community work.[23] Under the present regime this 14-year-old boy is considered a sex offender and is subject to reporting obligations under the CPOR Act for seven-and-a-half years.

Case example 10

The offender pleaded guilty to five counts of sexual penetration of a child of or over the age of 13 years and under the age of 16 years. The offender was 16 years and the complainant was 13 years of age (the offender was aware of her age). The offender and complainant met through a relative of the complainant. The offender sent text messages to the complainant and eventually a relationship developed. On the first occasion they were at the offender's house and he fondled her breasts and digitally penetrated her vagina with her consent. Some days later they discussed having sexual intercourse and condoms were purchased. They had consensual sexual intercourse on three occasions. During one of these incidents the offender asked the complainant to perform fellatio but she refused. The statement of material facts suggest that he 'coerced' the complainant into performing fellatio on him although it is not clear how he did this other than by repeatedly asking her. Later, the complainant told her mother about the extent of her sexual relationship with the offender and the police then became involved.

The offender was 17 years old at the time of sentencing. He had no criminal record. He was sentenced to a Conditional Release Order for 10 months with a requirement to attend 12 psychological counselling sessions. The Commission spoke with this offender who advised that he successfully completed the Conditional Release Order and has not offended since. He was initially required to report once a month to the police, after some time this was reduced to every two months and then to once every six months. After approximately 12–18 months his reporting obligations were suspended by the Commissioner of Police. The police advised him that he no longer needed to report because he had been reporting as required and was a first offender. This offender told the Commission that he felt it was a 'bit unfair' that he had to report on the register at all and was very relieved that none of his friends or acquaintances had discovered he was on the sex offender register.[24]

to the newspaper article, the mother of one boy was distressed that her son could be considered a child sex offender until he was 24 years old: Loney G, 'Schoolboys Set to be on Sex Register', *The Weekend West*, 22–23 January 2011, 18.

22. Letter from Judge Reynolds, President of the Children's Court of Western Australia (2 November 2010) 1.
23. Information obtained from Statement of Material Facts and lawyer.
24. Information obtained from Statement of Material Facts, lawyer and the offender.

Case example 11

The offender, who was 17 years of age, was in a juvenile detention centre. He was running on the oval during the evening. The 13-year-old complainant (who was also a detainee) climbed out of her compound and met the offender. They engaged in 'consensual' sexual intercourse. The complainant later told staff at the detention centre. The offender was sentenced to a Conditional Release Order for 12 months.[25] Again this offender will be required to comply with the CPOR Act for seven-and-a-half years.

Case example 12

The offender was 15 years of age and the complainant was 14 years of age. Hence, both parties were under the age of consent.[26] The complainant sent the offender a text message and after exchanging phone numbers they agreed to meet. After meeting they returned to the offender's house to play video games. The offender's mother was at home in another room. It appears that the offender tried to kiss the complainant and encourage her to have sex with him. The complainant told the offender that she wasn't interested in having sex and also expressed concern about getting pregnant but remained in the room. The offender then put on a condom and began to penetrate her. The complainant said to 'stop' and as soon as the offender realised what she was saying he stopped and the complainant left.

This encounter was the offender's first sexual experience. The sentencing judge expressed the view that the offender had 'misread the situation' and mistakenly believed that she was interested in having sex with him. The offender had no prior criminal record and was sentenced to an Intensive Youth Supervision Order.[27] As a consequence of this offence the offender will be subject to the CPOR Act for seven-and-a-half years and required to report for that period unless his reporting obligations are suspended by the Commissioner of Police.

25. Information obtained from lawyer.
26. In relation to age of consent laws in the United States it has been observed that such laws 'greatly complicate the issue of adolescent sexual offending' and that the 'logic of the law deviates by holding one minor legally responsible for exploiting another minor's inability to make mature decisions about sex, even when the perceived perpetrator is just as legally incapable of consenting to sex himself': Garfinkle E, 'Coming of Age in America: The misapplication of sex-offender registration and community-notification laws to juveniles' (2003) 91 *California Law Review* 163, 187.
27. Information obtained from Sentencing Transcript.

Case example 13

The offender was aged 15 at the time of the offence and the complainant was approximately 13. The offender and the complainant, who were known to each other, were swimming at a public swimming pool and the offender touched the complainant's breast and digitally penetrated her vagina. The complainant said that she didn't say anything at all but the offender believed she had agreed to the conduct. The state accepted that although the complainant may have felt pressured, that was not the result of anything said or done by the offender. The state did not seek detention, instead submitting that a community based order would be appropriate. The offender had no prior record. He was sentenced to a Youth Community Based Order for eight months with a requirement to participate in counselling.

As a consequence of the offences the offender will be subject to the CPOR Act for seven-and-a-half years. The offender had himself been sexually abused when he was approximately 11 years old by an older man. Because the offender and the person who abused him lived in the same town it is possible that he could come face-to-face with the perpetrator of this crime (who is also a reportable offender) at the time he is reporting to the police.[28]

The abovementioned case examples demonstrate that even where the complainant has willingly participated in the sexual activity (or where the offender reasonably believed that the complainant was a willing participant) juvenile offenders are subject to sex offender registration. The only way in which sex offender registration may not apply is if the court refers the matter to a Juvenile Justice Team. However, offences involving the sexual penetration of a child under the age of 13 years cannot be referred to the team under the *Young Offenders Act 1994* (WA). And, even if there is power to refer a child-sexual offence to the team, the court may decide that a referral to the team is not the most appropriate option. For example, the offender may have personal issues that are more appropriately dealt with by a supervision order. Importantly, the President of the Children's Court has held that the potential for registration under the CPOR Act is not relevant when determining the appropriate sentence – a court cannot circumvent the operation of the CPOR Act by referring a matter to the Juvenile Justice Team.[29] Hence, for a matter to be referred to the team, it must be the appropriate option in all of the circumstances irrespective of potential sex offender

28. Information obtained from Sentencing Transcript.
29. *ABW v The State of Western Australia* [2009] WACC 4.

registration. Nevertheless, the Commission has been told that some juvenile child sex offenders are being referred to the Juvenile Justice Team. It was also noted that some accused have accepted responsibility for an alleged child sexual offence even though they did not admit to the alleged conduct in order to enable the matter to be referred to the team so that they did not have to risk sex offender registration.[30]

Non-consensual sexual activity

The Commission's research and consultations have shown that a number of young children (ie, aged less than 14 years) are dealt with for sexual offences committed against much younger children (ie, aged 10 years or less). These types of offences are difficult to categorise because they may extend beyond what is ordinarily considered to be age-appropriate sexual experimentation. Further, because the complainant is very young the concept of factual consent is inapplicable. Generally, an apparent willingness to engage in the prohibited sexual conduct on the part of the complainant does not provide any mitigation in cases involving very young complainants.

Nonetheless, given the relative youth of the offender, the need for ongoing registration and reporting is questionable. In this context it is worth remembering that under the criminal law a child aged between 10 and 14 years is not criminally responsible for an act or omission 'unless it is proved that at the time of doing the act or making the omission he had capacity to know that he ought not to do the act or make the omission'.[31] The Commission is not aware how often this provision is argued in relation to sexual offending allegedly committed by children aged less than 14 years.

In recognition of the potential difficulty in obtaining convictions for younger children as a consequence of the requirement to prove that the child knew what he or she was doing was wrong (and also in order to enable early intervention), an alternative option is available in Victoria. The Children's Court can make a therapeutic treatment order (or a therapeutic treatment placement order) for a child aged between 10 and 15 years if that child has exhibited sexually abusive behaviour.[32] Any criminal proceedings relating to the alleged behaviour can be adjourned while the order is in force and, at the end of the order, if the court is satisfied that the child has attended and participated in the treatment program the court 'must discharge the child without any further hearing of the criminal proceedings'.[33] It has been observed that this 'process allows a child to avoid the stigma and difficulties that may attach to processing through the Criminal Division of the Court'.[34] The court also has the power to refer a case to the Secretary of Child Protection in order to enable an investigation. The legislation establishes a Therapeutic Treatment Board comprised of representatives from Child Protection, the police, the Office of the Director of Public Prosecutions and various treatment providers. This board provides advice on the 'appropriateness of applying for a therapeutic treatment order'.[35]

The following case example demonstrates circumstances in which an alternative option, such as the therapeutic treatment order available in Victoria, would arguably be more appropriate than criminal prosecution (and consequent sex offender registration) for the offender.

Case example 14

A 13-year-old offender pleaded guilty to one charge of indecent dealing of a child under the age of 13 years. The complainant was seven years old. The complainant had slept over at the offender's house on a number of occasions because she was a friend of the offender's younger sister. The complainant entered the offender's bedroom (and according to the statement of material facts) touched the offender's penis in response to a request by him for her to do so. The offender had no prior record and was placed on a Youth Community Based Order.[36] As a result of this offence, the offender will be subject to the CPOR Act for seven-and-a-half years.

The circumstances in the following case are very unusual (given the offender's age at the time of sentencing) and demonstrate that the inflexible application of sex offender registration, irrespective of the circumstances of the offence and the offender, can operate unfairly.

30. Consultation with Claire Rossi & Sarah Dewsbury, Legal Aid WA (8 June 2010).
31. *Criminal Code* (WA) s 29. Children under the age of 10 years cannot be held criminally responsible.
32. *Children, Youth and Families Act 2005* (Vic) s 244. In 2008–09 there were a total of 12 therapeutic treatment orders made by the Victorian Children's Court. No therapeutic treatment placement orders were made in that year: Victoria Law Reform Commission, *Protection Applications in the Children's Court*, Final Report (2010) 465.
33. *Children, Youth and Families Act 2005* (Vic) s 354.
34. *Victoria Police v HW* [2010] VChC 1, [14] (Grant J).
35. Victorian Department of Human Services, *Children in Need of Therapeutic Treatment: Therapeutic treatment orders* (2007).
36. Information obtained from Statement of Material Facts and lawyer.

Case example 15

The offender was 21 years of age at the time of sentencing and he was dealt with in the Children's Court for three counts of indecent dealing. The offences occurred some 10 years earlier, when the offender was aged between 11 and 12 years and while he was still in primary school. The two complainants were aged between 6 and 7 years. The offender and the two complainants were neighbours. The offender was at the complainants' house in a computer room. The offender put his hands inside the first complainant's pants and touched his penis. The second offence again took place in the computer room; the offender was looking at pornography on the computer and while he was doing this the complainant was able to view the screen. In relation to the third offence the offender showed the second complainant how to masturbate by touching the second complainant's penis.

The offender was not questioned by police until many years after the commission of the offences. The offences came to light because a family member asked one of the complainants if they had ever been sexually interfered with and he replied 'yes'. The complainant's mother was then informed and she referred the matter to the authorities.

At sentencing it was submitted on behalf of the offender that the offences were no more than sexual experimentation. Although the offender was approximately five years older than the complainants there was no suggestion that he had used any force or threats. The state submitted that the offender should be placed on a suspended sentence. The offender had no criminal record at all (ie, either before or after the commission of the offences).

The sentencing judge noted that the age disparity was five years and that, despite being very young himself, the offender would have appreciated the extreme youth of the complainants. Nonetheless, given that the offender had no criminal record the offences could be regarded as an 'aberration'. He was sentenced to three separate adult Conditional Release Orders (ie, good behaviour bonds).[37] As a consequence of being sentenced for these offences the offender will be required to register and report pursuant to the CPOR Act for seven-and-a-half years. Because the offences involved children under the age of 13 years the Commissioner of Police has no discretion to waive the offender's reporting requirements.

37. Information obtained from Sentencing Transcript.

The Commission has also been told of cases involving sexual activity between two children where the offender is intellectually disabled and the complainant, although chronologically younger, has a similar intellectual age to the offender.[38] While this does not necessarily reduce the risk of future offending,[39] it may impact upon an assessment of the offender's culpability and whether the offender's sexual tendencies or attractions are viewed as 'deviant' or 'abnormal'.

Case example 16

A 17-year-old offender was dealt with for three charges of indecent dealing of a child under the age of 13 years. The offences occurred on two different occasions and involved a 10-year-old complainant who was present at the offender's home. On each of the three occasions the offender exposed his penis in front of the complainant. On two occasions the offender asked the complainant to touch his penis but she declined and on one occasion the offender masturbated in front of the complainant but he stopped as soon as she asked him to.

The offender had significant mental health issues and had been on medication and receiving psychological treatment. The offender had a maturity level more akin to a 10- to 12-year-old and had no prior record. He was sentenced to an Intensive Supervision Order for nine months.[40] As a consequence of these offences the offender is a reportable offender under the CPOR Act for a period of seven-and-a-half years.

Other non-consensual behaviour

The CPOR Act potentially applies to other types of non-consensual behaviour that may or may not be sexually motivated or involve any underlying sexual deviancy (eg, indecent assault). In the following example a young boy has been charged with two indecent assault offences allegedly committed against older children.

38. Consultation with Sandra Boulter (Principal Solicitor), Sally Dechow & James Woodford, Mental Health Law Centre (25 May 2010); consultation with Steve Begg (Solicitor in Charge), Ben White and Taimil Taylor, Aboriginal Legal Service, Broome (20 July 2010); consultation with Brianna Lonnie, Simon Holme & Matt Panayi, Legal Aid WA, Kununurra (22 July 2010); consultation with Magistrate Catherine Crawford (9 September 2010).
39. The APMC national working party recommended that people with an intellectual disability or mental illness should not be excluded from the registration scheme because they may pose a significant risk to children. On the other hand, it was recognised that such offenders may have difficulty in complying with the requirements of registration because of their disability or illness: Inter-jurisdictional Working Party, *Child Protection Offender Registration with Police: A national approach,* Report to the Australasian Police Ministers' Council (2003) 82–3.
40. Information obtained from lawyer.

Case example 17

A 13-year-old boy has been charged with one count of aggravated indecent assault (the circumstance of aggravation being that the accused was in company) and one count of indecent assault. For the first charge, it is alleged that the accused was on a train in the company of six other juveniles who approached the 16-year-old complainant and hassled her in relation to her belongings. As the complainant got off the train, it is alleged that the accused 'slapped her on her bottom'. In relation to the second charge, it is alleged that the accused was again with friends at a train station. The complainant in this matter (also a 16-year-old girl) walked past the accused and the allegation is that the accused squeezed her buttock cheek and put his hand on her buttock for a short while (and that he repeated this behaviour).[41]

This accused, who was described as an immature 13-year-old, has pleaded not guilty to the two charges. However, if he is found guilty of these offences he will be subject to sex offender registration for a period of four years.[42]

More serious sexually abusive behaviour

The Commission acknowledges that there are cases where juveniles are subject to the CPOR Act as a result of offences involving coercive, abusive or deviant sexual behaviour. In such cases, the offences are likely to be regarded as very serious and sex offender registration will be considered appropriate and necessary. Nevertheless, the following case is an example where the offence is serious but the circumstances do not necessarily demand sex offender registration.

Case example 18

The offender and the complainant were both 15 years old. The complainant was the girlfriend of the offender's best friend. Some flirting had taken place between the offender and the complainant and they had previously engaged in consensual sexual activity. The offender pleaded guilty to one charge of aggravated sexual penetration without consent. Just prior to the commission of the offence, the offender and the complainant commenced kissing and engaged in consensual sexual intercourse. The complainant then said 'stop, it's hurting'. The offender continued to penetrate the complainant for approximately five minutes, finally ceasing once he realised that the complainant was crying. The offender had no prior record and was sentenced to a Conditional Release Order for 10 months with psychological counselling.[43] As a result of this conviction he will be required to report to police pursuant to the CPOR Act for seven-and-a-half years.

This offence is obviously serious; however, the offender was only 15 years of age and according to the criminal law, he was himself too immature to legally consent to sexual activity. While it is fitting that this young boy was held to account for his actions so that he could learn from the experience and appreciate the appropriate boundaries of sexual relationships, it is questionable whether requiring him to register and report to police is necessary. It is also noteworthy that if both parties had been over 18 years the offender would not be subject to sex offender registration.[44] An adult should be sufficiently mature to know how to respond when a willing sexual partner decides to withdraw consent during intercourse; however, it is debatable whether a 15-year-old is capable of fully appreciating the gravity of the behaviour. In such circumstances a response which promotes rehabilitation and avoids negative labelling is possibly a better option.

Non-sexually motivated conduct

Most reportable offences listed in schedule 1 and schedule 2 of the CPOR Act appear, on their face, to be sexually based; however, it is possible for a person to commit a reportable offence without having any sexual motivation for the offending behaviour. This may be somewhat unusual but it is important to bear in mind that a person could be classified as a sex offender, and required to report and register, on the basis of conduct that although unlawful is not necessarily sexually motivated. One example raised with the Commission concerned an incident where a number of school students were charged with indecent assault following a school-yard prank where a boy's pants were pulled down (colloquially known as 'dacking').[45] Another potential example, concerns practices such as 'sexting'. Young people may swap explicit photos or other material or post explicit pictures on social networking websites as a joke or possibly for more sinister reasons (eg, bullying). Nonetheless, unless the material is being used or distributed for sexual gratification it is arguably inaccurate to categorise the culprits as 'sex offenders'.

41. Information obtained from Statement of Material Facts and lawyer.
42. An offence of indecent assault cannot be referred to the juvenile justice team.
43. Information obtained from Sentencing Transcript.
44. The *Community Protection (Offender Reporting) Act 2004* (WA) does not currently require registration for sexual offences committed against adults: see Introduction, 'Extending the register to adult sex offenders'.
45. Information obtained from lawyer.

The impact of sex offender registration on juveniles

Chapter Two of this Discussion Paper sets out the obligations imposed upon reportable offenders under the *Community Protection (Offender Reporting) Act 2004* (WA) ('the CPOR Act').[1] In this section the Commission considers the repercussions of registration for juvenile reportable offenders because it is difficult to divorce the consequences of being a registered sex offender from whether an offender should be required to register in the first place. Also, when considering the impact on juvenile reportable offenders it is important to recognise that there are two distinct types of juvenile reportable offenders in Western Australia: those who are included on the Australian National Child Offender Register (ANCOR) but who have had their reporting obligations suspended by the Commissioner of Police; and those who are subject to ongoing reporting obligations (for a period of either four years or seven-and-a-half years). Thus, as an absolute minimum, a juvenile reportable offender will have his or her name included on the sex offender register.

Labelling and Rehabilitation

One of the key concerns about sex offender registration for juvenile offenders relates to the potential stigma associated with being labelled a 'sex offender' at such a young age and the impact of labelling on future rehabilitation. This issue is relevant to both juveniles who are required to comply with ongoing reporting obligations and to juveniles who are included on the register but are no longer required to report to police. A recent and comprehensive report prepared on behalf of the Australian Crime Commission in relation to sexually abusive behaviour in children and young people observed that:

> There is a 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.[2]

It was further noted that a number of clinicians 'expressed deep concerns about the stigmatising and life-long consequences for a young person if they are placed on … ANCOR, commonly known as "the Sex Offender Register"'.[3]

The negative impact of labelling juveniles as 'sex offenders' has been recognised elsewhere.[4] For example, it has been observed that:

> Labelling young people who have sexually abused as 'sex offenders' is thought by many to be potentially psychologically harmful and can inhibit efforts to change.[5]

Further, in an analysis of the sex offender registration scheme in the United Kingdom, it was argued that

> The practice of labelling a child as a sex offender together with the inevitable impact on self-perception and social reaction may actually serve to reinforce that identity rather than work towards challenging the behaviour.[6]

Various individuals have raised similar concerns to the Commission during consultations for this reference.[7]

1. See Chapter Two, 'Reporting'.
2. O'Brien W, *Australia's Response to Sexualised or Sexually Abusive Behaviours in Children and Young People* (Canberra: Australian Crime Commission, 2010) 12.
3. Ibid.
4. See, eg, New South Wales Ombudsman, *Review of the Child Protection Register: Report under s 25(1) of the Child Protection (Offenders Registration) Act 2000* (2005) 35; Association for the Treatment of Sexual Abusers, *Report of the Taskforce on Children with Sexual Behaviour Problems* (2006) 24; Miner M et al, 'Standards of Care for Juvenile Sexual Offenders of the International Association for the Treatment of Sexual Offenders' (2006) 1(3) *Sexual Offender Treatment* 4; Wakefield H, 'The Vilification of Sex Offenders: Do laws targeting sex offenders increase recidivism and sexual violence?' (2006) 1 *Journal of Sexual Offender Civil Commitment: Science and the Law* 141, 142; Human Rights Watch, *No Easy Answers: Sex offender laws in the US* (2007) 65; O'Brien W, *Problem Sexual Behaviour in Children: A review of the literature* (Canberra: Australian Crime Commission, 2008) 7.
5. Boyd C, 'Young People Who Sexually Abuse: Key issues' (2006) 3 *Australian Centre for the Study of Sexual Assault Wrap* 2.
6. Myers S, 'The Registration of Children and Young People under the Sex Offenders Act (1997): Time for a change?' (2001) 1(2) *Youth Justice* 40, 44.
7. Consultation with Michelle Scott, Commissioner for Children and Young People (8 June 2010); consultation with Katherine Hams, Manager, Kimberley Aboriginal Medical Services Council (21 July 2010); email consultation with Dr Katie Seidler, Clinical and Forensic Psychologist, LSD Psychology: Clinical Forensic Psychology Services (1 November 2010);

A clinical psychologist with experience working with juvenile offenders stated that:

> I have significant concerns about the registration process having a deleterious impact on the developmental pathway of juvenile offenders, especially in relation to their psychosocial development, which includes their development of relationship and intimacy skills, thereby possibly only serving to increase their risk in later years.[8]

Expressing similar concerns, a psychologist working with Kimberley Aboriginal communities argued that an 'at risk' register with a therapeutic focus should be established for juvenile offenders as a more appropriate alternative to immediate placement on the sex offender register. She suggested that upon successful completion of the relevant rehabilitation program, and once the juvenile turns 18 years, the young person's name could be removed from the 'at risk' register. If, at that stage, valid concerns about the risk of further offending remained, the young person could be placed on the adult sex offender register.[9]

In an opinion commissioned for this reference, clinical psychologist Christabel Chamarette explained that for children 'whose sense of identity is fragile and evolving' the label of 'sex offender' may become a 'self-fulfilling prophecy'.[10] She also referred to potential harmful consequences for juvenile child sex offenders who may themselves be victims of 'abuse, neglect or trauma' and for this group 'naming and shaming' is 'counter-productive'.[11]

The Commission's consultations also revealed examples that demonstrate the potential negative aspects of being labelled a 'sex offender'. In one case a 14-year-old boy felt compelled to leave school after rumours circulated that he was a registered sex offender and this boy subsequently became suicidal.[12] In another case an offender's sister posted a statement on Facebook that her brother was listed on the sex offender register.[13] One lawyer informed the Commission that a number of his clients have been distressed about being included on the ANCOR register.[14] The Commission was also informed about a case where an 11-year-old boy was told by his stepfather that he was a 'paedophile' – the boy had lifted up the skirt of a five-year-old relative. Although this boy was not charged (and hence not registrable) the impact of being labelled a 'paedophile' had serious repercussions. His sense of despair about being equated to adult sex offenders caused this boy to attempt suicide three times.[15] In her written opinion, Christabel Chamarette included comments from another psychologist who has treated juveniles convicted of sexual offending. This psychologist's comments included that she had seen examples of 12- to 14-year-olds calling themselves 'paedophiles' and these children experienced 'anxiety and depression'.[16]

In response to concerns about the potential negative impact of labelling a young person as a 'sex offender', it could be argued that any stigma arises because the young person has been charged and convicted for the offence and not because of the subsequent registration under the CPOR Act. A similar argument was raised in a Canadian case, *R v Burke,*[17] when the Crown asserted that it is the conviction for the offence which results in the label of 'sex offender' not registration. Caldwell J stated:

> [C]onviction alone does not lead to a formalized label designated by the state. It is the inclusion in the registry that leads to the formalized state designated label as section 3(1) of the [Sex Offender Information Registration Act] specifically defines all who are ordered to comply with the Act as 'sex offenders'. This factor has a psychological impact on such individuals as they know that they are officially designated as 'sex offenders'.[18]

Evidently (unlike the Canadian legislation) the CPOR Act does not expressly use the term 'sex offender'; however, in practice the term 'sex offender' is frequently employed. For example, the phrase 'sex offender register' is used in court proceedings, even in jurisdictions where the title of the legislation does not use that terminology.[19]

Chamarette C, 'Opinion provided to the Law Reform Commission of Western Australia' (10 October 2010).

8. Email consultation with Dr Katie Seidler, Clinical and Forensic Psychologist, LSD Psychology (1 November 2010).
9. Consultation with Katherine Hams, Manager, Kimberley Aboriginal Medical Services Council (21 July 2010).
10. Chamarette C, 'Opinion provided to the Law Reform Commission of Western Australia' (10 October 2010).
11. Ibid.
12. Youth Law Team, Legal Aid WA, *Submission on Community Offender Protection Register* (24 February 2009). Christabel Chamarette noted that negative labelling is likely to increase suicide risk: ibid.
13. Consultation with Claire Rossi & Sarah Dewsbury, Legal Aid WA (8 June 2010).
14. Telephone consultation with Dave Woodroffe, Aboriginal Legal Service, Kununurra (22 June 2010).
15. Chamarette C, 'Opinion provided to the Law Reform Commission of Western Australia' (10 October 2010).
16. Ibid.
17. (2005) ONCJ 422.
18. Ibid [12].
19. The legislation in three Australian states uses the phrase 'sex offender' in their titles; however, a search of publicly available cases on AustLII in November 2010 showed that there were 17 hits for the term 'sex offender register' and, of these, there were 10 references in jurisdictions that did not use the term in the legislation. Two of these were in Western Australia. In some instances the phrase 'Australian National Child (Sex) Offender Register' was used to refer to the 'Australian National Child Offender Register' (ANCOR).

A media release issued when the CPOR Act was passed stated that:

> Police Minister Michelle Roberts said the new laws, which passed through Parliament this week, would require paedophiles and serious and repeat sex offenders to report to police and have their details logged on a national database – a Sex Offender Register.[20]

The Western Australia Police website refers to ANCOR in its 'terminology and acronyms' section[21] – it is stated that ANCOR is the 'Australian National Child (Sex) Offender Register'. Further, the brochure given to reportable offenders mentions the requirement to contact the Sex Offender Management Squad and also refers to ANCOR as the 'Australian National Child (Sex) Offender Register'. ANCOR is in fact an acronym for Australian National Child Offender Register.

The President of the Children's Court, Judge Reynolds, advised the Commission that in many instances, a sexual offence results from a one-off bad decision and the lesson learnt from being charged and sentenced is sufficient – the young person can comply with any sentence imposed and resume their life. But for those on the register, they are marked as a 'sex offender' and are constantly reminded of the offence.[22] Similarly, Associate Professor David Indemaur of the Crime Research Centre expressed the opinion that registration is likely to be stigmatising over and above the conviction for the offence.[23] Christabel Chamarette's written opinion quotes a psychologist who stated that it is important that these young people can move on with their lives and 'although the offending behaviour is not forgotten' it should not be made 'current by remaining on the register years after the event'.[24]

Furthermore, it might be argued that any negative impact from labelling a young person as a 'sex offender' only occurs if the label is publicly known (eg, because of a publicly accessible register). Christabel Chamarette explained that the impact of labelling is 'extremely detrimental to the well being and rehabilitation of the child' even if the 'label' is not known to the public.[25] The label will be known to the offender and certain police and in all probability it will also be known to some family members and other government agencies. Also, as explained in Chapter Two, there are numerous ways in which a person's status as a registered offender can become known to members of the public.[26]

The Commission is of the view that inclusion on the register established under the CPOR Act imposes additional negative labelling and stigma beyond any that arises because of the original charge and conviction. Being charged and sentenced for a sexual offence is not the same as being told (after being sentenced) that it is also necessary to report to police for a number of years and be included in a register that is designed to protect the community from sex offenders. Sex offender registration extends stigma well beyond the period of the sentence that was originally imposed.

Bearing in mind that juvenile reportable offenders have been found guilty and sentenced for a child sexual offence, it might also be argued that any resulting stigma is a small price to pay to ensure that such offenders are registered with and monitored by police. However, the Commission's research and consultations strongly suggest that negative labelling (in particular, for juveniles) is detrimental to rehabilitation. The President of the Children's Court, Judge Reynolds, advised the Commission that for some cases, the requirement to register and report may be detrimental to a 'young person's rehabilitation and development'.[27] A recent study in New South Wales observed that registration can impact negatively upon community reintegration by causing 'stress and social isolation' which may in turn trigger further offending.[28] In her opinion, Christabel Chamarette cites another psychologist who stated that:

> I consider that the mandatory sex offender registration scheme is harmful to adolescents who have offended sexually and is likely to increase the likelihood that they form an identity as a sex offender, ruminate on their offending, have difficulty focusing on developing their strengths, feel less worthy than others, and feel hopeless about leading a non-offending lifestyle. [29]

Christabel Chamarette suggested that mandatory registration of juvenile child sex offenders is 'unlikely to assist and much more likely to hinder rehabilitation as it is a "one size fits all" approach'.[30]

20. Michelle Roberts, 'WA's Sex Offender Laws Will Be the Toughest in the Nation', *Media Statement*, 27 November 2004.
21. See http://www.police.wa.gov.au/WAPoliceNews/MediaGuides/Policeterminologyandacronyms/tabid/1496/Default.aspx#ANCOR.
22. Consultation with Judge DJ Reynolds, President of the Children's Court of Western Australia (21 June 2010).
23. Telephone consultation with David Indemaur, Crime Research Centre, University of Western Australia (13 July 2010).
24. Chamarette C, 'Opinion provided to the Law Reform Commission of Western Australia' (10 October 2010).
25. Ibid.
26. See Chapter Two, 'Access to register and confidentiality'.
27. Letter from Judge DJ Reynolds, President of the Children's Court of Western Australia (2 November 2010) 2.
28. Seidler K, 'Community Management of Sex Offenders: Stigma versus support' (2010) 2(2) *Sexual Abuse in Australia and New Zealand* 66, 71.
29. Chamarette C, 'Opinion provided to the Law Reform Commission of Western Australia' (10 October 2010).
30. Ibid.

The Commission believes that when assessing if sex offender registration is necessary or appropriate for juvenile child sex offenders the potential harmful effects of being labelled as a 'sex offender' cannot be ignored. For more serious high-risk juvenile child sex offenders the need to protect the community via registration may outweigh concerns about labelling. However, for less serious juvenile child sex offenders (such as those described in this chapter) the potential for registration to be counterproductive in terms of future rehabilitation may call for a different approach.

Practical Consequences

Reporting requirements

As previously discussed the reporting obligations under the CPOR Act are potentially onerous for all reportable offenders;[31] however, the difficulties may be more pronounced for juvenile offenders. Under the provisions of the legislation a parent or guardian can report on behalf of a juvenile reportable offender or, if personal attendance is required, a parent or guardian can accompany the juvenile to the police station and make the report on their behalf. The ability of juvenile reportable offenders to comply with their reporting obligations may be affected by the level of support they receive from their families.

It is also significant that many juvenile reportable offenders are required to comply with the CPOR Act many years after they have turned 18. Chief Magistrate Steven Heath told the Commission that he has seen a number of adults charged with breaching the CPOR Act years after the original sexual offence had been committed. In some cases the offender did not appear to be a risk to the community because there has been no (or very minor and unrelated) further offending.[32] It is possible that failing to comply with the CPOR Act may be the only reason why an offender becomes involved in the adult justice system.

Regional and remote juvenile reportable offenders

The Commission's consultations indicate that juveniles from regional and remote areas are likely to experience considerable difficulty in regard to reporting obligations. The Commissioner for Children and Young People expressed concern about the impact of registration on young Aboriginal people, especially those living in remote areas.[33] It is evident that cultural and language differences can impinge upon a young person's capacity to understand reporting obligations as well as their ability to comply. Furthermore, young people living in remote locations may find it difficult to comply because of the large distances, lack of transport and other social disadvantages. The Commission discusses the impact of reporting obligations on Aboriginal offenders in more detail in the following chapter.[34]

Further, during consultations the Commission was repeatedly told about the high incidence of young Aboriginal people with Foetal Alcohol Spectrum Disorder (FASD). A former East Kimberley magistrate has written that 'a large number of the juveniles and a proportion of the adults appearing in the Children's and Magistrates Courts have undiagnosed FASD'.[35] When considering the capacity of young people with FASD to comply with reporting obligations it is important to note that such persons may experience problems with memory, and that some may be unable to tell the time of the day or the week and hence they will find it very difficult to manage appointments.[36] In this regard, Youth Justice Services in the Kimberley explained that if young people with FASD are required to comply with a community-based sentence, the juvenile justice officer effectively has to report to the young person rather than having the young person report to them because the person does not understand the obligation to report. Youth Justice Services commented that young people with FASD would find it very difficult, if not impossible, to understand the reporting obligations under the CPOR Act.[37]

'Overlapping' obligations

A key theme that emerged during consultations was the difficulty for juveniles who are subject to dual or 'overlapping' reporting obligations. A juvenile reportable offender may be required to report to police under the CPOR Act and—at the same time—report to a juvenile

31. See Chapter One, 'Key issues impacting on reform'.
32. Consultation with Chief Magistrate Steven Heath (2 August 2010).
33. Consultation with Michelle Scott, Commissioner for Children and Young People (8 June 2010).
34. See Chapter Six, 'Problems for Aboriginal reportable offenders'.
35. Crawford C, 'Families Impacted by the Criminal Justice System on the Frontier: A new model required' (2010) 17 *Psychiatry, Psychology and Law* 464, 468.
36. Douglas H, 'Sentencing and Fetal Alcohol Spectrum Disorder (FASD)' (Paper presented at the National Judicial College of Australia Sentencing Conference, Canberra, 6 February 2010).
37. Consultation with Gaelyn Shirley, Team Leader, Youth Justice Services, Department of Corrective Services, Broome (21 July 2010).

justice officer as part of a community-based order and, possibly, also report to police as a condition of bail for other pending charges. Although juvenile justice officers may endeavour to assist the young person to comply with the various obligations there is a real potential for confusion. The Commission was told of one example where a juvenile reportable offender was required to report under the CPOR Act and also report to juvenile justice as part of a community-based sentence. At the completion of the community-based sentence, the juvenile justice officer informed the offender that his 'reporting is all finished'. This young person did not have sufficient understanding of the justice system to appreciate the difference between juvenile justice and ANCOR police and hence he believed that all of his reporting obligations had ended. He was charged with failing to report as required under the CPOR Act.[38]

In another case, an adult (who was a reportable offender because of an offence that occurred when he was under the age of 18 years) was subject to three different reporting regimes (reporting under the CPOR Act, reporting as a bail condition and reporting to a community corrections officer). The Commission was told that this young man was a reportable offender as a consequence of 'consensual' sexual activity with a girl aged about 13 years that took place when he was 16 to 17 years of age. On one occasion, this offender appeared in court on unrelated charges and saw his ANCOR case officer at court. He believed that because this police officer had spoken with him, he had complied with his obligation to report; however, he had not signed the appropriate form and was therefore held in breach.[39] Also, the Commission was told that there had been a few cases in the East Kimberley where reportable offenders had been charged with failing to comply with their reporting obligations under the CPOR Act soon after they had completed a community-based sentence (thus suggesting that, upon completion of the sentence, the offender may have believed that the requirement to report was finished).[40]

The issue of 'overlapping obligations' was raised with representatives from the Department of Corrective Services and the Commission queried whether there was any scope for community corrections officers or juvenile justice officers to report on behalf of a reportable offender.[41] In response, it was highlighted that information held by corrections and justice officers may not necessarily be accurate (eg, an offender may tell the officer that they have moved address or changed employment but it will not always be possible for the officer to verify the accuracy of that information). Furthermore, it was stated that it would not be practical or appropriate for community corrections officers and juvenile justice officers to be held accountable for reporting obligations under the CPOR Act.

Nonetheless, it was recognised that there may be instances where state government authorities (including the Department of Corrective Services) may be responsible for a change in the reportable offender's personal details. In these circumstances it was suggested that it may be appropriate to enable an officer of the relevant government agency to make a report on behalf of the offender. For example, a juvenile reportable offender may be under the care of the Department for Child Protection and that department may change the juvenile's place of residence. Other departments such Disability Services Commission or the Department of Health may be involved with juvenile reportable offenders and make decisions which impact upon the status of the personal details required to be reported to the police under the CPOR Act. For this reason, the Commission is of the view that the CPOR Act should be amended to enable a representative of a government agency to lodge a report on behalf of a juvenile reportable offender.[42]

If such a report is made, the legislation should then provide that the reportable offender is not to be prosecuted for failing to comply with his or her reporting obligations in relation to that particular information.[43] The purpose of reporting obligations is to obtain up-to-date and accurate personal details of registered offenders – it is not designed to criminalise young people for inadvertence or a lack of capacity to report. Enabling government agencies that are closely involved with juvenile reportable offenders to lodge a report on behalf of the offender should assist in ensuring police obtain up-to-date information and that breach proceedings are only instituted if necessary.

38. Information obtained from lawyer. It was also observed that some Aboriginal young people perceive all government agencies to be one and the same.
39. Information obtained from lawyer.
40. Consultation with Brianna Lonnie, Simon Holme & Matt Panayi, Legal Aid WA, Kununurra (22 July 2010).
41. Consultation with Lex McCulloch (Assistance Commissioner Youth Justice Services), Steve Robins (Assistance Commissioner, Adult Community Correctons), Angie Dominish, Marlene Hamilton & Alisha Edwards, Department of Corrective Services (7 September 2010).
42. The Commission makes an identical proposal in Chapter Six in relation to adult reportable offenders: see Proposal 13.
43. Section 66 of the *Community Protection (Offender Reporting) Act 2004* (WA) currently deals with matters that constitute a bar to prosecution.

PROPOSAL 2

Reporting on behalf of a juvenile reportable offender

1. That the *Community Protection (Offender Reporting) Act 2004* (WA) be amended to provide that if a government agency is involved with a juvenile reportable offender to the extent that the agency is empowered to make decisions that impact on the status of the reportable offender's personal details (as defined under s 3 of the Act), a representative of that agency (if that representative is aware that the offender is a reportable offender under the Act) *may* notify police of any change to the offender's personal details as required under s 29 of the *Community Protection (Offender Reporting) Act 2004* (WA).
2. That s 66 of the *Community Protection (Offender Reporting) Act 2004* (WA) be amended to provide that a juvenile reportable offender is not to be prosecuted for a failure to comply with s 29 of this Act if a representative of a government agency has provided the police with the required information within the stipulated timeframe.

QUESTION B

Reporting on behalf of a juvenile reportable offender

Should the ability of a representative of a government agency to report on behalf of a juvenile reportable offender be limited to specified government agencies and, if so, what should those government agencies be?

Periodic reporting

Juvenile reportable offenders are required to report periodically (at least once a year) but in practice most report more frequently. The determination of the frequency of periodic reporting is made by the Western Australia Police. Because the police do not use an actuarial risk assessment tool for juvenile reportable offenders the decision about reporting frequency is necessarily subjective.[44] Many people consulted mentioned that the determination of the frequency of periodic reporting should not rest solely with the police and concerns were expressed that some reportable offenders were being required to report too often.[45] As stated in Chapter Two, in some remote communities all reportable offenders are subject to the same reporting frequency,[46] thus suggesting that an individualised assessment may not always be undertaken. Of course, practicalities may call for such a response because police may set the same periodic reporting obligations for all reportable offenders in a particular location in order to allow the designated police officers to visit those offenders at one time.

Some individuals consulted were of the view that reportable offenders should have a right to have their reporting obligations reviewed by a court. In particular, the Chief Justice suggested there should be a right of review before a magistrate.[47] Legal Aid WA in Kununurra contended that if a reportable offender was subject to community supervision, the Department of Corrective Services should have a role to play in recommending the reporting frequency and, if the police did not follow this recommendation, the offender should be able to apply to a magistrate for a review.[48] Department of Corrective Services staff in Perth also believed that, in theory, the court should set the reporting frequency but it was acknowledged that this may cause problems in practice for police.[49] The Commission is of the view that it is essential that police are able to respond to changes in an offender's personal circumstances by increasing or decreasing the reporting frequency. For example, the police may wish to increase reporting frequency if a reportable offender (who has previously been convicted of offending against very young children) moves into a new household with young children present. Conversely, in order to facilitate community reintegration the police may wish to decrease the reporting frequency for a reportable offender who appears stable and has just commenced a new full-time job or enrolled in full-time study.

44. See Chapter Two, 'Periodic reporting'.
45. Consultation with Chief Justice Wayne Martin, Supreme Court of Western Australia (28 June 2010); consultation with Magistrate Catherine Crawford (9 September 2010); consultation with Brianna Lonnie, Simon Holme and Matt Panayi, Legal Aid WA, Kununurra (22 July 2010); consultation with Lex McCulloch (Assistant Commissioner Youth Justice Services), Steve Robins (Assistant Commissioner, Adult Community Corrections) Angie Dominish, Marlene Hamilton & Alisha Edwards, Department of Corrective Services (7 September 2010).
46. See Chapter Two, 'Periodic reporting'.
47. Consultation with Chief Justice Wayne Martin, Supreme Court of Western Australia (28 June 2010). The Chief Magistrate had reservations about this option because, in most instances, reportable offenders would have been dealt with by a superior court and a magistrate would be required to become familiarised with all of the background information before making a decision, consultation with Chief Magistrate Steven Heath (2 August 2010).
48. Consultation with Brianna Lonnie, Simon Holme and Matt Panayi, Legal Aid WA, Kununurra (22 July 2010).
49. Consultation with Lex McCulloch (Assistant Commissioner Youth Justice Services), Steve Robins (Assistant Commissioner, Adult Community Corrections) Angie Dominish, Marlene Hamilton & Alisha Edwards, Department of Corrective Services (7 September 2010).

Another option put forward is that a court could set the reporting frequency at the start of the process with the proviso that the police have the power to change the reporting frequency 'for cause' and if the offender is dissatisfied with any such change he or she should be entitled to apply to a court for a review of that decision.[50] Also, the Department of Corrective Services staff mentioned that a joint approach between juvenile justice and the police at the start of the process in determining reporting frequency may be a workable solution. It was contended that a joint approach would mean that juvenile justice officers were aware of the offender's obligations and would be able to ensure that the young person is not overloaded with too many similar and 'overlapping' requirements.[51]

While the Commission sees the theoretical appeal of having a right of review before a court (or a process in which the court has input into the decision about reporting frequency) it is concerned about the impact of such a provision on the overall operation of the registration scheme. As will be discussed further below, the Western Australia Police are concerned about court involvement in the registration process because of the resourcing implications. Although resourcing implications are relevant to the question of mandatory registration for juvenile offenders, they are even more so in relation to the question of reporting frequency. Applications for a review of periodic reporting frequency would likely be common and for each such application the police would need to provide evidence to justify the basis of their decision. Then, if the police determined that reporting frequency needed to be increased, the whole process would be repeated. One option to deal with this would be to limit any right of review, for example it could be provided that a reportable offender is only entitled to seek a review of his or her periodic reporting frequency once each year. However, if the police had the authority to change reporting frequency (as they necessarily must) then the offender would have to wait another year before seeking a review. Thus any annual review could, in practical terms, be pointless. The alternative is to provide a right of review for each change in reporting frequency but this would have significant ramifications in terms of resources and police time.

It was also suggested that a process could be established whereby a reportable offender could seek a review by a more senior police officer[52] – this would be less resource intensive and quicker than a right to a review before a court. This option might assist in resolving issues where individual police officers in specific locations are setting unnecessarily frequent periodic reporting.[53] The provision of a formal right of review in the legislation to a senior police officer may also ensure that reportable offenders are aware that they can seek a reconsideration of their reporting frequency. The Commission has been told of one case where a juvenile reportable offender asked his designated ANCOR case officer if he could report less often than once a month. The response was 'it is out of my hands'.[54] An official internal review process would discourage such a response, ensure that reportable offenders are informed that they can seek reconsideration of their reporting frequency and provide reportable offenders with a right to be heard. The Commission has concluded that a right of review should be included in the legislation but seeks submissions about whether the review should be before a court or made to a specified senior police officer.[55]

PROPOSAL 3

Review of reporting frequency for juvenile reportable offenders

That the *Community Protection (Offender Reporting) Act 2004* (WA) be amended to provide that a juvenile reportable offender can seek a review of the frequency of his or her periodic reporting obligations imposed under s 28(3) of the Act.

QUESTION C

Review of reporting frequency for juvenile reportable offenders

(i) Do you consider that this right of review should be available before a court (and, if so, which court) or before a senior police officer (and, if so, how senior)?

(ii) Should there be a limit on the number of times or frequency in which a juvenile reportable offender is entitled to seek a review of his or her period reporting obligations?

50. Consultation with Magistrate Catherine Crawford (9 September 2010).
51. Consultation with Lex McCulloch (Assistant Commissioner Youth Justice Services), Steve Robins (Assistant Commissioner, Adult Community Corrections) Angie Dominish, Marlene Hamilton & Alisha Edwards, Department of Corrective Services (7 September 2010).
52. Consultation Gaelyn Shirley, Team Leader, Youth Justice Services, Department of Corrective Services, Broome (21 July 2010).
53. In this regard the Commission notes that the management of reportable offenders in regional areas is decentralised and under the control of local police districts: email from Acting Detective Superintendent Paul Steel, Sex Crime Division Western Australia Police (22 October 2010).
54. Information obtained from lawyer.
55. The Commission replicates this proposal for adults in Chapter Six, see Proposal 14.

Community reintegration

As outlined earlier in this Paper, status as a reportable offender does not usually, in theory, restrict a person's freedom of movement.[56] The only exception to this general rule is if a prohibition order is made and to date there has only been one prohibition order made in relation to a juvenile reportable offender.[57] Nonetheless, during consultations the Commission was told of instances where juvenile reportable offenders had been told that they could not (or believed that they were not entitled to) engage in certain activities.

Case example 19

A 16-year-old was sentenced to an Intensive Youth Supervision Order for nine months for engaging in consensual sexual intercourse with his 14-year-old girlfriend. As a consequence he was required to report under the CPOR Act for seven-and-a-half years. This juvenile reportable offender resided in a remote community with a multi-functional police facility. The offender was required to report to police once a week but found it difficult to remember dates and times and he was breached after he missed a couple of reports. On one occasion, the offender was told by police that he was not permitted to attend a football trip in another community. Understandably, his family were upset. The offender's legal representative intervened on his behalf and eventually he was told by police that he was allowed to attend the trip.[58]

Case example 20

A 12-year-old boy from a remote community was sentenced for sexual penetration of a child under the age of 13 years and accordingly he was subject to reporting obligations for seven-and-a-half-years. On one occasion the offender's parents advised police that they intended to take him to a particular regional town to go shopping for clothes. They were told that he was not allowed to go; however, the family decided to take him anyway. The offender was charged with breaching his reporting obligations despite the fact that the police had been notified of the intended travel. The charge was eventually withdrawn by the police prosecutor.[59]

56. A reportable offender's liberty may be restricted if he or she refuses to undergo a fingerprint examination or if it is necessary to detain the offender to ensure that he or she has been notified of the reporting obligations.
57. See Chapter Two, 'Prohibition orders'.
58. Information obtained from lawyer.
59. Information obtained from lawyer.

It appears that there is a degree of misunderstanding about the effect of registration and the power of police to restrict a reportable offender's freedom of movement. Child psychologist Christabel Chamarette advised the Commission that she was aware of at least two juveniles who had been erroneously told by police that they were not allowed to mix with other children because of their registration status. She noted that this is problematic because young people 'need to mix with children their own age'.[60] The Commission has also been told that some reportable offenders (not necessarily juveniles) believe that they cannot change jobs or move from one community to another. In one instance, a reportable offender resigned from his employment believing that he had to reside close to a police station.[61] Whether the misunderstanding is caused by a lack of awareness on the part of the offender or because of the actions of police, it is possible that the future rehabilitation of juvenile offenders could be jeopardised if the parameters of the scheme are not clearly understood from the outset. An offender's ability to participate in normal activities is important to maximise community reintegration and future rehabilitation.

The Commission was advised that all designated ANCOR police officers are required to undergo a three-day training course. This course is run once a year and some officers have been required to participate more than once. A shorter ANCOR awareness course is also available for those officers who require training at other times. In addition, case management practices are reviewed by the Sex Offenders Management Squad to ensure that reportable offenders are managed properly.[62] In the Kimberley, the Commission was told that each designated officer receives a four-hour course presented by the District Manager. The Commission was also told by the District Manager that he believed that all designated officers are aware of the rights of reportable offenders and that they are entitled to move around so long as the police are notified in accordance with the CPOR Act.[63] In his view, examples such as those referred to above may have arisen in the early stages of the scheme but should not now occur. Nonetheless, the Commission sees merit in a review of the processes and procedures used to explain the obligations *and the rights* of juvenile reportable offenders. This is particularly important for those juvenile offenders who are disadvantaged by language or cultural barriers or by

60. Chamarette C, 'Opinion provided to the Law Reform Commission of Western Australia' (10 October 2010) and email correspondence (10 November 2010).
61. Information obtained from lawyer.
62. Email from Martyn Clancy-Lowe, State Coordinator, Sex Offender Management Squad (15 November 2010).
63. Consultation with Sergeant Kevin Hall, Family Protection Coordinator, Western Australia Police, Kimberley (20 July 2010).

disability. Furthermore, in the Commission's opinion the brochure handed to reportable offenders should be revised and produced in a more 'child-friendly' style.

PROPOSAL 4

Provision of information for juvenile reportable offenders

1. That the Western Australia Police review its processes and procedures for advising juvenile reportable offenders of their obligations and rights under the *Community Protection (Offender Reporting) Act 2004* (WA) to ensure that juvenile reportable offenders understand both their obligations and rights in relation to the scheme.
2. That the brochure provided to juvenile reportable offenders by the Western Australia Police be revised to ensure that the information is provided in a child-friendly, accessible format.

Accessing health services and other assistance

The potential for sex offender registration may discourage young people from accessing health services. One lawyer mentioned that, since the 'Kimberley taskforce',[64] young Aboriginal people seem to be more reluctant to seek health and contraception assistance out of fear that disclosure of underage sexual activity may lead to police involvement and potential sex offender registration.[65] The National Children's and Youth Law Centre similarly stated that the possibility of a criminal conviction coupled with registration and reporting requirements may 'deter sexually active young people from accessing specific services'.[66] It was also suggested that appropriate reforms to the scheme may 'ease the anxiety of young people in accessing health services'.[67]

Others consulted by the Commission observed that the potential for sex offender registration may dissuade families who are experiencing sibling abuse from seeking assistance.[68] It was said that some parents want authorities to get involved in order to stop any recurrence of the behaviour, and to obtain appropriate treatment for the perpetrator and for the victim. In some instances, parents were not aware that police would charge the young person and that registration would follow. Moreover, if parents sought legal advice before contacting the police it is likely that lawyers would advise them of the potential of sex offender registration and this would discourage reporting the problem to authorities.[69] Likewise, Christabel Chamarette advised that juveniles may deny their offending behaviour (possibly on legal or parental advice) in order to avoid the consequences of registration and this may, in turn, prevent therapeutic intervention.[70] She also provided information about one case where the mother of a 14-year-old who had sexually offended against his 8-year-old sister had contacted the police to obtain assistance and was shocked because 'she had no idea that it would ruin his life to the extent of gaining a criminal record and having to report to ANCOR (the sex offender register) till he was 21 years'.[71] These issues are likely to be far more prominent with a mandatory sex offender registration scheme because young people and their families may avoid seeking assistance from government agencies or health services as registration is seen as inevitable.

Implications for the justice system

The President of the Children's Court, Judge Reynolds, expressed concern that some accused have pleaded not guilty in order to avoid the register and this is 'not in the best interests of justice' because extra resources are required for the trial, and the complainant has to 'suffer the trauma' involved in giving evidence and being cross-examined.[72] One case was mentioned – the accused was charged with sexual penetration of an underage child and, even though the evidence was fairly clear that the sexual activity was consensual, he pleaded not guilty because he was worried about being subject to sex

64. The 'Kimberley Taskforce' commenced in 2007 and involved the Western Australia Police in conjunction with other government agencies conducting a number of operations in relation to child abuse in remote Aboriginal communities: Western Australia Police, *Annual Report* (2008) 27.
65. Consultation with Nick Espie, Aboriginal Legal Service, Kununurra (23 July 2010).
66. Submission from National Children's and Youth Law Centre (September 2010) 7.
67. Ibid.
68. The Commission notes that there are many other barriers to disclosing sexual abuse committed by juveniles (eg, the view that it is just experimentation or 'child's play'; family dynamics in cases of sibling abuse; and the usual problems of fear and shame: O'Brien W, *Australia's Response to Sexualised or Sexually Abusive Behaviours in Children and Young People* (Canberra: Australian Crime Commission, 2010) 23. Hence, the potential for sex offender registration may compound these existing barriers.
69. Consultation with Claire Rossi & Sarah Dewsbury, Legal Aid WA (8 June 2010).
70. Chamarette C, 'Opinion provided to the Law Reform Commission of Western Australia' (10 October 2010).
71. Ibid.
72. Letter from Judge DJ Reynolds, President of the Children's Court of Western Australia (2 November 2010) 2.

offender registration. The victim of this offence was very perturbed because the plea of not guilty meant in effect that the accused denied that the sexual activity ever took place.[73] The fact that some accused plead not guilty in order to avoid potential registration was confirmed by others.[74] One lawyer advised that parents have contacted him insisting that their child plead not guilty, even when the evidence clearly establishes that an offence has taken place, because the parents do not want their child being included on the sex offender register.[75] As noted earlier, it was reported to the Commission that some young people are 'accepting responsibility' for sexual offences in order to enable the matter to be referred to a juvenile justice team so that there is no risk of registration and this is sometimes done even though the young person denies the offence. This is equally concerning. Again, a discretionary scheme would minimise these adverse consequences.

73. Consultation with Judge DJ Reynolds, President of the Children's Court of Western Australia (21 June 2010).
74. Consultation with Claire Rossi & Sarah Dewsbury, Legal Aid WA (8 June 2010).
75. Consultation with Gerald Xavier, Senior Solicitor, Youth Legal Service (21 June 2010).

A discretionary approach

The preceding discussion demonstrates that the registration of juvenile child sex offenders can have negative and, possibly, unintended consequences. Furthermore, in view of the types of behaviour that may lead to sex offender registration, the Commission has concluded that registration is not appropriate for every juvenile offender who is sentenced for a child sexual offence. The New South Wales Ombudsman's comments on this issue are pertinent:

> The key question is whether persons convicted in these circumstances pose a child protection risk. If not, then it must be considered whether the obligations of registration create an unnecessary burden in respect of ongoing reporting obligations and potential stigmatisation as a child sex offender. There is also the issue of the time and resources of police involved in managing the registration, ongoing reporting and monitoring of these registered persons.[1]

The Commission agrees. In this section alternative approaches to mandatory registration are considered in order to determine the best way to enable the offender's 'child protection risk' to be taken into account, and to ensure that the Western Australian sex offender registration scheme does not unnecessarily capture and stigmatise juvenile offenders.

The Position Elsewhere

As noted earlier in this Discussion Paper, four Australian jurisdictions exclude juveniles from mandatory registration. In Victoria, the sentencing court has discretion to make a sex offender registration order for a juvenile offender[2] but only if a sentence is imposed.[3] The court can only make a sex offender registration order if it is satisfied beyond reasonable doubt that the person poses a risk to the sexual safety of one or more persons or to the community. Also, a sex offender registration order can only be made if an application has been lodged by the prosecution within 30 days after the sentence was imposed.[4] While the Commission is not aware if this requirement has caused any difficulties in practice, it is noted that a similar requirement under the Canadian scheme was problematic because some prosecutors failed to make an application.[5] South Australia and the Northern Territory also give the court discretion to determine if a juvenile offender should be subject to registration.[6] In both cases the court can make an order if satisfied that the offender poses a risk to the sexual safety of children.[7] Tasmania is unique because it provides for a limited discretion for both adult and juvenile offenders who are dealt with for a reportable offence. The sentencing court is required to make an order unless satisfied that the offender does 'not pose a risk of committing a reportable offence in the future'.[8]

The remaining Australian jurisdictions each provide for mandatory registration (like Western Australia); however, a broader statutory exclusion is available. These statutory exclusions are primarily based on the sentencing disposition of the court. In New South Wales automatic registration does not apply to a juvenile offender who is sentenced for a Class 1 or Class 2 offence by way of a 'non-conviction' order under s 33(1)(a) of the *Children (Criminal Proceedings) Act 1987*.[9]

1. New South Wales Ombudsman, *Review of the Child Protection Register: Report under s 25(1) of the Child Protection (Offenders Registration) Act 2000* (2005) 21.
2. During second reading speech the Victorian government acknowledged 'the need to retain discretion when dealing with young offenders': Victoria Parliamentary Debates, *Legislative Assembly*, 3 June 2004, 1851 (Mr Haermeyer, Minister for Police and Emergency Services).
3. *Sex Offenders Registration Act 2004* (Vic) s 11. If an order under s 360(1)(b), (c) or (d) of the *Children, Youth and Families Act 2005* (Vic) (ie, certain non-conviction orders such as a dismissal with an undertaking or a good behaviour bond) is made there is no power to make a sex offender registration order. As stated earlier in this chapter, the option of a therapeutic treatment order is available for juveniles aged less than 15 years so, if the treatment order is complied with and the charges are therefore dismissed, the offender will not be liable to sex offender registration.
4. *Sex Offenders Registration Act 2004* (Vic) s 11.
5. See Chapter Three, 'Canada'.
6. *Child Sex Offenders Registration Act 2006* (SA) s 6(3); *Child Protection (Offender Reporting and Registration) Act 2004* (NT) s 11.
7. *Child Sex Offenders Registration Act 2006* (SA) s 9(3); *Child Protection (Offender Reporting and Registration) Act 2004* (NT) s 13.
8. *Community Protection (Offender Reporting) Act 2005* (Tas) s 6. Section 49 provides that when 'a court is determining whether it is satisfied as to a matter for the purposes of making an order under this Act, the standard of proof is proof on the balance of probabilities'.
9. Between 2005–09 in the New South Wales Children's Court there were 15 non-conviction orders imposed out of a total of 221 sexual offence cases (7%). For juvenile sexual offenders dealt with in the higher courts between 2002–08, there were 7 non-conviction orders out of a total of 254 sexual offence

In addition, other specified offences committed by a juvenile are excluded (eg, a single offence involving an act of indecency or a single offence of possessing or publishing child pornography).[10] Queensland and the Australian Capital Territory similarly exclude certain non-conviction orders from mandatory registration as well as a single Class 2 offence if the sentence did not include supervision or imprisonment.[11] In relation to the provision of a statutory exclusion in New South Wales it was observed that:

> Persons will not be required to register if an offence is technically proved, but no conviction is recorded. For example, two 15-year-olds in a sexual relationship will be committing an offence, but there is no child protection benefit in requiring them to register.[12]

It was further stated that this provides an 'in-built safety mechanism to ensure that such matters, if they reach the courts, are appropriately dealt with'.[13]

Thus, in summary there are two main approaches in other Australian jurisdictions: court discretion or statutory exclusions based on the sentence imposed and/or the nature of the offence. The Commission sought information from other jurisdictions in order to gauge if there are any material differences in the proportion of juvenile reportable offenders in other jurisdictions. Most jurisdictions declined to provide the information[14] or did not respond. Only the Northern Territory and the Australian Capital Territory provided information. The numbers of registered offenders in those jurisdictions is quite small and, therefore, it is difficult to make any useful comparisons.[15]

The only available and comparable information is found in the 2005 New South Wales Ombudsman's review. It reported that for the first two years of operation in New South Wales, there were 1344 people identified as registrable persons (some were absent from the state, some were yet to be notified and some were still in custody). Of these 1344 persons, there were 828 currently registered at the end of the two-year review period. Of these, there were 22 juveniles registered with a further 27 persons who were registered because of offences committed while they were under the age of 18 years. Thus, there were a total of 49 juvenile registered offenders.[16] On the basis of the lowest figure (828), juveniles represented approximately 6% of all registered offenders in New South Wales at that time.[17] In contrast, based on the figures provided to the Commission from the Western Australia Police, juvenile reportable offenders represented about 12% of the total number of registered offenders at the end of 2009.[18]

Alternative Approaches

In order to avoid the potential negative consequences of registration for juvenile offenders, one obvious option is to amend the legislation to exclude juveniles altogether. The Commission has formed the view that there are and will continue to be circumstances in which registration for juvenile offenders is appropriate and necessary. Hence, the Commission has rejected this option. Any reform to the *Community Protection (Offender Reporting) Act 2004* (WA) ('the CPOR Act') must therefore enable some, but not all, juvenile offenders to be excluded from the scheme. The Commission discusses below the different options available to achieve this outcome.

Limit mandatory registration to particular offences

Currently, any juvenile offender who is sentenced for an offence listed in schedule 1 (Class 1 offences) or schedule 2 (Class 2 offences) of the CPOR Act is subject to mandatory registration (except for a single offence of child pornography).[19] The list of Class 1 and Class 2

cases (3%): New South Wales Legislative Council Standing Committee on Law and Justice, *Spent Convictions for Juvenile Offenders* (July 2010) 65–6.

10. *Child Protection (Offenders Registration) Act 2000* (NSW) s 3A(2).
11. *Child Protection (Offender Reporting) Act 2004* (Qld) s 5(2); *Crimes (Child Sex Offenders) Act 2005* (ACT) s 9. Further, other specified single offences (eg, indecent dealing) or child pornography are excluded from the ambit of mandatory registration for juveniles.
12. New South Wales, *Parliamentary Debates*, Legislative Assembly, 8 June 2000, 6907 (Mr Campbell).
13. New South Wales, *Parliamentary Debates*, Legislative Council, 4 July 2001, 16221 (Ian MacDonald).
14. Letter from Detective Senior Sergeant Noel McLean, South Australia Police (15 July 2010); letter from Commander DW Hudson, Assistance Commissioner, New South Wales Police Force (19 October 2010); telephone consultation, Senior Sergeant Lee Shepherd, Child Safety & Sexual Crime Investigation Group, Queensland Police (29 September 2010); email consultation Sergeant Steve Herbert State Intelligence Service, Tasmania Police (15 October 2010).
15. In the Northern Territory as at 30 June 2010, there were 199 registered offenders and they were all adults: email consultation from Misty Graham, Manager, Information Access, Northern Territory Police, Fire and Emergency Services (30 July 2010). As at end June 2010, in the Australian Capital Territory there were 93 registered offenders. Of these, 91 were adults at the time of their offence and 2 were juveniles: Letter from Detective Sergeant AM Marmond, Australian Federal Police (16 July 2010).
16. New South Wales Ombudsman, *Review of the Child Protection Register: Report under s 25(1) of the Child Protection (Offenders Registration) Act 2000* (2005) 15.
17. If the figure of 1344 registered persons is used, juvenile reportable offenders represented approximately 3.5% of all registered persons.
18. See Chapter Two, 'Introduction'.
19. See further discussion in Chapter Two, 'Exception to mandatory registration'.

offences could be reduced for juveniles so that juveniles are only subject to automatic registration for the most serious child sexual offences included in the schedules.[20] The Commission does not favour this approach because offence classification is a crude measure of potential risk. If the intent is, for example, to exclude cases involving consensual sexual activity or sexual experimentation between two young people, then offences under s 320 (sexual offences against children aged under 13 years) and s 321 (sexual offences against children aged between 13 and 16 years) of the *Criminal Code* (WA) would have to be removed from the list of reportable offences for juveniles. However, depending on the circumstances, a juvenile offender dealt with under those sections may pose a high risk to other children and sex offender registration would, therefore, be appropriate. Conversely, if only the most serious offences were included in the list (eg, sexual penetration without consent), an offender who arguably did not require registration would have no avenue of exclusion.[21]

Limit mandatory registration to certain sentences

Mandatory registration could be triggered by a particular type or length of sentence. For example, the legislation could provide that a juvenile sentenced to detention[22] or a Conditional Release Order is automatically subject to registration and reporting obligations. The Australasian Police Ministers' Council national working party recommended that registration periods should not generally be linked to the sentence imposed because sentencing courts may discount sentences as a result of registration. It was also commented that sentences are based on the seriousness of the offence rather than the risk of reoffending.[23] Similarly, in relation to the scheme in the United Kingdom (which bases the registration period on the sentence imposed) it has been observed that the 'sentence becomes the determining factor rather than the assessment of any risk posed'[24] and that the severity of a sentence imposed is 'not necessarily a good indicator of risk'.[25]

Although the sentence imposed for an offence is largely based on the seriousness of the offence, an assessment of future risk may also be relevant.[26] For this reason the Commission considers that the sentence imposed is a better indicator of risk than the offence classification alone. However, the Commission agrees that mandatory registration for juvenile offenders should not be based on the sentence imposed because a sentence is usually based on a number of factors and these factors may not always be relevant to an assessment of the offender's future risk. For example, a juvenile offender might be sentenced to a period of detention for a child sexual offence because he or she is sentenced at the same time for a breach of a prior community-based sentenced imposed for a non-sexually related offence. Likewise, a sentencing court may impose a Conditional Release Order for a number of offences with only one of those offences being a child sexual offence.

Exclude certain sentencing dispositions from mandatory registration

Another approach, in line with the position in some Australian jurisdictions, is to broaden the statutory exclusion so that juveniles sentenced to low-level sentencing dispositions (eg, 'no punishment' or good behaviour bond) are not automatically subject to the CPOR Act. This is the position adopted by the national working party when it recommended the inclusion of 'minimum sentencing thresholds'.[27] The Commission does not consider that this approach is appropriate for juvenile offenders. As a consequence of the focus on rehabilitation in the juvenile justice system, some offenders may receive community-based sentences in order to assist with a variety of ongoing issues, and these

20. This option was mentioned during consultations as a 'compromise' position: consultation with Magistrate Catherine Crawford (9 September 2010). This is also the position under the United Kingdom scheme: juveniles are subject to automatic registration if they are convicted of sexual penetration without consent (irrespective of the sentence imposed). Juvenile offenders are also subject to automatic registration if they receive a sentence of at least 12 months' imprisonment: *Sexual Offences Act 2003* (UK) schedule.
21. See, eg, case example 18 above.
22. A 2001 Home Office consultation paper suggested a number of options for juvenile sex offenders – one option was to exclude juveniles aged less than 16 years unless they had been given a custodial sentence: United Kingdom, Home Office & Scottish Executive, *Consultation Paper on the Review of Part 1 of The Sex Offenders Act 1997* (2001) 28–9.
23. Inter-jurisdictional Working Party, *Child Protection Offender Registration with Police: A national approach,* Report to the Australasian Police Ministers' Council (2003) 125–6.
24. Thomas T, 'The Sex Offender Register: Some observations on the time periods for registration' (2009) 48 *The Howard Journal of Criminal Justice* 257, 259.
25. Ibid 260.
26. The Hon Justice Murray has recently stated that expert psychiatric and psychological reports in relation to 'prognosis and prediction of future behaviour and the provision to the court of opinions about risk management in an effort to treat and rehabilitate an offender and reduce the likelihood of recidivism' may be important for a sentencing court: Hon Justice Murray, 'The Challenges of Reporting Psychiatric Opinions to the Court' (Paper presented to the Royal Australian and New Zealand College of Psychiatrists, *John Pougher Memorial Lecture*, 16 October 2010).
27. Inter-jurisdictional Working Party, *Child Protection Offender Registration with Police: A national approach,* Report to the Australasian Police Ministers' Council (2003) recommendations 4 & 12.

issues may not be linked to the sexual offending. For example, a juvenile offender might be sentenced to a community-based sentence for two offences (say, sexual penetration of a child aged between 13 and 16 years and burglary). The sexual offence may have occurred in the context of a consensual 'boyfriend/girlfriend' relationship but the burglary may be motivated by a long-term drug addiction. It would be unfair to subject the offender to registration simply on the basis of a sentence designed to assist the offender with problems that are unrelated to the sexual offence or to the risk of future sexual offending. Further, it has been observed by the Law Council of Australia:

> Whether a sentencing judge opts to discharge an offender without recording a conviction or opts to impose a non-custodial or supervisory sentence will depend on a wide variety of factors, which may or may not be relevant to whether the offender should be included on a child offender register. For example, such factors may include the offenders' prior convictions for entirely unrelated crimes, such as drink driving or offences of dishonestly.[28]

Extend the power of the Commissioner of Police to waive reporting obligations

As described in detail earlier in this Paper, the Commissioner of Police has a limited discretion to suspend the reporting obligations of juvenile offenders who are sentenced to prescribed sentences for prescribed offences.[29] Prescribed offences exclude, among other things, sexual offences committed against children under the age of 13 years. The Western Australia Police have advised the Commission that, if the power to suspend reporting obligations was extended to cover all juvenile offenders, they would expect a considerable increase in the number of suspensions approved.

While extending the power to suspend the reporting obligations of all juvenile offenders would go some way toward alleviating the unfairness of mandatory registration for juveniles, the Commission has a number of concerns with this approach. First, any decision by the Commissioner of Police is administrative and it lacks the transparency and accountability of court proceedings. The offender has no right to be heard and no right of appeal against the decision. Second, the Commissioner of Police may understandably take a cautious approach in order to avoid any public backlash should an offender, whose reporting obligations have been suspended, subsequently reoffend. Finally, because the decision by the Commissioner of Police is made after the offender is deemed a reportable offender (and hence after the offender is already aware of his or her registration status) any potential stigma may not be avoided.

Having said that, the Commission agrees that the existing power of the Commissioner of Police to suspend reporting obligations should be extended. Even if a court has the power to determine if a juvenile offender should or should not be subject to the CPOR Act, there may be circumstances in which the police subsequently decide that reporting is no longer necessary (or that it is no longer necessary for the offender to be included on the register). This proposal should not be seen as an alternative to the remaining proposals in this chapter; instead it is an additional tool to enable the scheme to operate fairly and appropriately for juvenile offenders.

PROPOSAL 5

Power of the Commissioner of Police to suspend reporting obligations and remove a juvenile reportable offender from the register

1. That s 61(1) of the *Community Protection (Offender Reporting) Act 2004* (WA) be amended to provide that if a person is a reportable offender only in respect of an offence committed by the person when he or she was a child, the Commissioner of Police must consider whether or not to approve the suspension of the reportable offender's reporting obligations.
2. That s 61 of the *Community Protection (Offender Reporting) Act 2004* (WA) be amended to provide that the Commissioner of Police may, in addition to suspending the reportable offender's reporting obligations, remove the offender from the register.

Court discretion

In half of the Australian states and territories, juvenile child sex offenders are not subject to mandatory registration. Instead, the sentencing court has discretion to determine if a juvenile offender should be subject to registration and reporting obligations. This option was rejected by the national working party for a number of reasons. Each of these reasons is considered below.

28. Law Council of Australia, *Policy Statement on Registration and Reporting Obligations for Child Sex Offenders* (2010) 3.
29. *Community Protection (Offender Reporting) Act 2004* (WA) s 61. See further discussion Chapter Two, 'Discretion of Commissioner of Police for juvenile offenders'.

The role of the courts

The national working party's report argued that courts are not necessarily in the best position to determine the future risk of an offender because they can only make a decision based on the information available at the time.[30] Although not stated in its report, it is assumed that the working party was referring to the fact that police and other government agencies may be privy to information about an offender that is not ordinarily presented to a sentencing court (eg, there may have been numerous unproven allegations of child sexual abuse made against the offender in the past[31]). The Western Australia Police expressed the view during consultations that courts should not have any discretion to determine if an offender (whether juvenile or adult) should be subject to registration. They are concerned that courts will not order registration in circumstances where the police believe registration is warranted. It was also mentioned that because different judicial officers will have different views about sex offender registration there will be inconsistencies in approach. In contrast, they favour giving discretion to the Commissioner of Police because the decision is being made by one person.[32]

It seems that the working party adopted the mandatory approach because it means that no-one will escape the registration net. However, as the Commission has demonstrated in this Paper, mandatory registration potentially captures juvenile offenders who do not pose a risk to the safety of children and this is because a mandatory approach does not enable *any* assessment of risk and of the individual circumstances of the case. The Commission acknowledges the concern that a sentencing court may not necessarily have all of the relevant information available to it to best determine future risk. However, that concern can be lessened by ensuring that the process enables relevant information to be presented to the court before a decision is made. In other words, the Commission is not suggesting that a sentencing court should base its decision about registration solely on the information presented to it for sentencing purposes.

30. Inter-jurisdictional Working Party, *Child Protection Offender Registration with Police: A national approach,* Report to the Australasian Police Ministers' Council (2003) 60.
31. In this regard, the Commission notes that under the *Working with Children (Criminal Record Checking) Act 2004* (WA) a negative notice can be issued in relation to a person who has been charged although not convicted of a relevant offence.
32. Consultation with Detective Inspector Paul Steel (Sex Crime Division) and Martyn Clancy-Lowe (State Coordinator Sex Offender Management Squad), Western Australia Police (28 June 2010).

The role of the prosecution

Another argument raised in the national working party's report is that the burden of applying for a registration order would fall on the prosecution and then, if a prosecutor failed to apply for an order and the offender subsequently reoffended, the prosecution might be subject to criticism. It appears that in Canada, where registration is contingent upon an application by the prosecution, some prosecutors have failed to make an application either because of excessive workloads or negligence.[33] The Commission is of the view that this problem can be easily overcome by ensuring that the court is required to determine the issue of registration – in other words, it should not be dependent upon an application by the prosecution. During consultations concern was expressed about who would be required to remember and raise the issue of registration if a discretionary system is introduced.[34] The Commission believes that if the legislation stipulates that the court *must* consider registration, then judicial officers would be alive to the issue and would be aware that for every occasion in which a juvenile is being sentenced for a reportable offence a decision about registration has to be made. As a safety-net, the legislation could also provide that if the court fails to consider the issue, the matter can be bought back to court at any time within six months of the date of sentence.

Resources

A major issue for the national working party was the impact a discretionary scheme would have on police and justice resources. In particular, it was noted that a discretionary scheme would divert resources away from seeking a conviction.[35] However, a considerable proportion of accused charged with sexual offences plead guilty; therefore, in these cases, the prosecution would have no requirement to focus on obtaining a conviction.[36] In any event, the issue of registration should not arise until after guilt is proven and, if necessary, an adjournment could be sought to enable the prosecution to obtain relevant information and prepare its case for registration after the trial has ended.

33. See Chapter Three, 'Canada'
34. Consultation with Magistrate Colin Roberts, Broome (19 July 2010).
35. Inter-jurisdictional Working Party, *Child Protection Offender Registration with Police: A national approach,* Report to the Australasian Police Ministers' Council (2003) 60.
36. Between 1 January 2002 and 31 December 2005, 11% of the sexual assault cases listed for trial in the District and Supreme Court were disposed of by way of a plea of guilty. In the same period, 76% of sexual assault cases that were not listed for trial were disposed of by way of a plea of guilty: Community Development and Justice Standing Committee, *Inquiry into the Prosecution of Assaults and Sexual Offences*, Report No 6 (2008) 58–9.

The Commission acknowledges that a discretionary system would increase the workload of the prosecution, the police and the courts.[37] This is especially so for the police who may be required to provide evidence to substantiate the need for registration or to respond to appeals lodged by an offender. The Western Australia Police advised that there would be significant resourcing implications if they were required to establish in court that an offender should be included on the register.[38]

However, the number of juvenile offenders subject to registration is not substantial. By the end of 2009 there were 212 juvenile reportable offenders in Western Australia (the scheme commenced in 2005). Statistics provided to the Commission by the Children's Court show that in 2009–10 there were 145 case lodgements for sexual offences. A case lodgement refers to an offender being processed through the court with one or more charges lodged on one occasion, hence the figure of 145 is likely to count some offenders more than once (ie, if an offender had charges lodged on two separate days it would be counted as two case lodgements, even if all the charges were eventually heard together). Further, the figure of 145 includes sexual offences committed against adults and these are not currently subject to registration. Thus, if a discretionary scheme existed, the number of instances in which the court could have been required to consider the registration issue in 2009–10 would have been less than 145. Bearing in mind that the police now suspend reporting obligations for a proportion of juvenile cases, it is expected that the prosecution would not seek or argue for registration in all cases.

Moreover, if there are fewer juvenile offenders subject to registration and reporting, the police resources required for ongoing monitoring and administrative functions (eg, recording changes in personal details) will be reduced. In any event, even if a discretionary scheme ultimately uses more resources overall than a mandatory scheme, the Commission is of the view that this is a necessary cost to ensure that juveniles are not unduly disadvantaged by the scheme, to give effect to the principle that the best interests of the child should be a primary consideration, and to ensure that children should continue to be treated differently from adults by the justice system.

37. During consultations one magistrate noted that a discretionary scheme may impact court resources: Consultation with Magistrate Colin Roberts, Broome (19 July 2010).
38. Consultation with Detective Inspector Paul Steel (Sex Crime Division) and Martyn Clancy-Lowe (State Coordinator Sex Offender Management Squad), Western Australia Police (28 June 2010).

Impact on victims

The working party also mentioned that a discretionary scheme would lead to delay and uncertainty for victims.[39] It is assumed that the basis of this concern is that, if the proceedings were delayed to determine the issue of registration, the imposition of the sentence (and hence the finalisation of the offence) would also be delayed. However, any burden caused to the victim by an adjournment of the proceedings could be alleviated by enabling the sentencing court to impose the sentence before the matter is adjourned for the purpose of determining registration.

The Commission consulted with representatives of the Victim Support Services and the Child Witness Service.[40] Those consulted supported a discretionary scheme, especially if there was scope for victim input into the decision-making process.[41] It is also possible that some victims of juvenile child sexual offending may not want the offender to be subject to sex offender registration (eg, certain intrafamilial cases and boyfriend/girlfriend cases). The Commission notes that in relation to one of the case examples referred to in this Discussion Paper, the *West Australian* reported that the parents of the victim thought it was 'ridiculous' for the offender to be placed on the sex offender register.[42]

Future offending

During consultations with the Western Australia Police, the Commission was told that a discretionary system for juvenile offenders may undermine the effectiveness of the scheme in the following manner: if a juvenile offender escaped registration for a reportable offence but subsequently committed a further reportable offence, the juvenile would not be required to register for the longer applicable reporting period.[43] This argument was relied on by the former government when the then opposition sought to amend the CPOR Act in 2008 to provide for a

39. Inter-jurisdictional Working Party, *Child Protection Offender Registration with Police: A national approach,* Report to the Australasian Police Ministers' Council (2003) 60.
40. Consultation with Kay Benham (Director Court Counselling), Ruth Abdullah (Victim Support Services/Child Witness Service, Broome), Olwyn Webley (Victim Support Services/ Child Witness Service, Derby) and Simon Walker (Victim Support Services, Perth) Department of the Attorney General (19 August 2010); telephone consultation with Christine Wild, Child Witness Service, Department of the Attorney General (24 August 2010).
41. During the consultation there were some very minor reservations about giving courts discretionary power to consider the question of registration; however, court discretion was clearly preferred to police discretion.
42. See Chapter Four, case example 1.
43. Consultation with Detective Inspector Paul Steel (Sex Crime Division) & Malcolm Penn (Executive Manager, Legislative Services) Western Australia Police (29 June 2009).

limited discretion for specified juvenile offenders. It was noted that if a juvenile offender was not made subject to registration for a Class 2 offence but then reoffended by committing a Class 1 offence, the offender would not be liable to the greater reporting periods that apply to offenders who have two or more convictions for a reportable offence.[44]

Pursuant to ss 46 and 47 of the CPOR Act, juvenile reportable offenders are subject to either one of two reporting periods: four years or seven-and-a-half years. The lower reporting period applies if the offender has been found guilty of a single Class 2 offence and the higher period applies for a single Class 1 offence. The higher period also applies if the offender has been found guilty of more than one reportable offence. If a juvenile offender, who had previously been found guilty of a Class 1 or Class 2 offence and avoided registration, reoffended by committing a Class 2 offence he or she would only be required to report for the lesser period of four years.[45]

The Commission does not accept that this is a valid argument against a discretionary system for juveniles. Reform to the CPOR Act—to enable a discretionary system for juveniles—could be accompanied by an amendment to provide that if a juvenile reportable offender has previously been found guilty of a Class 1 or a Class 2 offence and has not been ordered to be subject to registration and reporting in relation to that offence, then the applicable reporting period is to be calculated on the basis that the earlier offence had resulted in a reporting order.[46]

Further, during consultations it was suggested that if a juvenile is given the 'benefit of the doubt' on one occasion by the court, any subsequent child sexual offending should result in automatic registration.[47] In other words, a juvenile offender who repeatedly commits child sexual offences should not be entitled to argue against his or her registration on each occasion. The Commission sees some merit in this approach but is cautious about removing court discretion for juveniles. Proven child sexual offence recidivism would strongly suggest the presence of risk to the lives or sexual safety of any person. However, it is possible that exceptional cases may arise where a juvenile has two separate and unrelated incidents but registration is nevertheless inappropriate. Overall, the Commission believes that the courts are well placed to consider the individual circumstances and it has no doubt that past child sex offence convictions would be taken into account by the court when assessing risk.

Juvenile offenders from other jurisdictions

The working party's report noted that a discretionary scheme would not be able to 'adequately respond to offenders from other jurisdictions'.[48] However, under the existing national scheme, offenders subject to registration in one jurisdiction usually remain subject to registration if they move to another state or territory. Also, the CPOR Act catches non-registered offenders from other jurisdictions if they move to Western Australia by recognising equivalent sentences and offences in other jurisdictions.[49] If Western Australia was to have a discretionary system for juveniles and a court did not order registration, the particular offender would not be subject to registration in jurisdictions with similar discretion;[50] however, the offender may be subject to registration in jurisdictions with mandatory schemes (such as the scheme that currently exists in Western Australia). On the other hand, if a Western Australian court (with discretion) determined that a reporting order should be made in relation to a juvenile offender and that offender moved to another jurisdiction, say Victoria, the offender would be subject to registration in Victoria.[51] This is necessary to ensure that reportable offenders cannot avoid registration and reporting obligations by moving between jurisdictions. This objective was one of the key reasons for promoting nationally consistent sex offender registration laws.[52] So long as the CPOR Act requires registrable interstate offenders who move to Western Australia to continue to register in this state and requires Western Australian reportable offenders to

44. Western Australia, *Parliamentary Debates*, Legislative Assembly, 8 April 2008, 1975b–1993a (JC Kobelke).
45. If a juvenile offender (who had been found guilty of a Class 1 or Class 2 offence and avoided registration) then reoffended by committing a Class 1 offence, he or she would still be subject to the highest reporting period because seven-and-a-half years applies to a single Class 1 offence.
46. See Proposal 8 below.
47. Telephone consultation with Christine White, Child Witness Service, Department of the Attorney General (2 August 2010). This was also the view of the New South Wales Sentencing Council in 2009: see New South Wales Sentencing Council, *Penalties Relating to Sexual Assault Offences in New South Wales* (2009) vol 3, [10.41]–[10.42].
48. Inter-jurisdictional Working Party, *Child Protection Offender Registration with Police: A national approach,* Report to the Australasian Police Ministers' Council (2003) 60.
49. See *Community Protection (Offender Reporting) Act 2004* (WA) ss 3, 6(1) & 10.
50. For example, s 6(3) of the *Sex Offenders Registration Act 2004* (Vic) provides that a person is not a registrable offender merely because he or she was sentenced for an offence committed as a child.
51. Section 6 of the *Sex Offenders Registration Act 2004* (Vic) provides that a 'registrable offender' includes a 'corresponding registrable offender'. A corresponding registrable offender is defined under s 9 to mean a person who had been required to report in another jurisdiction before coming to Victoria and would still be required to report in that other jurisdiction if he or she had remained in that jurisdiction.
52. Inter-jurisdictional Working Party, *Child Protection Offender Registration with Police: A national approach,* Report to the Australasian Police Ministers' Council (2003) 5.

continue to register if they leave the state, this goal is achieved.

The Commission's View

As noted above, the Western Australia Police do not support a discretionary regime for juvenile offenders. However, all other agencies and individuals that expressed an opinion about this issue during consultations supported court discretion for juvenile offenders.[53] A number of people consulted further emphasised that—for juveniles—there should be a presumption against registration. In other words, registration should not apply unless it is established that the juvenile poses a risk to children.[54] On the other hand, the Office of the Director of Public Prosecutions suggested that the court's discretion should be limited; a court should not be empowered to consider the question of registration if certain aggravating circumstances are present (eg, age disparity,[55] coercion or violence).[56]

Further, various commentators have argued that sex offender registration laws should not be imposed automatically on juveniles.[57] In relation to sex offender registration and notification schemes in the United States it has recently been argued that registration of juveniles should be determined by reference to 'objective measures of the recidivism risk posed by an individual youth rather than on a youth's conviction offense'.[58] Human Rights Watch recommended that juvenile offenders should not be required to register at all but, if it was determined that they should be subject to registration, registration should only apply after 'a panel of qualified experts determines that the child poses a high risk of sexual reoffence, and that public safety cannot be adequately protected through any means other than the child being subject to registration'.[59]

In 2009 the New South Wales Sentencing Council recommended that, for first time offenders under the age of 18 years, the court 'should have a discretion at the time of imposing sentence, to excuse the requirement for registration'. It was also suggested that this discretion 'should only be exercised in less serious cases' and should 'not be available where the offender commits a subsequent offence while a juvenile'.[60] In 2010 the New South Wales Legislative Council Standing Committee

53. Judge DJ Reynolds, President of the Children's Court of Western Australia; Sandra Boulter (Principal Solicitor), Sally Dechow (Senior Lawyer) and James Woodford, Mental Health Law Centre; Mara Barone, Aboriginal Legal Service; Claire Rossi & Sarah Dewsbury, Legal Aid WA; Michelle Scott, Commissioner for Children and Young People; Gerald Xavier (Senior Solicitor) Youth Legal Service; Dave Woodroffe, Aboriginal Legal Service, Kununurra; Matthew Bugg & Sean Stocks, Office of the Director of Public Prosecutions; Chief Justice Wayne Martin, Justice Peter Blaxell and Justice Lindy Jenkins, Supreme Court of Western Australia; Tara Gupta, Andy Gill, Kellie Williams & Sandie van Soelen, Department of Child Protection; Cleo Taylor (Senior Practice Development Officer, Kimberley) & Kathryn Dowling (Team Leader Duty Intake, Broome) Department for Child Protection; Sergeant Kevin Hall, Western Australia Police, Kimberley; Thomas Allen & Ted Wilkinson, Legal Aid WA, Broome; Steve Begg, Ben White and Taimil Taylor, Aboriginal Legal Service Broome; Gaelyn Shirley, Youth Justice Services, Department of Corrective Services; Katherine Hams, Manager, Kimberley Aboriginal Medical Services Council; Detective Alan Goodger, Kununurra Police; Brianna Lonnie, Simon Holme & Matt Panayi, Legal Aid WA, Kununurra; Glen Dooley and Nick Espie, Aboriginal Legal Service Kununurra; Chief Magistrate Seven Heath; Emeritus Professor Freda Briggs, University of South Australia; Christine White, Child Witness Services, Department of the Attorney General; Kay Benham (Director Court Counselling), Ruth Abdullah, Olwyn Webley & Simon Walker (Victim Support Services) Department of the Attorney General; Lex McCulloch (Assistant Commissioner Youth Justice Services), Steve Robins (Assistant Commissioner, Adult Community Corrections) Angie Dominish, Marlene Hamilton & Alisha Edwards, Department of Corrective Services; Judy Seif, Barrister; Magistrate Catherine Crawford; Dr Katie Seidler, Clinical and Forensic Psychologist; Christabel Chamarette, Clinical Psychologist; Law Council of Australia.
54. Chief Justice Wayne Martin, Justice Peter Blaxell and Justice Lindy Jenkins, Supreme Court of Western Australia; Judge DJ Reynolds, President of the Children's Court; Chief Magistrate Steven Heath; Mara Barone, Aboriginal Legal Service; Claire Rossi & Sarah Dewsbury, Legal Aid WA; Tara Gupta, Andy Gill, Kellie Williams & Sandie van Soelen, Department for Child Protection.
55. However, those spoken to declined to specify what the age disparity should be.
56. Consultation with Matthew Bugg & Sean Stocks, Office of the Director of Public Prosecutions (28 June 2010). Although not suggesting that the absence of any aggravating factors should be a precondition to court discretion, Legal Aid lawyers in Kununurra suggested that the court should consider factors such as age disparity and coercion in determining if registration is required: consultation with Brianna Lonnie, Simon Holme & Matt Panayi Legal Aid WA, Kununurra (22 July 2010). The Commission is of the view that, while these factors will be relevant to sentencing and may also be relevant to whether registration is appropriate, whether the offender poses a risk remains the key issue.
57. Some commentators have asserted that such schemes should not apply to juveniles at all: see, eg, Miner M et al, 'Standards of Care for Juvenile Sexual Offenders of the International Association for the Treatment of Sexual Offenders' (2006) 1 *Sexual Offender Treatment* 4.
58. Letourneau E et al, 'Do Sex Offender Registration and Notification Requirements Deter Juvenile Sex Crimes?' (2010) 37 *Criminal Justice and Behaviour* 553, 567.
59. Human Rights Watch, *No Easy Answers: Sex offender laws in the US* (2007) 15. See also Myers S, 'The Registration of Children and Young People under the Sex Offenders Act (1997): Time for a change?' (2001) 1(2) *Youth Justice* 40, 46 where it is argued that there should be a presumption against registration for juvenile offenders.
60. New South Wales Sentencing Council, *Penalties Relating to Sexual Assault Offences in New South Wales* (2009) vol 3, [10.41]–[10.42].

on Law and Justice supported this recommendation.[61] The Law Council of Australia has recently declared its policy on registration for child sex offenders and asserts that inclusion on a register (for all offenders) should be at the discretion of the sentencing court.[62]

The Commission is strongly persuaded by its research, the case examples referred to in this Paper, and by the views expressed by a wide range of individuals and agencies during consultations that mandatory sex offender registration for juvenile offenders is inappropriate and for this reason the CPOR Act needs to be reformed.

Discretion at time of sentencing

The Commission has concluded that the sentencing court should determine whether a juvenile offender should be subject to the CPOR Act because the sentencing stage of the criminal justice process is the ideal time for the issue to be considered. Sentencing proceedings involve a detailed consideration of the circumstances of the offence, and the offender's antecedents and personal circumstances. Pre-sentence reports are invariably required for sentencing in the Children's Court and psychological reports are routinely ordered for juveniles being sentenced in the Children's Court for sexual offences.

However, it is important that the boundary between the appropriate sentencing disposition and whether the offender should be subject to registration is not blurred. The sentence must reflect the seriousness of the offence and take into account ordinary sentencing principles and principles of juvenile justice. Hence, it is the Commission's view that although sentencing is the appropriate stage for the issue of registration to be considered, it is necessary for the applicable sentencing legislation to stipulate that the sentencing court cannot take into account registration and reporting obligations when determining the appropriate sentence.

Such provisions exist in Victoria and South Australia. Section 5(2BC) of the *Sentencing Act 1991* (Vic) provides that:

> In sentencing an offender a court must not have regard to any consequences that may arise under the *Sex Offenders Registration Act 2004* or the *Working with Children Act 2005* from the imposition of the sentence.

Section 10(4a) of the *Criminal Law (Sentencing Act) 1988* provides that:

> (4a) Despite any other provision of this Act, in determining sentence for an offence a court must not have regard to any consequences that may arise under the *Child Sex Offenders Registration Act 2006*.

The Commission is of the view that s 8 of the *Sentencing Act 1995* (WA) should be amended to provide that any consequences under the CPOR Act do not constitute mitigation.

PROPOSAL 6

Sex offender registration is not to provide any mitigation

That s 8 of the *Sentencing Act 1995* (WA) be amended to provide that the fact that an offender is or may be subject to reporting obligations under the *Community Protection (Offender Reporting) Act 2004* (WA) is not a mitigating factor.[63]

Presently, the CPOR Act enables a sentencing court to make an offender reporting order in relation to non-Class 1 and non-Class 2 offences.[64] The process for these orders is comparable to what is being proposed by the Commission, although the Commission has decided that some modifications are required by virtue of the fact that it is proposing to replace an existing mandatory system with a discretionary system. There is no requirement for a court to consider whether it should make an offender reporting order under s 13 of the CPOR Act. The court may make such an order on its own accord or it may make such an order following an application by the prosecution. As discussed above, the Commission is of the view that it should be mandatory for the court to *consider* whether a juvenile who has been found guilty of a reportable offence should be subject to the reporting obligations under the CPOR Act.

In relation to offender reporting orders, the court can only make an order if it 'is satisfied that the offender poses a risk to the lives or the sexual safety of one or more persons, or persons generally'.[65] The Commission agrees

61. New South Wales Legislative Council Standing Committee on Law and Justice, *Spent Convictions for Juvenile Offenders* (July 2010) 105–6.
62. Law Council of Australia, *Policy Statement on Registration and Reporting Obligations for Child Sex Offenders* (2010) 3.
63. This proposal will be relevant for both juvenile and adult offenders.
64. *Community Protection (Offender Reporting) Act 2004* (WA) s 13. The Commission notes that courts have discretion to make past offender reporting orders and child prohibition orders under the CPOR Act but neither of these orders is made at the time of sentencing.
65. Although the focus of the CPOR Act is on child sexual offences, it is noted that Class 1 and Class 2 offences include offences that may be committed against an adult (eg, sexual offences against relatives and sexual offences against an incapable person). It is noted that in *Commissioner of Police v ABC* [2010] 161, [16], Martino DCJ stated that the 'word

that this is the appropriate test for juvenile offenders. However, the Commission has some concerns about the most appropriate way to ensure that all relevant information is presented to the court to enable a decision to be made. In relation to offender reporting orders, the court can take into account:

(a) any evidence given during proceedings for the offence;

(b) any document or record (including an electronic document or record) served on the offender by the prosecution;

(c) any statement tendered, or deposition made, or exhibit tendered, at any proceedings in relation to the offence;

(d) any evidence given by a victim or the offender in relation to the making of the order;

(e) any pre-sentence report given to the court;

(f) any victim impact statement given to the court;

(g) any mediation report given to the court;

(h) any other matter the court considers relevant.[66]

While this provision is quite broad and enables the consideration of a wide variety of matters, some individuals consulted expressed the view that if a court is given discretion in relation to juveniles there needs to be a proper assessment of risk and that this assessment should be undertaken by an expert (eg, psychiatrist or psychologist).[67] It was also suggested that the court should have the power to require an offender to undergo a psychiatric or psychological assessment.[68]

Others consulted favoured a multi-agency approach so that various government agencies and individuals could each have input into the decision-making process. One regional police officer indicated support for court discretion for juveniles provided that the decision is made after a 'roundtable' consultation with various stakeholders (eg, police, psychologist, Department for Child Protection, Aboriginal community representative). This approach was supported by others consulted.[69] Representatives from Victim Support Services and the Child Witness Service agreed that there should be input from a wide range of agencies including the victim. It was said that those victims who wished to comment could do so as part of a victim impact statement.[70] The Department of Corrective Services representatives also supported a multi-agency approach. They highlighted that psychological reports are prepared for sentencing juveniles for sexual offences in any event and didn't consider that this approach would impact greatly on their resources. However, it was noted that there could

"risk" in s 19 of the *Community Protection (Offender Reporting) Act 2004* is not modified by an adjective, as the word is in s 7 of the *Dangerous Sexual Offenders Act 2006* which refers to an "unacceptable risk". If a court requires a person to comply with the reporting obligations of the *Community Protection (Offender Reporting) Act 2004* that person's liberty could be restricted and their privacy impaired. It is unlikely that the Parliament would have intended that would occur if the risk was insignificant. I conclude that the reference in s 19 to a risk to the lives or sexual safety of a person or persons is a reference to a risk that is more than a fanciful, minimal or merely theoretical risk.'

66. *Community Protection (Offender Reporting) Act 2004 s* 13(4).

67. Consultation with Cleo Taylor (Senior Practice Development Officer, Kimberley) & Kathryn Dowling (Team Leader Duty Intake, Broome) Department for Child Protection (19 July 2010); consultation with Claire Rossi & Sarah Dewsbury, Legal Aid WA (8 June 2010); consultation Carol Connelly, State Solicitors Office (22 October 2010). See also Youth Law Team, Legal Aid WA, 'Submission on Community Offender Protection Register' (24 February 2009) where it was suggested that the criteria and process should be similar to the criteria under the *Dangerous Sex Offenders Act 2006* (WA). It is noted that evidence of the results of the actuarial risk assessment tool used by the police in relation to adult reportable offenders (RM2000) has been presented in court during an application for a past offender reporting order and for an application for a child protection prohibition order. In *Commissioner of Police v ABC* [2010] WADC 161, [33] the court held that a detective, with many years experience in investigating sexual offences and with risk assessment training, was not qualified to give evidence in relation to the reliability of the RM2000. He was, however, entitled to give opinion evidence about the risk of reoffending based upon his experience in investigating sexual offences and managing sex offenders but such 'evidence does not have the same weight as a person with qualifications and experience in behaviour studies who has interviewed and assessed an offender' (at [34]).

68. Telephone consultation Carol Connelly, State Solicitors Office (22 October 2010).

69. Consultation with Gaelyn Shirley (Team Leader, Youth Justice Services, Broome) Department of Corrective Services (21 July 2010); consultation with Kay Benham (Director, Court Counselling), Ruth Abdullah (Victim Support Services & Child Witness Services, Kununurra), Olwyn Webley (Victim Support Services & Child Witness Services, Derby), Simon Walker (Victim Support Services, Perth) Department of the Attorney General (19 August 2010); consultation with Lex McCulloch (Assistant Commissioner Youth Justice Services), Steve Robins (Assistant Commissioner, Adult Community Corrections) Angie Dominish, Marlene Hamilton & Alisha Edwards, Department of Corrective Services (7 September 2010); consultation with Magistrate Catherine Crawford (9 September 2010).

70. Consultation with Kay Benham (Director, Court Counselling); Ruth Abdullah (Victim Support Services & Child Witness Services, Kununurra), Olwyn Webley (Victim Support Services & Child Witness Services, Derby), Simon Walker (Victim Support Services, Perth) Department of the Attorney General (19 August 2010); telephone consultation with Christine White, Child Witness Service, Department of the Attorney General (24 August 2010). However, the Commission notes that a recent inquiry in New South Wales, in relation to whether juvenile sexual offences convictions should be able to be spent, suggested that victim input into the decision may not be appropriate because the key issue is the risk of reoffending rather than the circumstances of the original offence: New South Wales Legislative Council Standing Committee on Law and Justice, *Spent Convictions for Juvenile Offenders* (July 2010) 91–2.

be resources implications for other agencies (such as the Department for Child Protection).[71]

One way of accommodating input from a variety of agencies is presently available under the CPOR Act in relation to prohibition orders.[72] Section 105 of the CPOR Act provides that:

> (1) When determining whether to make an application under this Part, or when making or responding to an application under this Part, the Commissioner may, by notice in writing, direct any public authority to provide to the Commissioner, on or before a day specified in the notice, any information held by the public authority that is relevant to an assessment of whether the reportable offender poses a risk to the lives or the sexual safety of one or more children, or children generally.
>
> (2) A public authority to which a direction under subsection (1) is given is authorised and required to provide to the Commissioner the information sought by the direction.
>
> (3) A public authority is not required to give information that is subject to legal professional privilege.

A similar provision could be included in relation to a discretionary system of registration for juvenile offenders so that the Commissioner of Police is empowered to seek information from other government agencies prior to the matter being determined in court and then be in a position to present that information or evidence if necessary. This approach would be less resource intensive than a 'roundtable style' meeting because the police can filter what is relevant and, therefore, not all agencies would be required to provide input. For example, the police could request any relevant information from the Department for Child Protection and if the response is that they do not have any information or prior dealings with the juvenile then their further involvement would not be needed.

In contrast, others consulted expressed their preference for a less formal and simple process. The President of the Children's Court, Judge Reynolds, said that there should not be a formal application as applies under the *Dangerous Sex Offenders Act 2006* (WA). He emphasised that for all sentencing matters in the Children's Court involving a child sexual offence, there would be a pre-sentence report and for the vast majority of cases a psychological report is ordered. If necessary, the case could be adjourned if further material was required but in most instances the matter could be determined at the time of sentencing.[73] Others consulted also stated that there is currently enough information before the court at sentencing to enable a decision to be made.[74]

In this regard, the Commission notes that s 21(2a) of the *Sentencing Act 1995* (WA) provides that:

> If the court gives instructions that it do so, a pre-sentence report is to set out matters that are relevant to the making of an offender reporting order under section 13 of the *Community Protection (Offender Reporting) Act 2004* in respect of the offender.

If a discretionary system was put in place for juvenile offenders under the CPOR Act, that section could easily be amended to enable a court to give instructions that a pre-sentence report is to set out matters that are relevant to the making a juvenile offender reporting order. Also, s 47 of the *Young Offenders Act 1994* (WA) provides:

> (1) The court dealing with a young person who has committed an offence may request the provision to it of any information that it requires in order to decide how to dispose of the matter.
>
> (2) The court may request the chief executive officer to cause to be prepared and submitted to it such reports concerning the young person as it considers relevant.
>
> (3) The chief executive officer is to cause the requested reports to be prepared and submitted to the court.

This section could also be amended to make it clear that a court may request information concerning matters that are relevant to the making of a juvenile offender reporting order.

Lawyers from the Aboriginal Legal Service in Broome were concerned that if sentencing proceedings were routinely adjourned for the purpose of determining if the offender should be subject to the CPOR Act, many of their clients would be disadvantaged because of practical difficulties in attending court hearings.[75] Similarly, Aboriginal Legal Service lawyers in Kununurra stated that the matter should be dealt with at the time of sentencing and that obtaining direct stakeholder input would be difficult in remote areas; instead, a report

71. Consultation with Lex McCulloch (Assistant Commissioner Youth Justice Services), Steve Robins (Assistant Commissioner, Adult Community Corrections) Angie Dominish, Marlene Hamilton & Alisha Edwards, Department of Corrective Services (7 September 2010).
72. Telephone consultation with Carol Connelly, State Solicitors Office (22 October 2010).
73. Consultation with Judge DJ Reynolds, President of the Children's Court Western Australia (21 June 2010).
74. Consultation with Thomas Allen & Ted Wilkinson, Legal Aid WA, Broome (20 July 2010); consultation with Detective Alan Goodger, Western Australia Police, Kununurra (22 July 2010).
75. Consultation with Steve Begg, Ben White & Taimil Taylor, Aboriginal Legal Service, Broome (20 July 2010).

should be prepared for the court to address the relevant issues.[76]

Given the divergent views in relation to this issue, the Commission seeks submissions from all relevant agencies about the most effective and efficient way to ensure that the court is fully and accurately informed of all relevant matters in order to enable it to determine if the juvenile offender poses a risk to the lives or sexual safety of any person. The Commission's proposal for the CPOR Act to be amended to remove mandatory registration for juvenile offenders and other ancillary proposals and questions appear below.

PROPOSAL 7

Juvenile offender reporting orders

1. That s 6(4) of the *Community Protection (Offender Reporting) Act 2004* (WA) be amended to provide that unless a person is a reportable offender because of subsection (3),[77] a person is not a reportable offender merely because he or she as a child committed a reportable offence.
2. That a new section be inserted into the *Community Protection (Offender Reporting) Act 2004* (WA) to provide that:
   (a) If a court finds a person guilty of committing a Class 1 or Class 2[78] offence that occurred when the person was a child, the court *must* consider whether it should make an order that the offender comply with the reporting obligations under this Act.
   (b) The court may make the order only if it is satisfied that the offender poses a risk to the lives or the sexual safety of one or more persons, or persons generally.
   (c) For the purposes of (b) above, it is not necessary that the court be able to identify a risk to a particular person or particular persons or a particular class of persons.
   (d) The court may adjourn the proceedings if necessary to enable relevant information to be presented in court.
   (e) If the court determines that it is necessary to adjourn the proceedings for the purpose of determining if a juvenile offender reporting order should be made, it may impose the sentence for the offence before the proceedings are adjourned for that purpose.
   (f) The court should make the order at the time the person is sentenced for the offence or at the time the proceedings are heard after being adjourned pursuant to (e) above.
   (g) If the court fails to consider whether it should make an order as required by (a) above, the prosecution can apply for an order to be made at any time within six months after the date of sentence.
3. The offender or the state has a right to appeal the decision of the court to make or not to make a juvenile offender reporting order.

PROPOSAL 8

Calculation of reporting periods

That s 46 of the *Community Protection (Offender Reporting) Act 2004* (WA) be amended to ensure that if a juvenile offender reporting order is not made in relation to a juvenile offender who was found guilty of a Class 1 or Class 2 offence and the juvenile offender again commits and is found guilty of a Class 1 or Class 2 offence, the applicable reporting period is calculated on the basis that the first abovementioned offence resulted in a juvenile offender reporting order.

PROPOSAL 9

Provision of information to the court

1. That s 21(2a) of the *Sentencing Act 1995* (WA) be amended to provide that if the court gives instructions that it do so, a pre-sentence report is to set out matters that are relevant to the making of a juvenile offender reporting order under the *Community Protection (Offender Reporting) Act 2004* (WA) in respect of the offender.
2. That s 47 of the *Young Offenders Act 1994* (WA) be amended to insert a new subsection (1a) to provide that the court may request a report containing information that is relevant to the making of a juvenile offender reporting order under the *Community Protection (Offender Reporting) Act 2004* (WA) including a psychological or psychiatric report.

76. Consultation with Nick Espie, Aboriginal Legal Service, Kununurra (23 July 2010).
77. That is, a corresponding reportable offender or a New South Wales reportable offender.
78. The Commission has not included Class 3 offences in its proposal at this stage because the provisions dealing with Class 3 offences have not yet commenced.

QUESTION D

Provision of information to the court

(i) What is the best way to ensure that the court is fully informed of all relevant matters when deciding if a juvenile offender reporting order should be made?

(ii) Do you think the court should make the decision about whether a juvenile offender reporting order should be made after hearing from a wide variety of agencies and, if so, what agencies should be entitled or able to present evidence or submissions?

(iii) Should the Commissioner of Police be empowered to direct other government agencies to provide the police with relevant information held about the offender to enable the police or the prosecution to make submissions to the court and/or present evidence?

Court review of registration status

As discussed in Chapter Two, only reportable offenders who are subject to lifetime registration are entitled to apply to a court for an order suspending their reporting obligations and they cannot make such an application unless at least 15 years have elapsed since they became subject to the CPOR Act.[79] Thus, under the current scheme juvenile reportable offenders have no scope to seek a review of their registration status or to demonstrate that they no longer pose a risk to the community. Many individuals consulted were of the view that there should be a separate review mechanism for juvenile offenders so that the offender has the ability to demonstrate that registration and reporting are no longer required.[80] Judge Reynolds emphasised that young people mature as they reach adulthood and their circumstances may have changed considerably since the time of the offending behaviour.[81] The Office of the Director of Public Prosecutions suggested that in addition to court discretion there should be a right of review in exceptional circumstances and that this review should be heard by a different court than the original sentencing court. The Department of Corrective Services suggested that a right of review would provide an incentive for rehabilitation.[82]

Only one other Australian jurisdiction provides a right of review for reportable offenders[83] over and above the right available to offenders registered for life. Section 28(2) of the *Community Protection (Offender Reporting) Act 2005* (Tas) provides that a reportable offender can apply to a magistrate for an order suspending his or her reporting obligations 'if the reportable offender has complied with the reporting obligations imposed on the offender for at least three-quarters' of the reporting period.

In some United States jurisdictions, offenders can apply for registration to cease if they can demonstrate that they are rehabilitated or no longer pose a risk. One commentator has referred to the scheme in Washington whereby juvenile offenders over the age of 15 years 'may be released from the requirement to register at any time if they can prove by clear and convincing evidence that future registration will not serve the purposes of the statute'. [84] Juvenile offenders under the age of the 15 years are also entitled to apply for registration to cease but they are subject to a lesser standard of proof. Under the national *Sex Offender Registration and Notification Act* (US) there is limited scope for certain offenders to apply to be removed from the register if they can demonstrate a 'clean record' and if they have participated in a sex offender treatment program.[85]

79. See Chapter Two, 'Application to District Court for offenders subject to lifetime registration'.
80. Consultation with Judge DJ Reynolds, President of the Children's Court Western Australia (21 June 2010); consultation with Chief Justice Wayne Martin, Justice Peter Blaxell and Justice Lindy Jenkins, Supreme Court of Western Australia (28 June 2010); consultation with Matthew Bugg & Sean Stocks, Office of the Director of Public Prosecutions (28 June 2010); consultation with Chief Magistrate Steven Heath (2 August 2010); consultation with Lex McCulloch (Assistant Commissioner Youth Justice Services), Steve Robins (Assistant Commissioner, Adult Community Corrections), Angie Dominish, Marlene Hamilton & Alisha Edwards, Department of Corrective Services (7 September 2010); consultation with Magistrate Catherine Crawford (9 September 2010).
81. Consultation with Judge DJ Reynolds. President of the Children's Court Western Australia (21 June 2010).
82. Consultation with Lex McCulloch (Assistant Commissioner Youth Justice Services), Steve Robins (Assistant Commissioner, Adult Community Corrections) Angie Dominish, Marlene Hamilton & Alisha Edwards, Department of Corrective Services (7 September 2010).
83. In 1995 the Parliament of Victoria Crime Prevention Committee recommended the establishment of a sex offender register and also that a 'Sex Offender Registration Review Panel be established to review the registration status of adolescent offenders': Victorian Parliament Crime Prevention Committee, *Combating Child Sexual Assault: An integrated model,* Inquiry into Sexual Offences Against Children and Adults, First Report (1995) 260–2.
84. Garfinkle E, 'Coming of Age in America: The Misapplication of sex-offender registration and community-notification laws to juveniles' (2003) 91 *California Law Review* 163, 179.
85. *National Guidelines for Sex Offender Registration and Notification* (2008) 58. For example, offenders subject to registration for 15 years can apply after 10 years.

In Canada, registered offenders can apply to the court for a termination order after specified periods of time. Offenders subject to a 10-year reporting period can apply for a termination order after five years, offenders subject to a 20-year reporting period can apply for a termination order after 10 years, and those subject to lifetime reporting can apply after 20 years.[86] Section 490.016(1) of the *Criminal Code* (Can) provides that:

> The court shall make a termination order if it is satisfied that the person has established that the impact on them of continuing the order or orders and any obligation, including on their privacy or liberty, would be grossly disproportionate to the public interest in protecting society through the effective investigation of crimes of a sexual nature, to be achieved by the registration of information relating to sex offenders under the *Sex Offender Information Registration Act*.

If the court refuses the application the person can reapply after another five years has elapsed.

The Commission is of the view that, even with a discretionary system for juvenile offenders, a subsequent right of review is desirable. A court may be satisfied that a juvenile offender poses a risk to the lives or sexual safety of any person at the time of sentencing. However, young peoples' maturity develops and with appropriate intervention any risk of reoffending may be eliminated. The Commission believes that registration and reporting obligations for juveniles (for either four years or seven-and-a-half years) without any avenue for review is potentially counterproductive to rehabilitation. The option of a review after either half the reporting period has elapsed or upon attaining the age of 18 years would provide some incentive for juvenile offenders to engage in appropriate treatment for their sexual offending behaviour and engage in other positive rehabilitation programs.

A continual or ongoing right of review is not considered practical or necessary. Thus, an offender may choose not to apply at the earliest possible time, instead waiting until he or she is in a position to demonstrate that there is no longer a risk to the community. In terms of negative labelling the Commission believes that it is important for a court to be able to remove the offender from the register rather than simply suspending reporting obligations. If the offender can establish that he or she no longer poses a risk to the community, then the basis for inclusion on the register disappears.

86. *Criminal Code* (Can) s 490.015 (1).

PROPOSAL 10

Right of review for juvenile reportable offenders

1. That the *Community Protection (Offender Reporting) Act 2004* (WA) be amended to provide that a person subject to a juvenile offender reporting order (as set out in Proposal 7 above) may apply to the President of the Children's Court or to the District Court[87] for a review of his or her registration status at any time after he or she has complied with the reporting obligations for at least half of the applicable reporting period or after he or she has attained the age of 18 years.
2. That an application for a review under this section can only be made once.
3. That upon an application the court may order that the offender is no longer subject to the juvenile offender reporting order if the court is satisfied that the offender does not pose a risk to the lives or sexual safety of one or more persons, or persons generally.
4. That the offender and the state have a right to appeal the decision of the court at the review.

Retrospective right of review

On the basis of the case examples referred to in this Paper, and from information obtained during consultations, the Commission is of the view that there are currently juvenile reportable offenders (of whom some may in fact now be over 18 years) who arguably do not need to remain on the sex offender register. If the existing juvenile reportable offenders had been dealt with under the Commission's proposed discretionary system for juvenile offender reporting orders, it is likely that some of these juveniles would not have been subject to the CPOR Act at all. Therefore, in the interests of justice, existing juvenile reportable offenders should be entitled to seek a review of their registration status without the need to wait for the qualifying period as suggested in the above Proposal. For example, a 13-year-old offender who was made subject to the CPOR Act one year ago (when 12 years old), for a period of seven-and-a-half years, would have to wait at least three years and nine months (ie, until 15 years and 9 months old) before being eligible to apply for a review. Because such offenders did not have the option to argue that registration was unnecessary at

87. If the offender is under the age of 18 years he or she should apply to the President of the Children's Court and if the offender is over the age of 18 years he or she should apply to the District Court.

the time of sentencing, the Commission believes they should be entitled to seek a review at any time.

PROPOSAL 11

Retrospective right of review for juvenile reportable offenders

1. That the *Community Protection (Offender Reporting) Act 2004* (WA) be amended to provide that an existing juvenile reportable offender may apply to the President of the Children's Court or to the District Court[88] for a review of his or her registration status at any time.
2. That an existing juvenile reportable offender means a person who is subject to the *Community Protection (Offender Reporting) Act 2004* (WA) only as a result of a reportable offence committed while he or she was under the age of 18 years at, or immediately before, the commencement of the provisions that establish a discretionary juvenile reporting order.
3. That an application for a review under this section can only be made once.
4. That upon an application the court may order that the offender is no longer subject to reporting obligations under the Act and is to be removed from the register if it is satisfied that the offender does not pose a risk to the lives or sexual safety of one or more persons, or persons generally.
5. That the offender and the state have a right to appeal the decision of the court at this review.
6. That if the court hearing the application determines that the reportable offender should remain subject to the registration and reporting obligations under the *Community Protection (Offender Reporting) Act 2004* (WA) the reportable offender remains entitled to apply for a review in accordance with Proposal 10.

88. If the offender is under the age of 18 years he or she should apply to the President of the Children's Court and if the offender is over the age of 18 years he or she should apply to the District Court.

An alternative scheme for juveniles

The need for appropriate treatment for juvenile child sex offenders was a common theme during the Commission's consultations.[89] In addition, a lack of appropriate treatment programs for child sex offenders (and their victims) in regional areas was mentioned.[90] The Department of Corrective Services told the Commission that there are specific sex offender treatment programs available in custody for juvenile detainees; however, only one-on-one psycho-sexual counselling (conducted by a psychologist) or psycho-sexual education (conducted by a juvenile justice officer) are available for juveniles in community settings (in both metropolitan and regional areas).[91] Dr Wendy O'Brien noted in a recent review that, following the removal of funding for a critical response team in the Kimberley in April 2009, a young person who is dealt with for a sexual offence in remote northern Western Australia is likely to only receive psycho-sexual education from a juvenile justice officer (although a psychologist will travel to the relevant location to prepare court reports and make any necessary assessments).[92] Dr O'Brien was also told by staff from the Department of Corrective Services that the provision of psychological services to juvenile offenders in other regional areas and outer metropolitan areas can be difficult.[93]

Dr O'Brien noted that some jurisdictions have specific sex offender treatment programs for juvenile offenders. For example, the Male Adolescent Program for Positive Sexuality in Victoria is an 'intensive group treatment program for adolescent males who have been found guilty

89. Consultation with Judge DJ Reynolds, President of the Children's Court Western Australia (21 June 2010); email consultation with Emeritus Professor Freda Briggs, University of South Australia (30 July 2010); telephone consultation with Christine White, Child Witness Service (24 August 2010); consultation with Katherine Hams, Manager, Kimberley Aboriginal Medical Services Council (21 July 2010).
90. Consultation with Cleo Taylor (Senior Practice Development Officer, Kimberley) & Kathryn Dowling (Team Leader Duty Intake, Broome) Department for Child Protection (19 July 2010); consultation with Sergeant Kevin Hall, Family Protection Coordinator, Western Australia Police, Kimberley (20 July 2010).
91. Consultation Lex McCulloch (Assistant Commissioner Youth Justice Services), Steve Robins (Assistant Commissioner, Adult Community Corrections), Angie Dominish, Marlene Hamilton & Alisha Edwards (7 September 2010).
92. O'Brien W, *Australia's Response to Sexualised or Sexually Abusive Behaviours in Children and Young People* (Australian Crime Commission: Canberra, 2010) 51. Likewise, the Chief Justice of Western Australian commented in a recent case that he was concerned to hear from a representative of the Department of Corrective Services that there are no sexual offender programs available in the Kimberley: Transcript of sentencing proceedings, INS KUN 50 of 2008 (17 June 2010) 6.
93. O'Brien, ibid 50.

of a sexual offence'.[94] This program was established in 1993. According to the Victorian Department of Human Services, an independent evaluation of the program in 1998 found that only 5% of the program's 138 clients committed further sexual offences over a four-and-half-year review period.[95] Likewise, in Queensland the Griffith Youth Forensic Services offers 'specialist state-wide assessment and intervention services for those aged 10–17 years who are convicted of sex offences'; however, there appears to be some difficulty in meeting regional demands.[96]

Others consulted emphasised that the concept of sex offender registration for juvenile offenders should be reformulated. It was suggested that instead of a sex offender register, juvenile child sex offenders could be placed on an 'at risk' register involving rehabilitative intervention. Inclusion on the sex offender register under the CPOR Act should only result if, by a certain age (eg, 18 or 21 years), such intervention fails or the young person has not complied with the requirements.[97] Others expressed the view that juvenile justice officers should be involved in monitoring offenders in order to provide a rehabilitative approach.[98]

A clinical psychologist from New South Wales advised the Commission that sex offender registration schemes may be more effective if they focussed on therapeutic intervention, and involved greater liaison between police and treatment providers.[99] The National Children's and Youth Law Centre submitted that intervention and prevention programs 'should be incorporated into the offender reporting scheme'.[100]

An analysis of the effectiveness of treatment programs for juvenile child sex offenders is beyond the scope of this reference; however, the Western Australian justice system endeavours, as far as possible, to provide treatment to juveniles who are convicted of sexual offending. The Commission assumes that the provision of such programs, where available, is evidence-based and designed to reduce the risk of reoffending. Nonetheless, there are clearly barriers to delivering sex offender treatment programs for juveniles, especially in regional and remote areas. The Commission is interested to hear from those with the relevant expertise and experience about whether a more treatment-oriented approach would be preferable to the current sex offender registration scheme in Western Australia. If such an approach is to be adopted then a considerable injection of resources would be required to ensure that treatment programs are available across the state.

As noted earlier in this chapter, therapeutic treatment orders are available in Victoria for juveniles aged less than 15 years who exhibit sexually abusive behaviour. If the juvenile completes the order successfully any pending criminal charges are dismissed. A similar, although not identical, process could be employed for juvenile offenders in this state. For example, the CPOR Act could provide that if a court is satisfied that a juvenile offender poses a risk to the lives or sexual safety of any person, it can make an order requiring the juvenile to undergo treatment instead of a juvenile offender reporting order. In such cases, the juvenile offender could be monitored and managed by Youth Justice Services. Furthermore, the legislation could stipulate that the personal details that are usually required to be provided to police under the CPOR Act could instead be provided to Youth Justice Services coupled with appropriate information sharing arrangements between juvenile justice and police.[101]

Those juveniles who do not successfully comply with the treatment requirements or who subsequently reoffend could then be made subject to a juvenile offender reporting order at a later time. The Commission believes that there is merit in a more rehabilitative approach for juveniles because it would reduce stigma; avoid some of the problems experienced by juveniles who are subject to overlapping obligations with justice agencies and the police; encourage juvenile offenders to admit responsibility and seek help; and encourage rehabilitation. Such an approach appropriately takes into account the best interests of the child and ensures that the differential treatment of juveniles from adults is adequate.[102]

94. Victoria Department of Human Services, *Male Adolescent Program for Positive Sexuality (MAPPS): A program of the Adolescent Forensic Health Service*, Fact Sheet (2009).
95. Ibid.
96. O'Brien W, *Australia's Response to Sexualised or Sexually Abusive Behaviours in Children and Young People* (Canberra: Australian Crime Commission, 2010) 51. Dr O'Brien discussed various treatment programs available in Australia including various early intervention programs available outside the criminal justice context.
97. Consultation with Katherine Hams, Manager, Kimberley Aboriginal Medical Services Council (21 July 2010
98. Telephone consultation with Dave Woodroffe, Aboriginal Legal Service, Kununurra (22 June 2010); consultation with Nick Espie, Aboriginal Legal Service, Kununurra (23 July 2010).
99. Email consultation with Dr Katie Seidler (Clinical and Forensic Psychologist) LSC Psychology (1 November 2010).
100. Submission from National Children's and Youth Law Centre (September 2010) 10.
101. In 2001 a Home Office consultation paper suggested as one option that children and young people could be registered with another agency other than the police 'which had a remit to address both their abusive behaviour and their wider needs': United Kingdom, Home Office & Scottish Executive, *Consultation Paper on the Review of Part 1 of the Sex Offenders Act 1997* (2001) 28–9.
102. See Chapter One, 'Key issues impacting on reform'.

QUESTION E

Alternative approach for juvenile child sex offenders

(i) Should the court have an alternative therapeutic order available for juvenile offenders who are considered to pose a risk to the lives or sexual safety of any member of the community?

(ii) If so, what should be the requirements of the therapeutic order and what should be the consequence for successful and non-successful completion of the order?

(iii) Do you think that such a therapeutic order should be limited to juveniles under a certain age or should it potentially be available to all juvenile offenders who have been found guilty of a Class 1 or Class 2 offence?

Chapter Six

The Impact of Sex Offender Registration on Adult Offenders

Contents

Introduction 141

Exceptional circumstances 142

'Consensual' sexual activity 142

Mistake about age 142

Ignorance of the law 142

Young adult offenders 144

Adult offenders with mental health issues 146

Persons acquitted on account of unsoundness of mind 146

Offenders with mental illness or intellectual disability 147

Other exceptional cases 152

The impact of sex offender registration on adult offenders 154

Community reintegration and stigma 154

Reporting obligations 154

Overlapping obligations 154

Problems for Aboriginal reportable offenders 155

Periodic reporting 156

Dealing with exceptional circumstances 158

Alternative approaches 158

Minimum sentencing thresholds 158

Limited discretion at time of sentencing 159

Right of review 160

The Commission's view 160

A limited discretion for adults 160

Right of review 163

Retrospective right of review 163

Introduction

In this chapter the Commission considers the application of the *Community Protection (Offender Reporting) Act 2004* (WA) ('the CPOR Act') to adult reportable offenders. This aspect of the reference is confined to only those adult offenders who have committed a reportable offence in 'exceptional circumstances'. The Commission's terms of reference do not define the phrase 'exceptional circumstances', although one example is mentioned: persons who commit a reportable offence involving consensual sexual activity with a person believed to be of or over the age of 16 years at the time the relevant reportable offence was committed. The link between the defence of honest and reasonable mistaken belief about age and the CPOR Act has been considered in detail in Chapter Four of this Paper. Of particular note, it was emphasised that there are offenders in Western Australia who are convicted of a child sexual offence and subject to sex offender registration even though the same behaviour would not have constituted a criminal offence in another jurisdiction. The Commission's research and consultations undertaken so far have revealed other examples of offences which it believes are appropriately captured by the term 'exceptional circumstances'. These examples are discussed in this chapter along with the potential practical impact that sex offender registration may have on adult reportable offenders who fit within the exceptional circumstances category.

Exceptional circumstances

Broadly speaking, sex offender registration schemes aim to protect the community and facilitate the investigation of sexual crimes. Hence, in order to achieve these goals sex offender registration schemes should capture those offenders who pose a significant risk of sexual reoffending. In Western Australia inclusion on the register is mandatory – an adult offender who is sentenced for a Class 1 or Class 2 offence is automatically subject to reporting obligations under the *Community Protection (Offender Reporting) Act 2004* (WA) ('the CPOR Act'). Mandatory registration does not enable any individualised assessment of the circumstances of the offence and the offender in order to determine if the offender poses a risk to the community. The Commission is of the view that the different categories of offending behaviour discussed below call for an individualised approach.

'Consensual' Sexual Activity

'Consensual' underage sexual activity is a common example relied on to justify a discretionary approach to the registration of juvenile offenders principally because both the offender and the victim are children. Yet, 'consensual' sexual relationships also occur between adults and children.[1] In fact, it is lawful for an adult to engage in consensual sexual activity with a child so long as the child is at least 16 years of age (and is not under the care, authority or supervision of the adult). For example, it is lawful for a 60-year-old to engage in consensual sexual intercourse with a 16-year-old. However, the law proscribes sexual contact between an adult and a child under the age of 16 years irrespective of the proximity of age between the two parties. Thus, an 18-year-old who engages in sexual activity with a girl on the day before she turns 16 is guilty of a criminal offence. The Commission does not have a mandate to consider the appropriateness or otherwise of the age of consent laws, but it is necessary for the Commission to consider if there are any examples of consensual sexual activity between an adult and an underage child that do not necessarily justify registration and reporting as a sex offender.

1. For a discussion of the term 'consent', see Chapter One, 'Terminology'.

Mistake about age

In Chapter Four, the Commission examined in detail the issue of honest and reasonable but mistaken belief about the age of the victim. The Commission highlighted that since reforms to the law in 2002, persons charged with a child-specific sexual offence have been precluded from relying on the defence of mistake unless they were no more than three years older than the victim. In practical terms, this means that the defence is not available to any accused who is of, or over, the age of 19 years. The Commission also referred to a number of case examples where a reportable offender had engaged in sexual activity with an underage person under a belief that the victim was of or over 16 years of age.[2] The Commission believes that these case examples demonstrate that mandatory sex offender registration for adult offenders is inappropriate.

Ignorance of the law

Ignorance of the law does not generally provide a defence to a criminal charge[3] but, depending on the circumstances, it may provide strong mitigation because the offender did not know that what he or she was doing was against the law.[4] The Commission has been told about a number of cases where young men from remote parts of Western Australia have engaged in consensual sexual activity with underage girls without knowing that such conduct constitutes an offence against the law of Western Australia. In one such case, a 22-year-old male was dealt with for sexual offences committed against a 13-year-old girl. The offender had been raised in a remote community and he commenced a short sexual relationship with the complainant. The offender did not know that it was an offence to engage in consensual sex with a person under the age of 16 years. In any event, the complainant had told the offender that she was 16 years of age.[5] The appeal court observed that:

> The circumstances of the commission of the offences in this case are towards the lower level of seriousness of offences of this kind. The appellant reasonably believed

2. See Chapter Four, case examples 5, 6, 7 & 8.
3. See *Criminal Code* (WA) s 22.
4. Law Reform Commission of Western Australia, *Aboriginal Customary Laws*, Project No 94, Discussion Paper (2005) 172.
5. [Case name deleted to protect identity] [2009] WASCA 22, [18].

that the complainant was aged 16. The complainant willingly engaged in the conduct, there being no element of pressure or advantage positively exercised by the appellant over the complainant.[6]

Despite these circumstances, this offender will be subject to reporting obligations under the CPOR Act for 15 years. Other, more detailed, examples are set out below.

Case example 21

The offender, who was aged either 18 or 19 years,[7] pleaded guilty to one count of sexual penetration of a child of or over the age of 13 and under the age of 16 years. The 14-year-old complainant was the offender's next door neighbour. It was not in dispute that the complainant willingly engaged in sexual intercourse with the offender. The offence was discovered after the complainant was treated for a sexually transmitted disease; she provided authorities with the names of the people with whom she had engaged in sexual activity. The offender was not responsible for the transmission of the disease.

The offender told the police that he believed that the complainant was 15 years of age and that he did not know that it was an offence to have consensual sex with a 15-year-old. The offender had told the complainant that they should not tell anyone about the incident because their two families were close and would think it was wrong due to their family connections. The offender was from a remote Aboriginal community; he had very low literacy levels and had no relevant criminal record. The offender was sentenced to 14 months' imprisonment suspended for 12 months. He appealed the sentence on the basis that it was manifestly excessive. On appeal it was noted that there were strong mitigating factors including the relative youth of the offender and that the offender (who had a disadvantaged background that had led to a very limited formal education) did not know that what he had done was illegal. It was also observed that the offender was immature for his age; that there was no element of coercion, persuasion or breach of trust; and that the complainant was a willing participant. However, the appeal court did not interfere with the original sentence imposed.[8]

As a result of this offence, the offender will be subject to reporting obligations under the CPOR Act for 15 years. This offender has since been dealt with for breaching those obligations and it appears from the Statement of Material Facts that he was charged with the breaching offence the first time he failed to report. He had reported three times in compliance with his obligations (on a fortnightly basis) before missing a report. Approximately two weeks after failing to report he was seen by his case officer (who was off-duty) and he was advised to attend the police station the following day. He attended as requested but was then breached for failing to report on the earlier occasion. According to the police, he had provided a number of different reasons for failing to report including that he had been too busy looking for work; that he had lost the phone numbers; and that he had attended the police station on a public holiday and the police station was closed. He instructed his lawyers that he had been concentrating on looking for work.

The offence of breaching his reporting obligations under the CPOR Act triggered his suspended sentence of imprisonment imposed for the original offence. He was therefore committed to the District Court for sentence and released on bail to attend the District Court at a later date. His bail conditions included a condition to report to the police every Friday. About two months later he was arrested for failing to report in accordance with his bail conditions. The offender's lawyer explained to the District Court that since he was committed to the District Court some two months earlier he had been complying with his obligations under the CPOR Act. However, the offender was confused about his overlapping reporting requirements.[9] The District Court re-released him on bail.

When he appeared in the District Court for sentencing he was fined $300 for failing to report under the CPOR Act and $400 for breaching the suspended sentence. The suspended sentence was ordered to continue. Apart from the original reportable offence the offender's criminal history consisted of two traffic convictions and one charge of breach of bail.[10]

6. Ibid [23]. The appeal court overturned the original sentence of immediate imprisonment and imposed a sentence of suspended imprisonment.
7. The evidence established two possible dates of birth for the offender.
8. [Case name deleted to protect identity] [2009] WASCA 10, [43] (Steytler P; McLure JA & Miller JA concurring).
9. For further discussion, see 'Overlapping obligations' below.
10. Information obtained from Sentencing Transcript, Statement of Material Facts and lawyer.

Case example 22

The offender pleaded guilty to one count of sexual penetration of a child of or over the age of 13 years but under the age of 16 years. The offender was 18 years old and the complainant was 14 years old – thus there was a four year age difference. The offender and complainant were known to each other; the offender had seen the complainant in town on a number of occasions and had seen her drinking alcohol with friends in the local park. The offender said that he considered the complainant to be more like a woman than a child. The offender was aware that the complainant had previously engaged in sexual activity with his brother and two other boys. The complainant was at the offender's house in company with his brother. The offender asked the complainant if she wanted to have sex and she replied 'yes'. They had sexual intercourse (using a condom) in the bedroom. The offender also said that he didn't address his mind to the complainant's age because he wasn't aware that there was a law prohibiting sexual conduct between two consenting people. The offender believed that as long as the complainant was willing to have sex he was not doing anything wrong. The offender had no prior convictions. He was sentenced to a Community Based Order for 12 months.[11] However, as a result of this offence he will be subject to the reporting obligations under the CPOR Act for 15 years.

Case example 23

The offender pleaded guilty to one count of sexual penetration of a child of or over 13 years and under 16 years. The offender was 19 years and the complainant was 14 years at the time of the offence. The offence took place after the offender and the complainant met up with each other in a regional town. They knew each other, having met before. The complainant asked the offender if she could see him that night, to which he replied 'yes'. They met at a house and the complainant willingly participated in sexual activity with the offender. The offender admitted to police that he was aware that the complainant was 14 years of age and he said that he had seen the complainant drinking alcohol before the offence. He believed he was dealing with a contemporary and he didn't fully appreciate the law in relation to sex with a person under the age of 16 years. The offence only came to light after the complainant was found to have contracted a sexually transmitted disease and she nominated the offender as well as two others as persons with whom she had engaged in sexual activity. She did not make a complaint about the incident itself. There was no predatory behaviour, pressure, abuse of trust or coercion.

At the time of the offending the offender had no prior convictions. The offender was working as a station hand and his employer gave evidence about his strong work ethic and that he was prepared, despite the commission of this offence, to continue to employ him. The oral pre-sentence report indicated that the offender came from a close and well respected family. The offender was described as 'intelligent but unsophisticated', especially in comparison to a 19-year-old from the metropolitan area. It was also explained that many young Aboriginal men in regional and remote areas do not necessarily think about or understand the distinction between a girl under 16 years and a girl aged 16 years. In particular, the officer from Community Justice Services referred to a general lack of sex education for Aboriginal people in the Kimberley.

The state submitted that a sentence of suspended imprisonment would be appropriate; however, the defence counsel argued for a Conditional Release Order or a Community Based Order with a spent conviction. At the time of sentencing the offender was 21 years of age. The offender was sentenced to a Community Based Order for 12 months. The sentencing judge stated that:

> One of the consequences of your conviction of this offence will unfortunately be that you will be subject to reporting obligations under the Community Protection Offender Reporting Act, and that will be for the next 15 years ... I say that that's unfortunate because I just can't believe that the legislature really intended that legislation of that kind should apply to people like you [who] have had sex with a girl who was four and a half years younger than you, but nevertheless, that's the law and that's what you will have to comply with.[12]

Young adult offenders

In the Commission's view the offenders' culpability is reduced in the abovementioned cases because the offenders did not know that they were committing an offence. These cases support the contention that mandatory sex offender registration for very young adults who have engaged in consensual sexual activity with an underage person is not always appropriate. The Commission has also been informed of other cases where, although the offender was aware that underage sexual activity is against the law and was aware of the complainant's age, the circumstances suggest that automatic registration without any assessment of the offender's risk is arguably unfair.

11. Information obtained from Sentencing Transcript.

12. Information obtained from Sentencing Transcript.

Case Example 24

The offender pleaded guilty to 11 counts of sexual penetration of a child of or over 13 years and under 16 years. At the time of the offending behaviour the offender was 18½ years old. The complainant, who was just over 14½ years of age, was a willing participant in the sexual activity. Thus there was an age disparity of four years. The offender was aware of the complainant's age and admitted to police that he knew it was wrong to have sex with a 14-year-old. The pre-sentence report also indicated that the offender was 'a somewhat immature and naive 18-year-old'.

The offender had no criminal history. The sentencing judge determined that the seriousness of offences warranted a term of imprisonment but because the offender's level of culpability was at the lower end of the scale a sentence of 40 months' imprisonment suspended for 24 months was imposed.[13] This offender will be subject to the CPOR Act for 15 years.

Case example 25

The offender, who was 21 years of age, was convicted of two counts of sexual penetration of a child of or over the age of 13 years but under the age of 16 years. The complainant was 15 years. The offender and complainant commenced a consensual relationship which lasted for approximately three months. The relationship ended after an incident which led to the offender being charged with aggravated assault and other matters. Although the offender had a criminal record he did not have any convictions for sexual offending. The offender was sentenced to an Intensive Supervision Order for 18 months.[14] He will be subject to the CPOR Act for 15 years.

The Commission was told of another case where an 18-year-old male was convicted of sexual penetration of a 14-year-old child. The complainant had initiated the sexual conduct. Before the offender and the complainant had sexual intercourse they engaged in a mature conversation about safe sex and the use of contraception. The offender had no criminal record and as a result of the conviction he will be required to comply with the reporting obligations under the CPOR Act for 15 years.[15] Another example mentioned involved a young man who was dealt with for having sexual relations with an underage girl. The man was charged because the complainant became pregnant. However, the offender and the complainant are apparently now living together and looking after their baby – yet the offender remains subject to reporting obligations for 15 years.[16]

During consultations, the Chief Justice referred to the Kimberley Taskforce and noted that there were a number of cases involving 18- to 19-year-old Aboriginal males being charged in relation to consensual sex with girls aged around 14 to15 years.[17] In fact, one police officer advised the Commission that about half of all the adult reportable offenders in a particular Kimberley town were young adult males who had been dealt with for consensual sexual activity with underage girls. These offenders were not viewed as predatory offenders and it was suggested that they did not necessarily need to be subject to registration.

The inappropriateness of mandatory registration for young adults who have engaged in consensual sexual activity with an underage child was acknowledged in South Australia. In order to accommodate similar concerns, the Bill in that state was amended to exclude an adult offender— who is not more than three years older than the victim— from mandatory registration.[18] However, this exception is restricted to adults aged 18 and 19 years of age. Under the *Child Sex Offenders Registration Act 2006* (SA) certain Class 1 and Class 2 offences are defined with reference to prescribed circumstances – if the offence occurred in the prescribed circumstances it is not classified as a Class 1 or Class 2 offence. Part 1 of schedule 1 of the *Child Sex Offenders Registration Act 2006* provides that an 'offence occurred in prescribed circumstances' if

(a) the victim consented to the conduct constituting the offence; and

(b) either—

(i) the offender was, at the time of the offence, 18 years of age and the victim was not less than 15 years of age; or

(ii) the offender was, at the time of the offence, 19 years of age and the victim was not less than 16 years of age.

If such a provision existed in Western Australia it would not have applied to the various case examples referred to above. The age disparity in the above cases ranges from

13. Information obtained from Sentencing Transcript.
14. Information obtained from Statement of Material Facts and lawyer.
15. Information obtained from lawyer.
16. Consultation with Chief Judge Peter Martino, District Court of Western Australia (29 July 2010).
17. Consultation with Chief Justice Wayne Martin, Justice Peter Blaxell and Justice Lindy Jenkins, Supreme Court of Western Australia (28 June 2010).
18. South Australia, *Parliamentary Debates*, House of Assembly, 16 November 2006, 1303–1304 (MJ Atkinson, Attorney General).

4–10 years. It has been suggested that an age disparity of five years or more 'could reasonably be construed to indicate that a power imbalance was operating or grooming was being undertaken'.[19] However, Wheeler JA has observed that:

> Abuse is not established – is not proved – by mere disparity in age. As a general rule, the greater the disparity in age, the more likely it is that there will also be disparity in power (physical, social and emotional), in understanding, in intellect and so on, and the more likely it is therefore that any consent to sexual activity will have been the result in whole or in part of use of that greater power. However, this is not a matter of simple mathematical calculation ... Disparity in age is, then a relevant factor, but its significance may vary considerably between cases.[20]

For these reasons, the Commission emphasises that setting strict rules about age disparity is problematic. An age disparity of more than five years may suggest abuse in most, but not necessarily all, cases.

The following account of a recent Tasmanian case illustrates the difficulty in making assumptions about age disparity as well as the inherent problems of applying mandatory laws. A 23-year-old male was sentenced in November 2010 for engaging in a sexual relationship with a young person under the age of 17 years (the age of consent being 17 years in Tasmania). The complainant was 15 years old at the time of the relationship and she was under the care of the Department of Health and Human Services, having been subject to a guardianship order. The complainant became pregnant as a result of the relationship and she advised a worker at her group home. The worker notified the police; the complainant initially refused to cooperate but eventually admitted that she had been involved in a sexual relationship with the offender. The sentencing judge emphasised that departmental workers had been aware of and had 'condoned' the relationship; the offender would pick the complainant up from the group home every Friday and she would stay with the offender at his mother's home. The group worker would then collect her at the end of the weekend.

Both the offender and the complainant wished for the relationship to continue and to care for their baby together, and they had accepted that they could not engage in sexual activity until the complainant turned 17 years. The sentencing judge observed that the courts 'are more and more frequently being called upon to sentence young men for this crime in circumstances where the female involved was an entirely willing partner'; however, the 'law exists to protect young people'.[21] In order to reflect the need for general deterrence, the offender was sentenced to a term of five months' imprisonment suspended for two years. Under the Tasmanian sex offender registration law, a sentencing court has discretion not to make a registration order if satisfied that the offender does not pose a risk of committing another reportable offence.[22] The sentencing remarks for the above case do not mention the *Community Protection (Offender Reporting) Act 2005* (Tas) at all; bearing in mind that s 6(2) of that Act provides that a registration order must be made at the time the sentence is imposed, it is assumed that no registration order was made. The Commission emphasises that if the offender had committed the offence and been sentenced in Western Australia he would be subject to registration and reporting for 15 years.

Adult Offenders with Mental Health Issues

The registration of sex offenders who suffer from mental health issues is problematic. The Australasian Police Ministers' Council national working party recommended that people with a mental illness or intellectual disability should not be excluded from the registration scheme because such persons may pose a significant risk to children. It was stated that '[m]entally ill and intellectually impaired offenders may actually pose a higher recidivist risk than the general offender population, given they generally have less control over their actions'.[23] On the other hand, it was acknowledged that such offenders may find it difficult to comply with the requirements of registration.[24] There are two types of mentally impaired persons who can be liable to sex offender registration in Western Australia: those who are acquitted on account of insanity and those who are convicted.

Persons acquitted on account of unsoundness of mind

In Western Australia mandatory sex offender registration applies to accused who have been held not to be criminally responsible for a reportable offence pursuant to s 27 of the *Criminal Code* (WA) and who have been made

19. Professor D Kenny & Dr Christopher Lennings, Submission to the New South Wales Legislative Council Standing Committee, *Law and Justice Inquiry into Spent Convictions for Juvenile Offenders* (March 2010) 5.
20. *The State of Western Australia v SJH* [2010] WASCA 40, [54].
21. *The State of Tasmania v MJJ* (sentencing remarks, 8 November 2010, Tennent J).
22. *Community Protection (Offender Reporting) Act 2005* (Tas) s 6.
23. Inter-jurisdictional Working Party, *Child Protection Offender Registration with Police: A national approach,* Report to the Australasian Police Ministers' Council (2003) 82.
24. Ibid 83.

subject to a custody order under Part 4 of the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) ('the CLMIA Act').[25] If an accused is found not guilty on account of unsoundness of mind, a superior court must make a custody order under the CLMIA Act if the offence is listed in schedule 1 of that Act.[26] Relevantly, schedule 1 includes indecent assault, aggravated indecent assault, sexual penetration without consent, aggravated sexual penetration without consent, sexual coercion and aggravated sexual coercion. The schedule does not include child-specific sexual offences under ss 320 and 321 of the *Criminal Code*. So, an accused acquitted under s 27 of the Code in relation to these offences may or may not have a custody order imposed.

If a custody order is made, the person will be held in a prison or an approved place (eg, Graylands Hospital) until released by the Governor following a recommendation by the Mentally Impaired Accused Review Board. In deciding whether to recommend the release of a mentally impaired accused, the Board must consider a number of factors including 'the degree of risk that the release of the accused appears to present to the personal safety of people in the community or of any individual in the community'.[27] One argument against registration of such persons is that they have not been held responsible for their actions under the criminal law.[28] Still, if persons who remain unconvicted of any crime can be held in custody it is difficult to argue that they cannot also be required to comply with registration and reporting conditions. On the other hand, if a determination is made that mentally impaired accused can be released from custody (either unconditionally or conditionally) it is arguable that registration is unnecessary. The New South Wales Ombudsman's report stated that:

> One argument for excluding forensic patients from registration is that they are not released into the community until the Mental Health Review Tribunal determines that 'no member of the public will be seriously endangered by the person's release'. However, it should also be noted that this is a somewhat different test to that which must be used by the [Administrative Decisions Tribunal] in deciding whether or not a person with lifetime reporting obligations is entitled to have those obligations suspended after 15 years, namely, 'the person does not pose a risk to the safety of children'.[29]

This argument was raised during consultations – it was suggested that persons subject to a custody order under the CLMIA Act should not be subject to sex offender registration because they will not be released from custody until it is determined that it is safe to do so.[30] However, the Commission notes that under the CPOR Act the applicable test is whether the offender poses 'a risk to the lives or the sexual safety of one or more persons or persons generally'.[31] Under the CLMIA Act a decision to release a mentally impaired accused from a custody order must take into account the 'degree of risk' posed by the accused as well as other factors (eg, whether the accused may benefit from treatment, whether the accused is likely to comply with conditions if released, whether the accused is able to take care of his or her day-to-day needs and the 'objective of imposing the least restriction of the freedom of choice and movement of the accused').[32] The Commission is not persuaded that sex offender registration is inappropriate for mentally impaired accused who have been subject to a custody order under the CLMIA Act.[33] In less-serious cases (and for the types of offending behaviour described in this chapter) the court will have discretion to determine if a custody order is necessary in any event.

Offenders with mental illness or intellectual disability

One common scenario mentioned during consultations concerned intellectually disabled young adults who engage in consensual sexual activity with underage children. It was observed that in some cases the older person has a similar intellectual age as the younger person.[34] An offender's intellectual and emotional maturity may be relevant when assessing their culpability in regard to a sexual offence committed against a child.

25. *Community Protection (Offender Reporting) Act 2004* (WA) s 3.
26. *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) s 20. If the offence is not listed in the schedule a superior court *may* make a custody order. A summary court has discretion to make a custody order in relation to an accused found not guilty on account of unsoundness of mind.
27. *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) s 33(5).
28. New South Wales Ombudsman, *Review of the Child Protection Register: Report under s 25(1) of the Child Protection (Offenders Registration) Act 2000* (2005) 38.
29. Ibid 23.
30. Consultation with Sandra Boulter (Principal Solicitor), Sally Dechow and James Woodford, Mental Health Law Centre (25 May 2010).
31. See, eg, *Community Protection (Offender Reporting) Act 2004* (WA) ss 53 & 61.
32. *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) s 33(5).
33. The Commission notes that in June 2010 there were no reportable offenders on the Western Australian register who had been released from a custody order made under the CLMIA Act: consultation with Detective Inspector Paul Steel (Sex Crime Division) and Martyn Clancy-Lowe (State Coordinator Sex Offender Management Squad), Western Australia Police (28 June 2010).
34. Consultation with Chief Judge Peter Martino, District Court of Western Australia (29 July 2010); consultation with Norm Smith, Manager, Kimberley Community Justice Services, Department of Corrective Services (21 July 2010).

A regional police officer advised that he was responsible for monitoring a 19-year-old male who was a reportable offender as a consequence of having consensual sex with a 12-year-old girl. He said that this offender had a mental age of about 14 years. The Commission was told of another case where a male in his mid-20s had been charged for engaging in a sexual relationship with a 13-year-old girl. It was stated that this man has a mental capacity of about 12 to 14 years. The girl's family supported and encouraged the relationship and took her to see him on occasions. It was suggested that his culpability was significantly reduced because he would have found it difficult to understand that what he was doing was wrong given the apparent acquiescence of her family and his mental capacity. At the time of the alleged offence the man had no criminal record but has since been dealt with for breaching bail conditions.[35] If convicted, this young man will be subject to the CPOR Act for 15 years.

Similar cases have arisen in other jurisdictions. In South Australia, the possibility of mandatory sex offender registration laws capturing people who would not ordinarily be regarded as 'paedophiles' was raised in Parliament. One Member of Parliament referred to a case where a mother of a 12- or 13-year-old girl had encouraged an adult male who was intellectually disabled (with a mental capacity of about 11 to 12 years) to engage in a consensual sexual relationship with her daughter.[36]

In 2010 in Tasmania a 32-year-old intellectually disabled woman was convicted of a number of offences arising out of a sexual relationship with 14-year-old girl.[37] The sentencing judge observed that the offender was aware that it was against the law to engage in sexual activity with a 14-year-old but also noted that the offender 'had little or no understanding of why it was against the law, or how wrong most people would consider such activities to be between a 32-year-old and a 14-year-old'. The judge stated that the offender was emotionally and intellectually at 'about the same level of maturity as many 14 year olds' and that she was 'no better equipped to make decisions about sexual matters than the sorts of people that the law seeks to protect by making sexual activities with minors illegal'. She was sentenced to 18 months' probation. The sentencing judge had limited discretion in relation to whether the offender should be subject to registration under the *Community Protection (Offender Reporting) Act 2005* (Tas) – a registration order was required to be made unless the court was satisfied that the offender did not pose a risk of committing a reportable offence in the future.[38] Although satisfied that the offender would not knowingly engage in sexual activities with an underage person in the future, the judge was of the view that—because of her intellectual and emotional functioning—there was a risk that she might unwittingly engage in sexual relations with an underage child if deceived by the young person about their age.[39] The judge commented that in this case, registration would constitute 'some sort of punishment': if the offender was to purchase a new car, move into a new house or move in with a partner who had children, those events would ordinarily be 'joyful', but the offender will be required to report such occasions to the police. It was also noted that the offender would need assistance to comply with the reporting requirements. The judge stated that it 'is almost inconceivable that there would be any useful purpose ever in her being on the register', but nonetheless ordered her to report under the *Community Protection (Offender Reporting) Act 2005* for 18 months.[40]

It is the Commission's view that a person's intellectual disability may reduce culpability in child-specific sexual offences, in particular, where the offender's mental capacity is similar to the chronological age of the complainant. On the other hand, it was observed during consultations that even where a 30-year-old has a mental capacity of a 15-year-old, the adult has still had an extra 15 years of social exposure and experience; hence, a cautious approach should be adopted in relation to sexual activity between an intellectually disabled adult and an underage child. Further, the age disparity will be relevant in this regard (eg, a 20-year-old intellectually disabled male having consensual sex with a 15-year-old is different from a 30-year-old intellectually disabled male having consensual sex with a 15-year-old girl).[41]

The Commission does not consider that intellectually disabled or mentally impaired offenders should be excluded from the ambit of the sex offender registration

35. Information obtained from lawyer.
36. South Australia, *Parliamentary Debates*, House of Assembly, 29 June 2006, 733 (Mrs Redmond).
37. *State of Tasmania v O* (26 May 2010, sentencing remarks, Blow J).
38. The Tasmanian legislation refers to the risk of committing a reportable offence in the future rather than the risk to the lives or sexual safety of any person.
39. The offender had been charged with a number of counts of indecent assault and aggravated sexual assault pursuant to ss 127 and 127A of the *Criminal Code Act 1924* (Tas). Under these sections consent is only available as a defence in limited circumstances (ie, where there is a close age difference between the accused and the complainant). Otherwise, consent of a child under the age of 17 years is irrelevant. A defence of reasonable but mistaken belief about the age of the complainant is not mentioned in these sections; however, under s 124 it is available as a defence to a charge of having sexual intercourse with a child under the age of 17 years.
40. Under the Tasmanian legislation the court has discretion in relation to the length of the reporting period.
41. Consultation with Katherine Hams, Manager, Kimberley Aboriginal Medical Services Council (21 July 2010).

scheme; however, intellectual disability or other mental health issues may be relevant when assessing culpability and future risk. As Wheeler JA has observed:

> [E]ven where a young person between 13 and 16 does appear to wish to engage in sexual activity, there is a duty cast upon others to refrain from encouraging or acting upon those wishes. The more mature the other person, the greater the degree of self-control which should be demanded of them.[42]

This is why it is generally understood that it is more serious for an older person (eg, 30-year-old) than a younger adult (eg, 18- or 19-year-old) to engage in consensual sexual activity with an underage child. Adults with intellectual disabilities or impaired mental functioning may not have the maturity and capacity to exercise the same degree of self-control or to understand the need to refrain from engaging in underage sexual activity that would be expected of another person of their age group. However, depending on the circumstances (eg, availability of support and treatment) they may also pose an ongoing risk. Therefore, the Commission is of the view that an individualised approach to such offenders is necessary.

Compliance issues

Evidently, offenders with intellectual disabilities and mental health issues may experience great difficulty in complying with sex offender registration and reporting obligations; they may have problems understanding the requirements of the legislation and in meeting those requirements on an ongoing basis. The following case illustrates these points and serves to highlight the problems for offenders with mental illness or intellectual disabilities (as well as other disadvantages). While many such offenders should nonetheless be subject to registration it is important that those who do not pose a risk are excluded so that they are not liable to the consequences for failure to comply.

Case example 26

A traditional Aboriginal male, who was about 50 years old, was sentenced for child sexual offences in the Northern Territory and placed on the Australian National Child Offender Register ('ANCOR'). He had convictions for indecent assault and attempting to procure a child under the age of 16 years to engage in sexual activity. The offences involved young children aged less than 10 years. Information from the pre-sentence report suggested that the police considered him to be high risk and he was required to report to police at least every three months.

The offender had been dealt with for at least four breaches of his reporting obligations under the CPOR Act over a one-year period. He was fined for the first two offences and then sentenced to imprisonment for the second two offences. Some months later he was again charged with failing to report and failing to notify the police of a change of address. He had moved to two different remote locations in the Kimberley without notifying police. The Statement of Material Facts provided that the reporting process had been explained to the offender by an interpreter and, when questioned, the offender acknowledged that he understood the process.

However, a Kimberley magistrate reported that when the charge was read to the offender 'he did not appear to understand it'. Another prisoner in the lock-up was used to interpret in court.[43] A psychologist's report prepared for an earlier matter revealed that the offender had very limited English language skills and poor hearing (he was profoundly deaf in one ear and had a badly perforated eardrum in the other). The psychologist stated that the offender 'functions at an intellectual level markedly below average'. The conclusion reached by the psychologist was that:

> [F]or both cultural and intellectual reasons, I do not believe he has the capacity to remember dates and regular obligations and, even if he were to report to police once or twice, one can predict that he would soon fail again. Unless some alternative means for him to fulfil his obligations can be found, he is likely to face many similar charges and spend much unmerited time in prison in the future.

Also, an earlier pre-sentence report stated that an interview was conducted with the offender but 'due to communication barriers the interview could not occur'.

The offender entered a plea of guilty to the latest charge of failing to report pursuant to the CPOR Act; however, it has subsequently been observed that 'in hindsight' he may have had a defence to the charge under s 63 of the CPOR Act.[44] The magistrate has

42. *Riggall v The State of Western Australia* [2008] WASCA 69, [21].

43. Crawford C, 'Families Impacted by the Criminal Justice System on the Frontier: A new model required' (2010) 17 *Psychiatry, Psychology and the Law* 464, 470.

44. Ibid 471. In determining if a reportable offender has a reasonable excuse for failing to comply with reporting obligations the court is to have regard to, among other things, whether the offender has a 'disability that affects the person's ability to understand, or to comply with, those obligations' and 'whether the form of notification given to the reportable offender as to his or her obligations was adequate to inform

since commented that he suffered from a number of disadvantages:

> He was illiterate so the statutory notice setting out his obligations was of no assistance to him; he did not understand or use standard English; he was profoundly deaf in one ear and had minimal hearing in the other; he had a cognitive impairment such that he was assessed as having an intellectual level markedly below average; he was spoken to in his own community like a child; he had served at least 12 months already for previous failures to report despite the criminal justice system having that information about his limitations.[45]

The offender was remanded in custody for 3–4 weeks in order for a community corrections officer to investigate community-based options. He was then placed on an Intensive Supervision Order for 12 months. A number of months later he was charged with failing to comply with the order because he had failed to report to his community corrections officer in the first month.[46] As the magistrate has since observed the 'reality is that [this offender] will never have the capacity to report as required'.[47]

The Commission is not suggesting that this offender should be exempt from registration; however, it appears that different processes could have been employed to maximise his understanding and compliance. As Magistrate Crawford has observed, if the purpose of sex offender registration is 'risk reduction' then 'comprehension by the offender, of his obligations, so as to ensure compliance, is paramount'.[48]

Presently, s 35 of the CPOR Act provides that if a reportable offender has a disability[49] that 'makes it impossible or impractical for him or her to make a report on their own' a parent, guardian, carer or other person may accompany them to the police station and make the report on their behalf. For 'personal details' that do not have to be reported in person, the support person can make the report on behalf of the offender. In general terms, the Commission was told that people with a mental illness do not have adequate support in the community and may not have access to a support person to assist them with their reporting obligations.[50]

On the other hand, the Western Australia Police advised that reportable offenders with mental health problems are often accompanied by support persons when they attend the police station (eg, from the Disability Services Commission or the Public Advocate).

The Commission acknowledges that special measures have been put in place to assist vulnerable reportable offenders when they report to police. The Western Australia Police informed the Commission that the following arrangements are made to assist reportable offenders with disabilities or other special needs:

- interpreters are provided for each meeting for reportable offenders who speak English as a second language;
- a support person attends with reportable offenders who have intellectual disabilities;
- reportable offenders with special needs can meet police at a location of their choice;
- a representative from the Office of the Public Advocate will attend meetings with some reportable offenders; and
- an Aboriginal Elder or other support person will attend meetings with some Aboriginal reportable offenders from remote communities.[51]

If these arrangements are consistently used, they go a long way to assist reportable offenders once they are in contact with police. However, reportable offenders are usually first notified of their reporting obligations and consequences of non-compliance by court staff (if sentenced to a non-custodial order) or by prison staff (if sentenced to imprisonment). Thus, if a reportable offender does not understand the initial requirement to report at the time when he or she is first advised, the offender may not attend the first meeting with police. Further, the Commission's consultations and the abovementioned case would suggest that these arrangements are not always adopted in regional and remote areas.[52]

In regard to the initial notification of reporting obligations the legislation merely stipulates that a reportable offender must be provided with written notification of his or her reporting obligations and the consequences of

him or her of those obligations, having regard to the offender's circumstances' (s 63(2)).

45. Ibid 470–1.
46. Ibid 472.
47. Ibid 472. Information also obtained from lawyer.
48. Ibid 471.
49. Disability is defined in s 3 to include 'any defect or disturbance in the normal structure or functioning of the person's brain'.
50. Consultation with Sandra Boulter (Principal Solicitor), Sally Dechow and James Woodford, Mental Health Law Centre (25 May 2010).
51. Email correspondence with Martyn Clancy-Lowe, State Coordinator, Sex Offenders Management Squad, Western Australia Police (26 November 2010).
52. People consulted in regional Western Australia advised that interpreters are seldom used for matters under the CPOR Act: see Chapter Two, 'Assistance and support to reportable offenders'.

failing to comply.[53] There is no requirement to provide an interpreter when providing this notification, nor is there any requirement to make other arrangements to ensure that the reportable offender fully understands the obligations and consequences of non-compliance.

The form 'Notification of Reporting Obligations' includes an acknowledgment of notification – there is a space for reportable offenders to sign (or decline to sign) that they have read the notice (or that they have had it read to them) and that they understand they are required to report their personal details to police on a particular day. There is also a space for the person serving the notice to certify that the reportable offender has been personally served with the notice, has been provided with a brochure, and has signed the notice as having received and understood the contents.

Various factors (such as language and cultural barriers) may prevent a proper understanding of the reporting obligations in these circumstances. Intellectual disability or other mental health issues will compound these problems. The national working party acknowledged that some offenders 'may not be able to comprehend their obligations if simply given a standard written notice'.[54] It suggested that special provisions should be included for vulnerable offenders including that the police should be able to notify a support person of the offender's reporting obligations and the consequences of non-compliance.[55]

Section 114(2)(e) of the CPOR Act provides that regulations may be made for or with respect to:

> (e) the notification of reporting obligations to reportable offenders, including —
>
> (i) the manner and form in which the information is to be given to reportable offenders;
>
> (ii) requiring the reportable offender to acknowledge being given the notice and prescribing how that acknowledgment is to be given;
>
> (iii) making special provision for the notification of reportable offenders who are children or who have disabilities or other special needs;
>
> (iv) requiring or authorising a person to be notified of a reportable offender's status as a child or person who has a disability or other special need to facilitate notification and reporting;
>
> (v) providing for the notification to be given to a carer of, or a person nominated by, a reportable offender who may be unable to understand his or her reporting obligations or the consequences of failing to comply with those obligations;
>
> (vi) requiring that a reportable offender be given additional information to that required by this Act;
>
> (vii) requiring a person to provide specified information to reportable offenders concerning their reporting obligations;
>
> (viii) requiring a person to inform the Commissioner —
>
> (I) that a reportable offender has left the custody or control of the person;
>
> (II) that the person has given specified information to a reportable offender;
>
> (III) that, in the opinion of the person, a reportable offender does or does not have the legal capacity to understand specified information;
>
> and
>
> (ix) requiring a person to give the Commissioner any acknowledgment by a reportable offender of the receipt of a notice or any other specified information that is held by the person.

No such regulations have been made in Western Australia; however, special provisions exist in some other jurisdictions. For example, regulation 15 of the *Child Protection (Offender Reporting and Registration) Regulations 2004* (NT) provides that the Commissioner must take reasonable measures to assist a child reportable offender or a reportable offender with a 'special need'[56] in understanding his or her reporting obligations and the consequences of non-compliance. Such measures may include an oral explanation, an audio or video explanation, a translation of the notice into a familiar language, the provision of an interpreter, or the provision of assistance from persons with special experience or the provision of a support person. Under Regulation 16 the Commissioner can inform a support person of the offender's reporting obligations (including a public authority that provides support to the offender) if the Commissioner forms the opinion that the offender (because he or she is a child or has a disability) is unable to understand the reporting obligations or consequences of non-compliance.[57]

53. *Community Protection (Offender Reporting) Act 2004* (WA) s 67.
54. Inter-jurisdictional Working Party, *Child Protection Offender Registration with Police: A national approach,* Report to the Australasian Police Ministers' Council (2003) 138.
55. Ibid 139.
56. Regulation 3 defines a reportable offender with a special need to include a reportable offender who has impaired intellectual functioning; who is subject to guardianship order; who is illiterate or is not literate in the English language; who is visually impaired; or who is 'subject to some other condition that may prevent the person from being able to understand a written notice'.
57. Regulation 14 of the *Sex Offenders Registration Regulations 2004* (Vic) provides that notification can be given to a carer of a child or a person who has disabilities or other special need if that person is unable to understand the reporting obligations or the

Because of the concerns expressed above, the Commission is of the view that regulations should be made in Western Australia. The Commission believes that the provision of special measures to assist vulnerable persons in understanding their obligations should be mandated rather than reliant on policy or individual practices. Such measures will reduce the potential for inadvertent breaches of the legislation and subsequent arrest, as well as increase the chance of compliance (and consequently improve the effectiveness of the scheme).

PROPOSAL 12

Notification of reporting obligations to children and persons with special needs

1. That the Western Australian government make regulations under s 114 of the *Community Protection (Offender Reporting) Act 2004* (WA) to provide for special measures for reportable offenders who are children and for reportable offenders with special needs who may have difficulties in understanding their reporting obligations and the consequences of non-compliance.
2. That such special measures should include the provision of a qualified interpreter, a written translation of the formal notice of reporting obligations, the assistance of a support person at the time notification is given and the provision for the person responsible for notifying the reportable offender to give notice to a parent, guardian, carer or other support person of the reporting obligations and the consequences of non-compliance.

Other Exceptional Cases

In the Commission's view the abovementioned categories constitute examples of exceptional circumstances. However, other case examples suggest it would be problematic to restrict the phrase 'exceptional circumstances' to specific defined categories; there is always the possibility that a case will not fit within those definitions but still demand an alternative to mandatory registration. The case below and discussion following illustrates this point.

consequences of non-compliance. See also *Child Sex Offenders Registration Regulations 2007* (SA) reg 16; *Child Protection (Offenders Registration) Regulation 2009* (NSW) cl 14.

Case example 27

A 35-year-old woman pleaded guilty to four counts of sexual penetration of a child of or over 13 but under the age of 16. The male complainant was between 14 and 15 years at the time of the offences. He was a friend of the offender's son and the offences mostly took place while the complainant was at the offender's house to see her son. Before the first offence took place, the complainant had gone with the offender and her son to stay at a caravan park. The offender and the complainant were asleep next to each other on the same bed but both fully clothed and in separate sleeping bags. During the night the complainant woke up and began kissing the offender. Later the next day, at the offender's house, the complainant entered the offender's bedroom; they both removed their clothing and had sexual intercourse. On each subsequent occasion the sexual conduct was initiated by the complainant (by him entering her bedroom at night).

The offender was a teacher and had taught the complainant some years earlier; however, the offender was not charged with the aggravating circumstances of the complainant being under her care, authority or supervision. However, as a result of the offences, the offender lost her job as a teacher and became estranged from her son. The offender suffered from clinical depression and was described as a lonely woman. There was some suggestion that she had been subject to sexual abuse as a child. She had only one prior intimate relationship which commenced when she was in her last year at school. As a result of this union she became pregnant. The father of her child went away to university and the offender had waited for him to return to her but he never did.

A psychological report suggested that her need for emotional intimacy, rather than physical/sexual pleasure, was the motivation for the offences and the offender was considered to be a low-risk of engaging in future relationships with teenage boys. The offender had no prior record. The sentencing judge stated that the 'complainant was in control of when and if sexual contact occurred' and he told the police that he was 'just in it for the sex pretty much'.[58] The complainant told a friend about the conduct and the friend reported it to the school chaplain. The offender was sentenced to 27 months' imprisonment. On appeal, the sentence was reduced to 18 months' imprisonment suspended for 12 months.[59] This offender will be subject to reporting obligations under the CPOR Act for 15 years.

58. *CJ v The State of Western Australia* [2009] WASCA 42, [16].
59. Ibid [115].

In Queensland, an adult offender pleaded guilty to one count of indecent dealing of a child under the age of 16 years. The victim, who was less than 12 years old at the time of the offence, had been in the offender's care because he and his wife ran a day and night childcare facility. The offender had placed his hand underneath the child's underpants while she was sleeping and touched her vagina. The child was unaware that the incident had occurred. The offender suffered extreme guilt and attempted suicide. He later confessed the incident to his step-son who then told the offender's wife; as a result their relationship broke down. Some years later the offender confessed to police and at the time of sentencing (about eight years after the incident) the victim was still not even aware of the matter (the offence would never have been detected if the offender had not confessed). The offence occurred at a time when the offender was suffering significant stress and was heavily intoxicated. The offender had no criminal record and was not considered to be at risk of reoffending. He was sentenced to a suspended sentence of imprisonment and the offender appealed the sentence. On appeal it was held that a conviction should be recorded because of the serious nature of the offence; however, because of the numerous mitigating circumstances (which were described as 'exceptional'), a good behaviour bond was imposed. Because the offence was classified as a Class 2 offence under the Queensland legislation and the offender did not receive a sentence of imprisonment or supervision, he was excluded from the scope of the mandatory registration provisions.[60] Had this offender been dealt with in Western Australia, the offence would be classified as a Class 1 offence and irrespective of the sentence imposed he would have been subject to reporting obligations for 15 years.[61]

An unusual case occurred in New South Wales. The offender was convicted of a number of serious offences of violence as well as one count of aggravated indecent assault. The offender inflicted serious violence on his 10-year-old nephew after finding out that he and his 15-year-old brother had sexually assaulted the offender's 6-year-old daughter on numerous occasions. The offender was told that 'on one occasion they had used a drug that would put her to sleep and enable them further to assault her'.[62] After being questioned by the offender, the nephew admitted that 'he and his brother had used an implement or a "machine" in the region of his daughter's genitals'.[63] The offence of aggravated indecent assault involved the offender forcibly twisting forceps on the nephew's penis (over his clothing). The offender was sentenced to a substantial term of immediate imprisonment. He was also subject to sex offender registration for a period of eight years (which would not commence until he was released from prison). On appeal it was observed that

> It is true that the present is an unusual case to come within the provisions of the *Offenders Registration Act.* The *Offenders Registration Act* is plainly designed to provide protection for the victims, past and potential, from individuals who pose a risk to them – that is, a risk that they will commit offences of a sexual nature. On no view of the present case could it be said that the applicant has a predilection sexually to molest children, or is likely to pose such a risk in the future. The *Offenders Registration Act* does not appear to envisage any exemption from its provisions, even where it can be clearly seen that an offender does not pose a relevant risk.[64]

These offences are extremely serious and the imposition of a substantial term of imprisonment is appropriate.[65] However, it is questionable whether this offender should be subject to sex offender registration and, as the appeal court observed, 'branded' and known to the local police as a 'sex offender' for eight years after he is released.[66]

60. See *Child Protection (Offender Reporting) Act 2004* (Qld) s 5.
61. *R v Kelly* [2009] QCA 185.
62. *TMTW v R* [2008] NSWCCA 50, [6].
63. Ibid.
64. Ibid [51].
65. It is noted that there are many serious violent offenders who receive substantial terms of imprisonment but who are not subject to registration and reporting obligations upon their release.
66. *TMTW v R* [2008] NSWCCA 50, [53].

The impact of sex offender registration on adult offenders

In assessing whether mandatory sex offender registration should apply to *all* adult offenders found guilty of committing a child sexual offence, and in particular whether mandatory registration should apply to cases such as those described in the preceding section, it is necessary to take into account the consequences of registration. Many of the practical consequences of and potential problems associated with registration have been discussed in Chapter Five in relation to juvenile reportable offenders. In this section the Commission briefly discusses some case examples and issues raised during consultations to demonstrate that adult reportable offenders are not immune from similar difficulties.

Community Reintegration and Stigma

Concerns about negative labelling are usually mentioned in relation to children; however, there is potential for young adults to also suffer stigma. As noted in Chapter Five, Christabel Chamarette expressed the view that for children 'whose sense of identity is fragile and evolving' the label of 'sex offender' may become a 'self-fulfilling prophecy'.[1] It is reasonable, in the Commission's view, to assume that an 18-year-old offender may suffer negative effects of labelling in much the same way as a 17-year-old offender. In a recent New South Wales study involving eight adult registered offenders, it was asserted that the registration is a 'constant reminder' of the offence and can increase 'stress and alienation'.[2] It was also observed that 'emotional stress and social isolation' has the potential to increase the risk of reoffending.[3]

During consultations the Commission was informed of instances where stigma has impacted upon adult reportable offenders. A regional police officer said that he was responsible for supervising an adult reportable offender who works on a station. Police visit this offender at the station to enable reporting and the offender's employer is aware of his registration status. When this reportable offender was told of the duration of his reporting obligations, he replied to the police officer: 'So I can't get another job until 2021'. The police officer explained to the offender that he was free to apply for a different job at any time, but in the police officer's opinion this offender feels too ashamed to seek alternative employment because he may be required to inform a new employer of his registration status. The Commission was also told that a young Aboriginal male, who was working on the mines, resigned from his job as soon as he was convicted of an offence involving consensual sexual activity with an underage girl. This young man believed that if it became known that he was on the sex offender register he would lose his job anyway.[4]

Reporting Obligations

Overlapping obligations

The potential confusion for offenders who are simultaneously subject to reporting obligations under *Community Protection (Offender Reporting) Act 2004* (WA) ('the CPOR Act') and to other reporting requirements (eg, as part of a community-based sentence or as a condition of bail) also arises in relation to adult offenders. The Commission was told of one adult reportable offender who was charged with breaching his bail conditions. The offender had reported to his designated officer in compliance with the CPOR Act and mistakenly believed that this covered his bail reporting conditions as well.[5] Furthermore, adult reportable offenders who are subject to a period of suspended imprisonment remain constantly at risk of imprisonment if they neglect to report or notify police of changes in their personal details.[6] The Commission was advised by the Aboriginal Legal Service in Broome that it is common for their clients to be subject to a period of suspended imprisonment for traffic-related matters and then, in some instances, this sentence is breached because the offender failed to report in compliance with the CPOR Act.[7]

1. Chamarette C, 'Opinion provided to the Law Reform Commission of Western Australia' (10 October 2010).
2. Seidler K, 'Community Management of Sex Offenders: Stigma versus support' (2010) 2(2) *Sexual Abuse in Australia and New Zealand* 66, 70–71.
3. Ibid 71.
4. Information obtained from lawyer.
5. Information obtained from lawyer.
6. Because the offence of failing to comply with reporting obligations under s 63 of the *Community Protection (Offender Reporting) Act 2004* (WA) carries imprisonment as a penalty, it will trigger a breach of a suspended sentence.
7. Consultation with Steve Begg, Ben White and Taimil Taylor, Aboriginal Legal Service, Broome (20 July 2010).

In order to lessen the frequency in which adult reportable offenders are arrested, charged and convicted for failing to report under the CPOR Act the Commission is of the view that its proposal in Chapter Five—to enable government agencies to report on behalf of an offender in specified limited circumstances—should also apply to adult reportable offenders.[8] This proposal has the potential to greatly assist in circumstances where vulnerable offenders (eg, those with an intellectual disability) are being supervised or managed by government agencies.

PROPOSAL 13

Reporting on behalf of an adult reportable offender

1. That the *Community Protection (Offender Reporting) Act 2004* (WA) be amended to provide that if a government agency is involved with an adult reportable offender to the extent that the agency is empowered to make decisions that impact on the status of the reportable offender's personal details (as defined under s 3 the Act) a representative of that agency (if that representative is aware that the offender is a reportable offender under the Act) *may* notify police of any change to the offender's personal details as required under s 29 of the *Community Protection (Offender Reporting) Act 2004* (WA).
2. That s 66 of the *Community Protection (Offender Reporting) Act 2004* (WA) be amended to provide that an adult reportable offender is not to be prosecuted for a failure to comply with s 29 of this Act if a representative of a government agency has provided the police with the required information within the stipulated timeframe.

QUESTION F

Reporting on behalf of an adult reportable offender

Should the ability of a representative of a government agency to report on behalf of an adult reportable offender be limited to specified government agencies and, if so, what should those government agencies be?

8. This was supported by representatives from the Department of Corrective Services. See discussion under Chapter Five, 'Reporting requirements' and Proposal 2.

Problems for Aboriginal reportable offenders

The Commission's regional consultations revealed that Aboriginal people from remote areas may be particularly disadvantaged in relation to the operation of the CPOR Act. The Commission was told that cultural obligations such as attendance at a funeral may take precedence over reporting obligations. The Aboriginal Legal Service in Broome noted that the minimum annual reporting condition requires the offender to report in the same calendar month each year but this period may clash with Aboriginal 'law business'. Moreover, customary law rules may prevent an Aboriginal reportable offender from informing police of the details of a cultural ceremony (eg, location) and as a result the offender may be in breach of the CPOR Act.[9] During consultations it was also suggested that Aboriginal reportable offenders in remote communities may fail to inform members of their family that they cannot travel with them to another community, town or even another state or territory without first informing police. A failure to 'own up' to their registration status is likely to result from a strong sense of 'shame'.[10]

The Commission was also informed that many Aboriginal people find the concept of prolonged reporting difficult to understand.[11] In contrast, traditional physical punishment under Aboriginal customary law was often swift and immediate. Significantly, once the punishment was administered the matter was usually at an end.[12] Although many Aboriginal people have now become accustomed to punishments such as imprisonment and community-based sentences, where the punishment extends for months or years, sex offender registration imposes ongoing and lengthy reporting obligations over and above the sentence imposed for the original offence. In some cases, reporting continues for life. One Aboriginal reportable offender asked his lawyer if there was any way he could be returned to prison for 12 months in order to 'wipe the slate clean' so he could then come out 'free' of all obligations.[13]

9. Consultation with Steve Begg, Ben White and Taimil Taylor, Aboriginal Legal Service Broome (20 July 2010).
10. Consultation with Magistrate Catherine Crawford (9 September 2010).
11. Telephone consultation with Dave Woodroffe, Aboriginal Legal Service, Kununurra (22 June 2010); consultation with Magistrate Colin Roberts, Broome (19 July 2010); consultation with Brianna Lonnie, Simon Holme and Matt Panayi, Legal Aid WA, Kununurra (22 July 2010).
12. Law Reform Commission of Western Australia, *Aboriginal Customary Laws*, Project No 94, Discussion Paper (2005) 90.
13. Information obtained from lawyer.

However, even more critically, Aboriginal offenders living in remote parts of Western Australia may suffer social and economic disadvantages that impact upon their capacity to comply with reporting obligations. Regional magistrates noted that a significant number of Aboriginal offenders are being dealt with for breaching the requirements of the CPOR Act.[14] As explained in Chapter Two, regional reportable offenders and Aboriginal reportable offenders appear to be considerably overrepresented in relation to breaching offences.[15] A number of people consulted expressed the view that reporting obligations are too onerous for offenders in remote locations.[16] Suggested reasons include geographical isolation and transport difficulties (including a lack of people with valid driving licences); social disadvantages such as alcoholism and homelessness; itinerant lifestyles (including crossing state borders); mental health issues; and comprehension problems caused by language and cultural barriers.[17] The Commission was told that the management of registered offenders in regional Western Australia is decentralised (ie individual police districts have direct management of offenders) and this may explain higher breach rates in regional locations.[18] On the other hand, the Commission was told by regional police that they endeavour to visit remote communities and accommodate practical difficulties as much as possible. Nevertheless, it is apparent that disadvantages in remote Western Australia affect the ability of reportable offenders to comply with the CPOR Act.

14. Telephone consultation with Magistrate Greg Benn, Kalgoorlie (24 May 2010); consultation with Magistrate Colin Roberts, Broome (19 July 2010); consultation with Magistrate Catherine Crawford (9 September 2010).
15. See Chapter Two, 'Breach of reporting obligations'.
16. Telephone consultation with Magistrate Greg Benn, Kalgoorlie (24 May 2010); consultation with Mara Barone, Aboriginal Legal Service (25 May 2010); consultation with Magistrate Colin Roberts, Broome (19 July 2010); consultation with Ted Wilkinson and Thomas Allen, Legal Aid WA, Broome (20 July 2010); consultation with Magistrate Catherine Crawford (9 September 2010).
17. Telephone consultation with Magistrate Greg Benn, Kalgoorlie (24 May 2010); consultation with Mara Barone, Aboriginal Legal Service (25 May 2010); consultation with Constable Kelly Taylor Western Australia Police, Broome (20 July 2010); consultation with Magistrate Colin Roberts, Broome (19 July 2010); consultation with Magistrate Catherine Crawford (9 September 2010); email consultation with Acting Detective Superintendent Paul Steel, Sex Crime Division (22 October 2010).
18. Email consultation with Acting Detective Superintendent Paul Steel, Sex Crime Division (22 October 2010).

Case example 28

An adult reportable offender from a remote community was breached for failing to comply with his reporting obligations under the CPOR Act. The reportable offender resided at a community with a police post; however the post is not always manned. The offender was required to telephone the ANCOR unit 1800 number if a police officer was not present at the community. When he was due to report the offender was unable to use the telephone in the community because it had been damaged and wasn't working. The offender could not drive to an alternative police station because he did not have a drivers licence. The offender was arrested by police for failing to report and was taken into police custody. He was driven in police custody—for over 800 km—to a regional town. He pleaded not guilty and the charge was eventually discontinued by the prosecution. Although the charge did not proceed, he had nonetheless been arrested and removed from his community and transported in police custody over very long distances. [19]

The Commission was also told of an instance where an offender was sentenced for a reportable offence in a regional court and his lawyer took him to the police station straight after court finished so that he could comply with his initial reporting requirements under the CPOR Act. The offender resided in a remote community some 200 km from the town. He was told by a police officer that he would have to return to his community and then report to his designated ANCOR police officer.[20] The offender's lawyer drove him back to his community to ensure that he complied with his reporting obligations.

These practical barriers that exist in remote Western Australia should not be disregarded when assessing if sex offender registration should apply automatically in relation to all adult offenders. In particular, for very young adults who have been dealt with for consensual sexual activity with underage persons in the circumstances described in the last section, it is arguably unnecessary and unfair to impose such onerous obligations.

Periodic reporting

As explained earlier in this Paper, some reportable offenders are subject to weekly, fortnightly, monthly, quarterly or biannual reporting requirements. This periodic reporting applies in addition to the ongoing requirement to notify police of any changes to an

19. Information obtained from lawyer.
20. Information obtained from lawyer.

offender's personal details.[21] For reportable offenders in remote Western Australia periodic reporting requirements are especially burdensome. In Chapter Five, the Commission proposed that juvenile reportable offenders should be entitled to apply for a review of the frequency of their periodic reporting obligations;[22] however, the Commission has not yet determined whether such a review should be conducted by a court or by a senior police officer. Bearing in mind the difficulties discussed above for reportable offenders in remote areas, the Commission repeats its proposal (and associated questions) for adult reportable offenders.

PROPOSAL 14

Review of reporting frequency for adult reportable offenders

That the *Community Protection (Offender Reporting) Act 2004* (WA) be amended to provide that an adult reportable offender can seek a review of the frequency of his or her periodic reporting obligations imposed under s 28(3) of the Act.

QUESTION G

Review of reporting frequency for adult reportable offenders

(i) Do you consider that this right of review should be available before a court (and, if so, which court) or before a senior police officer (and, if so, how senior)?

(ii) Should there be a limit to the number of times or frequency in which an adult reportable offender is entitled to seek a review of his or her periodic reporting obligations?

21. Chapter Two, 'Periodic reporting'.
22. See Chapter Five, Proposal 3.

Dealing with exceptional circumstances

Having regard to the research, consultations and case examples discussed in this Paper, the Commission has formed the view that there should be a mechanism to exclude some adult offenders from the mandatory sex offender registration scheme. The Commission believes the case examples demonstrate that not all adult offenders found guilty of a child sexual offence necessarily constitute an ongoing risk to children. Having said that, the Commission does not consider that its proposed discretionary system for juveniles should be replicated for adults. There are sufficient differences between adult child sex offenders and juvenile child sex offenders to justify a more stringent approach to adult offenders. In this section the Commission discusses alternative options and makes proposals for reform in relation to adult offenders.

Alternative Approaches

Other than Tasmania, all Australian jurisdictions adopt a mandatory system of registration for adult child sex offenders. However, the provision of minimum sentencing thresholds in most jurisdictions means that adult offenders sentenced to low-level sentences are not included within the scope of automatic registration. It is important to emphasise that Western Australia is the only Australian jurisdiction that applies mandatory registration to *all* adult offenders found guilty of a reportable offence.

Minimum sentencing thresholds

The Australasian Police Ministers' Council working party recommended that the approach in New South Wales—of providing for minimum sentencing thresholds—should be followed under the proposed national sex offender registration scheme. It was considered that this approach would respond appropriately to exceptional cases.[1] It was proposed that two types of sentences should be immune from automatic registration. The first involved non-conviction orders for any Class 1 or Class 2 offence. The working party referred to the argument raised by the New South Wales Minister of Police in relation to minimum sentencing thresholds.[2] The Minister had contended that, if a court dismissed the charge and made a non-conviction order, the court had clearly determined that the offender did not pose a significant risk to the safety of children and, therefore, registration would be inappropriate.[3] The second category consisted of a single Class 2 offence where the sentence imposed does not include imprisonment or supervision (eg, fine or good behaviour bond). In relation to this category the New South Wales Minister of Police commented that:

> The bill will also exclude first time class 2 offenders who receive a fine or unsupervised good behaviour bond. As these offenders are less serious than class 1 offenders, there is no demonstration of actual recidivism, and the court is satisfied that such offenders are not of sufficient risk to the community to warrant any supervision after sentencing.[4]

One, or in some cases both, of these exclusionary categories are included in most other Australian jurisdictions.[5] Originally both categories were included

1. Inter-jurisdictional Working Party, *Child Protection Offender Registration with Police: A national approach,* Report to the Australasian Police Ministers' Council (2003) 80–1.
2. Ibid 80.
3. New South Wales, *Parliamentary Debates*, Legislative Assembly, 1 June 2000, 6477 (Mr P Whelan, Minister for Police).
4. Ibid.
5. New South Wales, Queensland and the Northern Territory exclude certain non-conviction orders from the ambit of mandatory registration: *Child Protection (Offenders Registration) Act 2000* (NSW) s 3A; *Child Protection (Offender Reporting) Act 2004* (Qld) s 5(2); *Crimes (Child Sex Offenders) Act 2005* (ACT) s 9; *Child Protection (Offender Reporting and Registration Act* (NT) s 11. In New South Wales the exemption covers non-conviction orders made under s 10 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) and under s 33(1)(a) of the *Children (Criminal Proceedings) Act 1987* (NSW) (eg, dismissal without recording a conviction, good behaviour bond without recording a conviction and order to participate in an intervention program without recording a conviction). In Queensland the exemption covers a non-conviction order made under s 12 of the *Penalties and Sentences Act 1992* (Qld) and s 183 of the *Youth Justice Act 1992* (Qld). The relevant non-conviction orders in the Australian Capital Territory cover dismissals and good behaviour bonds (*Crimes (Sentencing) Act 2005* (ACT) s 17) and in the Northern Territory an offender sentenced to a good behaviour bond is excluded from the mandatory registration provisions (*Child Protection (Offender Reporting and Registration Act* (NT) s 11). Queensland, South Australia and the Australian Capital Territory exclude from mandatory registration offenders sentenced for a single Class 2 offence if the sentence did not include imprisonment or supervision: *Child Protection (Offender Reporting) Act 2004* (Qld) s 5(2); *Child Sex Offenders Registration Act 2006* (SA) s 6; *Crimes (Child Sex Offenders) Act 2005* (ACT) s 9.

in New South Wales; however, in 2007 the exclusion of offenders sentenced to a penalty that did not involve imprisonment or supervision for a single Class 2 offence was removed.[6] During parliamentary debates it was stated that '[class 2] offences—such as possession of child pornography—are still serious offences that potentially endanger children and warrant monitoring by police through the registration process irrespective of the sentence received'.[7]

Limited discretion at time of sentencing

As noted above, there is provision for limited discretion in Tasmania. The sentencing court is required to make a registration order unless it is 'satisfied that the person does not pose a risk of committing a reportable offence in the future'.[8] Thus, there is in effect a presumption that adults found guilty of a reportable offence will be subject to registration; however, there is scope for the offender to demonstrate that he or she does not pose a risk to the community.

Likewise, in Canada there is a limited discretionary system for adult offenders. The national working party observed that the Canadian system establishes a 'presumption that persons convicted for certain offences would be required to register, but offenders will be able to argue, immediately after sentencing, that the presumption should be rebutted'.[9] A sentencing court is not required to make an order for registration if

> it is satisfied that the person has established that, if the order were made, the impact on them, including on their privacy or liberty, would be grossly disproportionate to the public interest in protecting society through the effective investigation of crimes of a sexual nature, to be achieved by the registration of information relating to sex offenders under the *Sex Offender Information Registration Act*.[10]

A review of the Canadian scheme found that there were difficulties with this discretionary approach (in particular, because the making a registration order is contingent upon an application by the prosecution). The review concluded that an automatic registration system should be introduced;[11] however, it was also recommended that:

> [A] judge should have the ability to depart from an automatic ruling in *rare* circumstances when he or she is convinced that the impact of inclusion in the registry on the offender's privacy and liberty would be grossly disproportionate to the public interest.[12]

On 17 March 2010 the Protecting Victims from Sexual Offenders Bill (Can) was introduced into Parliament.[13] The Bill proposes an automatic registration system[14] and, contrary to the recommendation above, it does not enable the court to depart from registration in 'rare circumstances'. The Bill was passed by the Senate and introduced into the House of Commons in May 2010. It was referred to the Standing Committee on Public Safety and National Security on 15 June 2010. During the committee stage, an amendment was proposed to provide for a limited discretion for sentencing courts so that an offender could seek to demonstrate that registration would be inappropriate. It was maintained that:

> [I]f we register every single person convicted of an offence, we may risk clogging the registry with a number of names that are not appropriately on the sex offender registry. If that's the case, when an emergency situation arises where the police need to do a very, very fast search, such as in a case where a child goes missing, this will cause them to have to search and investigate many more people, some of whom would be a waste of time, and that will slow down the police.[15]

Moreover, it was argued that although registration 'would be appropriate in the vast majority of cases' it may 'not be appropriate in every single case'.[16] The proposed amendment was rejected and the committee referred the Bill back to the House of Commons without amendment.[17]

6. *Child Protection (Offender Registration) Amendment Act 2007* (NSW).
7. New South Wales, *Parliamentary Debates*, Legislative Council, 5 December 2007, 5024 (Tony Kelly). An early amendment to the New South Wales legislation clarified that a registrable person included a person sentenced to suspended imprisonment for a single Class 2 offence: *Child Protection (Offenders Registration) Amendment (Suspended Sentences) Act 2007* (NSW).
8. *Community Protection (Offender Reporting) Act 2005* (Tas) s 6.
9. Inter-jurisdictional Working Party, *Child Protection Offender Registration with Police: A national approach,* Report to the Australasian Police Ministers' Council (2003) 39.
10. *Criminal Code* (Can) s 490.012(4).
11. Canada Parliament, House of Commons, Standing Committee on Public Safety and National Security, *Statutory Review of the Sex Offender Information Registry Act*, Report (2009) 8.
12. Ibid 9.
13. Dupuis T, *Bill S-2: Protecting Victims from Sex Offenders Act: Legislative summary* (Canadian Parliamentary Information and Research Service, 2010) 1.
14. Ibid 6.
15. Canada, House of Commons, Standing Committee on Public Safety and National Security, 40th Parliament, 3rd Session, *Evidence*, 6 October 2010, 1.
16. Ibid 2.
17. At the time of writing the Bill had not yet been again debated in the House of Commons.

Right of review

Another option, which already exists for a limited range of reportable offenders, is a subsequent right of review. Currently, certain reportable offenders subject to lifetime registration can apply to the District Court for an order suspending their reporting obligations. In such cases the court must be satisfied that the offender no longer poses a risk to the lives or sexual safety of any person.[18] Although the Commission understands the need to provide a right of review for offenders subject to lifetime registration,[19] it is important to remember that such offenders are proven sexual recidivists.[20] The present right of review does nothing to alleviate the harshness of registration for first time (and often young) offenders who pose no ongoing risk to the safety of the community. Furthermore, even if the right of review was extended so that it was available to a wider range of reportable offenders,[21] a successful application will only relieve a reportable offender of the obligation to report – it will not remove their name from the register. Thus, for very young adults who have been found guilty of an offence arising from consensual underage sexual activity, the stigma associated with registration may well remain.

The Commission's View

A limited discretion for adults

Only two people consulted for this reference were in favour of an unrestricted discretionary system for adult offenders at the time of sentencing.[22] However, as explained above, the Commission does not consider that its proposed broad discretionary system for juvenile offenders is appropriate for adult offenders. In contrast, the Office of the Director of Public Prosecutions supported a subsequent right of review for adult offenders. It was suggested that such a right should be contingent on establishing exceptional circumstances and that the application should be dealt with by a different court from the sentencing court.[23] However, the Commission has concerns about this option (as discussed above) and also notes that the resourcing implications would be even more substantial if a different court was required to consider the material afresh.

During initial consultations the Western Australia Police opposed any court discretion under *Community Protection (Offender Reporting) Act 2004* (WA) ('the CPOR Act'). Their reasons are considered in detail in Chapter Five.[24] Specifically in relation to adults, it was noted that very low-risk reportable offenders are generally only subject to a requirement to report to police once a year and they do not consider that this requirement is particularly onerous. But, as the Commission has explained in Chapter Two, all adult reportable offenders are subject to an ongoing obligation to report any changes to their personal details (and as often as those details change) and are liable to criminal prosecution for failure to comply.[25]

The overwhelming majority of people consulted by the Commission expressed support for a system whereby adult offenders would be subject to registration unless they could establish exceptional circumstances and could establish that they did not pose a risk to the safety of children.[26] A similar approach was recommended by

18. *Community Protection (Offender Reporting) Act 2004* (WA) s 53.
19. While rejecting any broad right of review because of resourcing implications and the belief that the risk of recidivism for child sex offenders remains for a considerable period of time, the national working party singled out lifetime reportable offenders. The reasons included the burden of lifelong reporting obligations and that, if low risk offenders could be removed it would relieve resources: Inter-jurisdictional Working Party, *Child Protection Offender Registration with Police: A national approach,* Report to the Australasian Police Ministers' Council (2003) 130.
20. Pursuant to s 46 of the *Community Protection (Offender Reporting) Act 2004* (WA) lifetime registration only applies to an adult offender who has been subject to the registration scheme and then again commits and is found guilty of another specified reportable offence.
21. During consultations the Western Australia Police stated that they would not object to widening the current right of review to enable other reportable offenders to apply for suspension of their reporting obligations, although they did not stipulate the applicable waiting period or to whom such a right should be available: Consultation with Detective Inspector Paul Steel, Sex Crime Division and Martyn Clancy-Lowe, State Coordinator Sex Offenders Management Squad (28 June 2010).
22. Consultation with Ted Wilkinson and Thomas Allen, Legal Aid WA, Broome (20 July 2010).
23. Consultation with Matthew Bugg and Sean Stocks, Office of the Director of Public Prosecutions (28 June 2010).
24. See Chapter Five, 'Court discretion'.
25. See Chapter Two, 'Reporting'.
26. Chief Justice Wayne Martin, Justice Peter Blaxell and Justice Lindy Jenkins, Supreme Court of Western Australia; Chief Magistrate Steven Heath; Mara Barone, Aboriginal Legal Service; Tara Gupta, Andy Gill, Kellie Williams, Sandie van Soelen, Department for Child Protection; Sergeant Kevin Hall, Family Protection Coordinator, Western Australian Police, Kimberley; Steve Begg, Ben White and Taimil Taylor, Aboriginal Legal Service Broome; Norm Smith (Manager, Kimberley Community Justice Services) Department of Corrective Services; Katherine Hams, Manager, Kimberley Aboriginal Medical Services Council; Detective Alan Goodger, Western Australia Police Kununurra; Brianna Lonnie, Simon Holme and Matt Panayi, Legal Aid WA, Kununurra; Kay Benham (Director Court Counselling), Ruth Abdullah (Victim Support Services/Child Witness Service Kununurra), Olwyn Webley (Victim Support Services/Child Witness Service Derby), & Simon Walker (Victim Support Services Perth, Department of the Attorney General; Christine White (Child Witness Service) Department of the Attorney General; Lex McCulloch (Assistant Commissioner Youth Justice Services), Steve Robins (Assistant Commissioner, Adult Community Corrections), Angie Dominish, Marlene Hamilton & Alisha

the New South Wales Ombudsman in 2005. The report noted that 'appeal provisions were not included in the legislation to simplify the process and avoid the delays and costs likely to arise if it were open to all potential registrable persons to appeal against their obligations'.[27] It considered a number of possible options for a review procedure and concluded that a broad appeal provision 'could make the system unmanageably complex with unacceptable delays and costs'.[28] The report suggested that consideration should be given to 'whether there is scope for a limited discretionary system in certain narrow circumstances, where it can be established that the person does not pose a risk to the safety of children'.[29]

During parliamentary debates in Western Australia some members emphasised that the registration scheme requires some discretion or provision for exemption. One Member of Parliament stated:

> I sincerely hope that the discretion that is allowed in the process will allow justice to be done. Justice is not the application of the law; justice is the application of the law with compassion. As much as I hope we share a universal abhorrence of sexual offences against children, I sincerely hope that our abhorrence does not lead to injustice against foolish people.[30]

Likewise, another Member argued that the Bill 'casts its provisions too wide' (for example, it treats an 18-year-old who pinches the bottom of a 17-year-old in the same way as it treats a 50-year-old who is jailed for forcing a 10-year-old to provide a sexual service). It was also stated that the Bill captures offenders 'whose sentences suggest that the offences they committed were not very serious'.[31]

Overall, the Commission has concluded that a limited discretion should be available to the sentencing court to determine that an adult offender should not be subject to registration and reporting under the CPOR Act. The Commission believes that the sentencing court is best placed to determine the issue because it will usually already have before it a significant amount of relevant information and because it is appropriate that the question of registration is not unnecessarily delayed. However, most adult offenders should be subject to registration and the Commission does not support a system whereby the court is required to consider the issue in every case. This would unduly impact on justice and police resources. Instead, the offender should be required to meet a strict standard before a court is obliged to examine the appropriateness of registration. For this reason the Commission proposes that the CPOR Act should provide that an adult offender who is sentenced for a Class 1 or Class 2 offence is automatically subject to registration and reporting obligations unless the offender can first satisfy the court that there are exceptional circumstances *and* then can satisfy the court that he or she does not pose a risk to the lives or sexual safety of any person. The Commission's proposal below provides a non-exhaustive list of what should constitute exceptional circumstances.

PROPOSAL 15

Limited exemption for adult reportable offenders

1. That a new section be inserted into the *Community Protection (Offender Reporting) Act 2004* (WA) to provide that if a court finds an adult offender[32] guilty of a Class 1 or Class 2 offence[33] and that offence would, apart from this section, result in the offender becoming a reportable offender, the court may consider whether it is appropriate to make an order that the offender is not a reportable offender if
   (a) the offender makes an application under this section for an order that he or she is not a reportable offender; and
   (b) the court is satisfied that the offender has demonstrated that there are exceptional circumstances.
2. That for the purpose of (1)(b) above, exceptional circumstances include:
   (a) Where the relevant Class 1 or Class 2 offence involved consensual sexual activity with a person, not being under the care, supervision or authority of the offender, who the offender honestly and reasonably, but mistakenly, believed was of or over the age of 16 years at the time of the offence.

Edwards, Department of Corrective Services. Chief Judge Peter Martino expressed view that there should be court discretion but he did not elaborate in regard to the appropriate test: Consultation with Chief Judge Peter Martino, District Court of Western Australia (29 July 2010).

27. New South Wales Ombudsman, *Review of the Child Protection Register: Report under s 25(1) of the Child Protection (Offenders Registration) Act 2000* (2005) 47.
28. Ibid.
29. Ibid.
30. Western Australia, *Parliamentary Debates*, Legislative Council, 15 November 2004, 8485c–8490a (D Tomlinson).
31. Western Australia, *Parliamentary Debates*, Legislative Council, 15 November 2004, 8485c–8490a (C Sharpe).
32. An adult offender should be defined as a person who committed the relevant offence when he or she was of or over the age of 18 years.
33. The Commission has not included Class 3 offences in its proposal at this stage because the provisions dealing with Class 3 offences have not yet commenced.

(b) Where the relevant Class 1 or Class 2 offence involved consensual sexual activity and the offender honestly believed that the conduct was not unlawful.

(c) Where the relevant Class 1 or Class 2 offence involved consensual sexual activity with a person under the age of 16 years and the offender was no more than 10 years older than the complainant at the time of the offence and the circumstances of the offence did not involve any abuse, coercion or breach of trust.

(d) Where the offender lacks the capacity to comply with his or her reporting obligations.

(e) Where the offender's culpability is significantly reduced because of a mental impairment or intellectual disability.

(f) Any other circumstance considered by the court to be exceptional.

3. That the court can only make an order that the offender is not a reportable offender if the court is satisfied that the offender has demonstrated that he or she does not pose a risk to the lives or sexual safety of one or more persons, or persons generally.

4. That for the purposes of 3 above, it is not necessary that the court be able to identify a risk to a particular person or particular persons or a particular class of persons.

5. That an application by the offender for an order that he or she is not a reportable offender must be made before the sentence is imposed.

6. That the court may adjourn the sentencing proceedings if necessary to enable relevant information to be presented to the court.

7. That if the court determines that it is necessary to adjourn the proceedings for the purpose of determining if an order should be made that the offender is not a reportable offender, it may impose the sentence for the offence before the proceedings are adjourned for that purpose.

8. That the court should make the order either at the time the person is sentenced for the offence or at the time the proceedings are heard after being adjourned pursuant to 6 above.

9. That the state or the offender has a right to appeal the decision of the court to make or not to make an order that the offender is not a reportable offender.

PROPOSAL 16

Calculation of reporting periods

That s 46 of the *Community Protection (Offender Reporting) Act 2004* (WA) be amended to ensure that if an order is made in accordance with Proposal 15 above (ie, that an adult offender is not a reportable offender in respect of a Class 1 or Class 2 offence) and the adult offender again commits and is found guilty of a Class 1 or Class 2 offence, the applicable reporting period is calculated on the basis that the offender was a reportable offender in respect of the first offence.

PROPOSAL 17

Provision of information to the court

That s 21(2a) of the *Sentencing Act 1995* (WA) be amended to provide that, if the court gives instructions that it do so, a pre-sentence report is to set out matters that are relevant to the making of an order that an adult offender is not a reportable offender under the *Community Protection (Offender Reporting) Act 2004* (WA).

QUESTION H

Provision of information to the court

(i) If an adult offender makes an application for an order that he or she is not a reportable offender under the *Community Protection (Offender Reporting) Act 2004* (WA) what is the best way to ensure that the court is fully informed of all relevant matters before it decides whether to make or decline to make the order?

(ii) Do you think that the court should only make the decision about whether an order should be made that an adult offender is not a reportable offender after hearing from a wide variety of agencies and, if so, what agencies should be entitled or able to present evidence or submissions?

(iii) Should the Commissioner of Police be empowered to direct other government agencies to provide the police with relevant information held about the offender to enable the police or the prosecution to make submissions to the court and/or present evidence?

Right of review

On the basis of the above proposal, exemption from registration for an adult offender will only result if the offender satisfies a strict two-stage test (exceptional circumstances *and* no risk). Nonetheless, the Commission remains concerned that there is no avenue for review for adult reportable offenders after registration has commenced. For example, an offender whose culpability was reduced because of a mental impairment may not be able to satisfy the court that he or she does not pose a risk to the community at the time of sentencing. However, some years later and after engaging in appropriate treatment, the offender may be able to establish that any pre-existing risk has been eliminated. A number of people consulted supported a right of review in addition to limited discretion at the time of sentencing.[34]

Along the same lines as its proposal for a right of review for juvenile reportable offenders, the Commission proposes that an adult reportable offender should be able to apply for a review of his or her registration status after half of the reporting period has expired. As representatives from the Department of Corrective Services observed, such an option would provide an incentive for rehabilitation and enable those who no longer pose a risk to the community to be removed from the register.[35] Bearing in mind the differences between adult and juvenile offenders, the Commission is of the view that an adult offender should be required to satisfy the court that there were exceptional circumstances at the time of the offending as well as the requirement to demonstrate that there is no longer any risk.

34. Consultation with Chief Justice Wayne Martin, Justice Peter Blaxell and Justice Lindy Jenkins, Supreme Court of Western Australia (28 June 2010); consultation with Chief Magistrate Steven Heath (2 August 2010); consultation with Matthew Bugg & Sean Stocks, Office of the Director of Public Prosecutions (28 June 2010); consultation with Lex McCulloch (Assistant Commissioner Youth Justice Services), Steve Robins (Assistant Commissioner, Adult Community Corrections), Angie Dominish, Marlene Hamilton & Alisha Edwards, Department of Corrective Services (7 September 2010).
35. Consultation with Lex McCulloch (Assistant Commissioner Youth Justice Services), Steve Robins (Assistant Commissioner, Adult Community Corrections), Angie Dominish, Marlene Hamilton & Alisha Edwards, Department of Corrective Services (7 September 2010).

PROPOSAL 18

Right of review for adult reportable offenders

1. That the *Community Protection (Offender Reporting) Act 2004* (WA) be amended to provide that an adult reportable offender may apply to the District Court for a review of his or her registration status at any time after he or she has complied with his or her reporting obligations for at least half of his or her reporting period.
2. That an application for a review under this section can only be made once.
3. That upon an application the court may order that the offender is no longer a reportable offender if it is satisfied that at the time the offender was sentenced there were exceptional circumstances and the offender does not pose a risk to the lives or sexual safety of one or more persons, or persons generally.
4. That the offender and the state have a right to appeal the decision of the court at the review.

Retrospective right of review

On the strength of its research, the Commission is of the view that there is likely to be some adult reportable offenders who do not need to remain on the sex offender register. If existing adult reportable offenders had been dealt with under the Commission's proposed limited discretionary system described above, it is quite possible that some of these adults would not have been subject to the CPOR Act at all. Therefore, in the interests of justice, existing adult reportable offenders should be entitled to seek a review of their registration status without the need to wait for the qualifying period suggested in Proposal 18 above. In the majority of adult case examples in this Paper, the applicable reporting period is 15 years and, therefore, the offender would have to wait at least seven-and-a-half years before having the opportunity to satisfy a court that there were exceptional circumstances and that he or she no longer poses a risk to the community.

PROPOSAL 19

Retrospective right of review

1. That the *Community Protection (Offender Reporting) Act 2004* (WA) be amended to provide that an existing adult reportable offender may apply to the District Court for a review of his or her registration status at any time.

2. That an existing adult reportable offender means a person who is subject to the *Community Protection (Offender Reporting) Act 2004* (WA) as a result of a reportable offence committed while he or she was of or over the age of 18 years at, or immediately before, the commencement of the provisions that establish a limited discretionary system for adult offenders.
3. That an application for a review can only be made once before the qualifying period as set out in Proposal 18 above.
4. That upon an application the court may order that the offender is no longer subject to reporting obligations under the Act and is to be removed from the register if it is satisfied that there were exceptional circumstances (as defined in Proposal 15) and that the offender does not pose a risk to the lives or sexual safety of one or more persons, or persons generally.
5. That the offender and the state have a right to appeal the decision of the court at the review.
6. That if the court determines that the offender should remain subject to the registration and reporting obligations under the *Community Protection (Offender Reporting) Act 2004* (WA) the reportable offender remains entitled to apply for a review in accordance with Proposal 18.

Appendices

Contents

Appendix A:	**List of proposals and questions**	167
Appendix B:	**List of people consulted**	177

Appendix A: List of proposals and questions

PROPOSAL 1 [page 39]

Exception for juvenile offenders convicted of a single prescribed offence

That regulation 8 of the *Community Protection (Offender Reporting) Regulations 2004* (WA) be amended to include the newly enacted offences under ss 217–220 of the *Criminal Code* (WA).

QUESTION A [page 98]

Prosecutorial policies

(i) Should the Director of Public Prosecutions *Statement of Prosecution Policy and Guidelines 2005* be amended to provide specific criteria to be considered when determining if a juvenile should be prosecuted for a child sexual offence?

(ii) Should the decision to charge a juvenile with a child sexual offence be overseen by a senior police officer?

PROPOSAL 2 [page 117]

Reporting on behalf of a juvenile reportable offender

1. That the *Community Protection (Offender Reporting) Act 2004* (WA) be amended to provide that if a government agency is involved with a juvenile reportable offender to the extent that the agency is empowered to make decisions that impact on the status of the reportable offender's personal details (as defined under s 3 of the Act), a representative of that agency (if that representative is aware that the offender is a reportable offender under the Act) *may* notify police of any change to the offender's personal details as required under s 29 of the *Community Protection (Offender Reporting) Act 2004* (WA).

2. That s 66 of the *Community Protection (Offender Reporting) Act 2004* (WA) be amended to provide that a juvenile reportable offender is not to be prosecuted for a failure to comply with section 29 of this Act if a representative of a government agency has provided the police with the required information within the stipulated timeframe.

QUESTION B [page 117]

Reporting on behalf of a juvenile reportable offender

Should the ability of a representative of a government agency to report on behalf of a juvenile reportable offender be limited to specified government agencies and, if so, what should those government agencies be?

PROPOSAL 3 [page 118]

Review of reporting frequency for juvenile reportable offenders

That the *Community Protection (Offender Reporting) Act 2004* (WA) be amended to provide that a juvenile reportable offender can seek a review of the frequency of his or her periodic reporting obligations imposed under s 28(3) of the Act.

QUESTION C [page 118]

Review of reporting frequency for juvenile reportable offenders

(i) Do you consider that this right of review should be available before a court (and, if so, which court) or before a senior police officer (and, if so, how senior)?

(ii) Should there be a limit on the number of times or frequency in which a juvenile reportable offender is entitled to seek a review of his or her period reporting obligations?

PROPOSAL 4 [page 120]

Provision of information for juvenile reportable offenders

1. That the Western Australia Police review its processes and procedures for advising juvenile reportable offenders of their obligations and rights under the *Community Protection (Offender Reporting) Act 2004* (WA) to ensure that juvenile reportable offenders understand both their obligations and rights in relation to the scheme.

2. That the brochure provided to juvenile reportable offenders by the Western Australia Police be revised to ensure that the information is provided in a child-friendly, accessible format.

PROPOSAL 5 [page 125]

Power of the Commissioner of Police to suspend reporting obligations and remove a juvenile reportable offender from the register

1. That s 61(1) of the *Community Protection (Offender Reporting) Act 2004* (WA) be amended to provide that if a person is a reportable offender only in respect of an offence committed by the person when he or she was a child, the Commissioner of Police must consider whether or not to approve the suspension of the reportable offender's reporting obligations.

2. That s 61 of the *Community Protection (Offender Reporting) Act 2004* (WA) be amended to provide that the Commissioner of Police may, in addition to suspending the reportable offender's reporting obligations, remove the offender from the register.

PROPOSAL 6 [page 130]

Sex offender registration is not to provide any mitigation

That s 8 of the *Sentencing Act 1995* (WA) be amended to provide that the fact that an offender is or may be subject to reporting obligations under the *Community Protection (Offender Reporting) Act 2004* (WA) is not a mitigating factor.

PROPOSAL 7 [page 133]

Juvenile offender reporting orders

1. That s 6(4) of the *Community Protection (Offender Reporting) Act 2004* (WA) be amended to provide that unless a person is a reportable offender because of subsection (3), a person is not a reportable offender merely because he or she as a child committed a reportable offence.

2. That a new section be inserted into the *Community Protection (Offender Reporting) Act 2004* (WA) to provide that:

   (a) If a court finds a person guilty of committing a Class 1 or Class 2 offence that occurred when the person was a child, the court *must* consider whether it should make an order that the offender comply with the reporting obligations under this Act.

   (b) The court may make the order only if it is satisfied that the offender poses a risk to the lives or the sexual safety of one or more persons, or persons generally.

   (c) For the purposes of (b) above, it is not necessary that the court be able to identify a risk to a particular person or particular persons or a particular class of persons.

   (d) The court may adjourn the proceedings if necessary to enable relevant information to be presented in court.

   (e) If the court determines that it is necessary to adjourn the proceedings for the purpose of determining if a juvenile offender reporting order should be made, it may impose the sentence for the offence before the proceedings are adjourned for that purpose.

   (f) The court should make the order at the time the person is sentenced for the offence or at the time the proceedings are heard after being adjourned pursuant to (e) above.

   (g) If the court fails to consider whether it should make an order as required by (a) above, the prosecution can apply for an order to be made at any time within six months after the date of sentence.

3. That the offender or the state has a right to appeal the decision of the court to make or not to make a juvenile offender reporting order.

PROPOSAL 8 [page 133]

Calculation of reporting periods

That s 46 of the *Community Protection (Offender Reporting) Act 2004* (WA) be amended to ensure that if a juvenile offender reporting order is not made in relation to a juvenile offender who was found guilty of a Class 1 or Class 2 offence and the juvenile offender again commits and is found guilty of a Class 1 or Class 2 offence, the applicable reporting period is calculated on the basis that the first abovementioned offence resulted in a juvenile offender reporting order.

PROPOSAL 9 [page 133]

Provision of information to the court

1. That s 21(2a) of the *Sentencing Act 1995* (WA) be amended to provide that if the court gives instructions that it do so, a pre-sentence report is to set out matters that are relevant to the making of a juvenile offender reporting order under the *Community Protection (Offender Reporting) Act 2004* (WA) in respect of the offender.

2. That s 47 of the *Young Offenders Act 1994* (WA) be amended to insert a new subsection (1a) to provide that the court may request a report containing information that is relevant to the making of a juvenile offender reporting order under the *Community Protection (Offender Reporting) Act 2004* (WA) including a psychological or psychiatric report.

QUESTION D [page 134]

Provision of information to the court

(i) What is the best way to ensure that the court is fully informed of all relevant matters when deciding if a juvenile offender reporting order should be made?

(ii) Do you think the court should make the decision about whether a juvenile offender reporting order should be made after hearing from a wide variety of agencies and, if so, what agencies should be entitled or able to present evidence or submissions?

(iii) Should the Commissioner of Police be empowered to direct other government agencies to provide the police with relevant information held about the offender to enable the police or the prosecution to make submissions to the court and/or present evidence?

PROPOSAL 10 [page 135]

Right of review for juvenile reportable offenders

1. That the *Community Protection (Offender Reporting) Act 2004* (WA) be amended to provide that a person subject to a juvenile offender reporting order (as set out in Proposal 7 above) may apply to the President of the Children's Court or to the District Court for a review of his or her registration status at any time after he or she has complied with the reporting obligations for at least half of the applicable reporting period or after he or she has attained the age of 18 years.

2. That an application for a review under this section can only be made once.

3. That upon an application the court may order that the offender is no longer subject to the juvenile offender reporting order if the court is satisfied that the offender does not pose a risk to the lives or sexual safety of one or more persons, or persons generally.

4. That the offender and the state have a right to appeal the decision of the court at the review.

PROPOSAL 11 [page 136]

Retrospective right of review for juvenile reportable offenders

1. That the *Community Protection (Offender Reporting) Act 2004* (WA) be amended to provide that an existing juvenile reportable offender may apply to the President of the Children's Court or to the District Court for a review of his or her registration status at any time.

2. That an existing juvenile reportable offender means a person who is subject to the *Community Protection (Offender Reporting) Act 2004* (WA) only as a result of a reportable offence committed while he or she was under the age of 18 years at, or immediately before, the commencement of the provisions that establish a discretionary juvenile reporting order.

3. That an application for a review under this section can only be made once.

4. That upon an application the court may order that the offender is no longer subject to reporting obligations under the Act and is to be removed from the register if it is satisfied that the offender does not pose a risk to the lives or sexual safety of one or more persons, or persons generally.

5. That the offender and the state have a right to appeal the decision of the court at this review.

6. That if the court hearing the application determines that the reportable offender should remain subject to the registration and reporting obligations under the *Community Protection (Offender Reporting) Act 2004* (WA) the reportable offender remains entitled to apply for a review in accordance with Proposal 10.

QUESTION E [page 138]

Alternative approach for juvenile child sex offenders

(i) Should the court have an alternative therapeutic order available for juvenile offenders who are considered to pose a risk to the lives or sexual safety of any member of the community?

(ii) If so, what should be the requirements of the therapeutic order and what should be the consequence for successful and non-successful completion of the order?

(iii) Do you think that such a therapeutic order should be limited to juveniles under a certain age or should it potentially be available to all juvenile offenders who have been found guilty of a Class 1 or Class 2 offence?

PROPOSAL 12 [page 152]

Notification of reporting obligations to children and persons with special needs

1. That the Western Australian government make regulations under s 114 of the *Community Protection (Offender Reporting) Act 2004* (WA) to provide for special measures for reportable offenders who are children and for reportable offenders with special needs who may have difficulties in understanding their reporting obligations and the consequences of non-compliance.

2. That such special measures should include the provision of a qualified interpreter, a written translation of the formal notice of reporting obligations, the assistance of a support person at the time notification is given and the provision for the person responsible for notifying the reportable offender to give notice to a parent, guardian, carer or other support person of the reporting obligations and the consequences of non-compliance.

PROPOSAL 13 [page 155]

Reporting on behalf of an adult reportable offender

1. That the *Community Protection (Offender Reporting) Act 2004* (WA) be amended to provide that if a government agency is involved with an adult reportable offender to the extent that the agency is empowered to make decisions that impact on the status of the reportable offender's personal details (as defined under s 3 of the Act) a representative of that agency (if that representative is aware that the offender is a reportable offender under the Act) *may* notify police of any change to the offender's personal details as required under s 29 of the *Community Protection (Offender Reporting) Act 2004* (WA).

2. That s 66 of the *Community Protection (Offender Reporting) Act 2004* (WA) be amended to provide that an adult reportable offender is not to be prosecuted for a failure to comply with s 29 of this Act if a representative of a government agency has provided the police with the required information within the stipulated timeframe.

QUESTION F [page 155]

Reporting on behalf of an adult reportable offender

Should the ability of a representative of a government agency to report on behalf of an adult reportable offender be limited to specified government agencies and, if so, what should those government agencies be?

PROPOSAL 14 [page 157]

Review of reporting frequency for adult reportable offenders

That the *Community Protection (Offender Reporting) Act 2004* (WA) be amended to provide that an adult reportable offender can seek a review of the frequency of his or her periodic reporting obligations imposed under s 28(3) of the Act.

QUESTION G [page 157]

Review of reporting frequency for adult reportable offenders

(i) Do you consider that this right of review should be available before a court (and, if so, which court) or before a senior police officer (and, if so, how senior)?

(ii) Should there be a limit to the number of times or frequency in which an adult reportable offender is entitled to seek a review of his or her periodic reporting obligations?

PROPOSAL 15 [pages 161–2]

Limited exemption for adult reportable offenders

1. That a new section be inserted into the *Community Protection (Offender Reporting) Act 2004* (WA) to provide that if a court finds an adult offender guilty of a Class 1 or Class 2 offence and that offence would, apart from this section, result in the offender becoming a reportable offender, the court may consider whether it is appropriate to make an order that the offender is not a reportable offender if

   (a) the offender makes an application under this section for an order that he or she is not a reportable offender; and

   (b) the court is satisfied that the offender has demonstrated that there are exceptional circumstances.

2. That for the purpose of (1)(b) above, exceptional circumstances include:

   (a) Where the relevant Class 1 or Class 2 offence involved consensual sexual activity with a person, not being under the care, supervision or authority of the offender, who the offender honestly and reasonably, but mistakenly, believed was of or over the age of 16 years at the time of the offence.

   (b) Where the relevant Class 1 or Class 2 offence involved consensual sexual activity and the offender honestly believed that the conduct was not unlawful.

   (c) Where the relevant Class 1 or Class 2 offence involved consensual sexual activity with a person under the age of 16 years and the offender was no more than 10 years older than the complainant at the time of the offence and the circumstances of the offence did not involve any abuse, coercion or breach of trust.

   (d) Where the offender lacks the capacity to comply with his or her reporting obligations.

   (e) Where the offender's culpability is significantly reduced because of a mental impairment or intellectual disability.

   (f) Any other circumstance considered by the court to be exceptional.

3. That the court can only make an order that the offender is not a reportable offender if the court is satisfied that the offender has demonstrated that he or she does not pose a risk to the lives or sexual safety of one or more persons, or persons generally.

4. That for the purposes of 3 above, it is not necessary that the court be able to identify a risk to a particular person or particular persons or a particular class of persons.

5. That an application by the offender for an order that he or she is not a reportable offender must be made before the sentence is imposed.

6. That the court may adjourn the sentencing proceedings if necessary to enable relevant information to be presented to the court.

7. That if the court determines that it is necessary to adjourn the proceedings for the purpose of determining if an order should be made that the offender is not a reportable offender, it may impose the sentence for the offence before the proceedings are adjourned for that purpose.

8. That the court should make the order either at the time the person is sentenced for the offence or at the time the proceedings are heard after being adjourned pursuant to 6 above.

9. That the state or the offender has a right to appeal the decision of the court to make or not to make an order that the offender is not a reportable offender.

PROPOSAL 16 [page 162]

Calculation of reporting periods

That s 46 of the *Community Protection (Offender Reporting) Act 2004* (WA) be amended to ensure that if an order is made in accordance with Proposal 15 above (ie, that an adult offender is not a reportable offender in respect of a Class 1 or Class 2 offence) and the adult offender again commits and is found guilty of a Class 1 or Class 2 offence, the applicable reporting period is calculated on the basis that the offender was a reportable offender in respect of the first offence.

PROPOSAL 17 [page 162]

Provision of information to the court

That s 21(2a) of the *Sentencing Act 1995* (WA) be amended to provide that, if the court gives instructions that it do so, a pre-sentence report is to set out matters that are relevant to the making of an order that an adult offender is not a reportable offender under the *Community Protection (Offender Reporting) Act 2004* (WA).

QUESTION H [page 162]

Provision of information to the court

(i) If an adult offender makes an application for an order that he or she is not a reportable offender under the *Community Protection (Offender Reporting) Act 2004* (WA) what is the best way to ensure that the court is fully informed of all relevant matters before it decides whether to make or decline to make the order?

(ii) Do you think that the court should only make the decision about whether an order should be made that the offender is not a reportable offender after hearing from a wide variety of agencies and, if so, what agencies should be entitled or able to present evidence or submissions?

(iii) Should the Commissioner of Police be empowered to direct other government agencies to provide the police with relevant information held about the offender to enable the police or the prosecution to make submissions to the court and/or present evidence?

PROPOSAL 18 [page 163]

Right of review for adult reportable offenders

1. That the *Community Protection (Offender Reporting) Act 2004* (WA) be amended to provide that an adult reportable offender may apply to the District Court for a review of his or her registration status at any time after he or she has complied with his or her reporting obligations for at least half of his or her reporting period.

2. That an application for a review under this section can only be made once.

3. That upon an application the court may order that the offender is no longer a reportable offender if it is satisfied that at the time the offender was sentenced there were exceptional circumstances and the offender does not pose a risk to the lives or sexual safety of one or more persons, or persons generally.

4. That the offender and the state have a right to appeal the decision of the court at the review.

PROPOSAL 19 [pages 163–4]

Retrospective right of review

1. That the *Community Protection (Offender Reporting) Act 2004* (WA) be amended to provide that an existing adult reportable offender may apply to the District Court for a review of his or her registration status at any time.

2. That an existing adult reportable offender means a person who is subject to the *Community Protection (Offender Reporting) Act 2004* (WA) as a result of a reportable offence committed while he or she was of or over the age of 18 years at, or immediately before, the commencement of the provisions that establish a limited discretionary system for adult offenders.

3. That an application for a review can only be made once before the qualifying period as set out in Proposal 18 above.

4. That upon an application the court may order that the offender is no longer subject to reporting obligations under the Act and is to be removed from the register if it is satisfied that there were exceptional circumstances (as defined in Proposal 15) and that the offender does not pose a risk to the lives or sexual safety of one or more persons, or persons generally.

5. That the offender and the state have a right to appeal the decision of the court at the review.

6. That if the court determines that the offender should remain subject to the registration and reporting obligations under the *Community Protection (Offender Reporting) Act 2004* (WA) the reportable offender remains entitled to apply for a review in accordance with Proposal 18.

Appendix B: List of people consulted

AM Marmond, Detective Sergeant, Australian Federal Police
Alan Goodger, Detective, Western Australia Police (Kununurra)
Aleisha Edwards, Department of Corrective Services
Angie Dominish, Department of Corrective Services
Andy Gill, Department for Child Protection
Annette Vangent, Kimberley Community Legal Services
Antoinette Fedele, Legal Aid WA (Kalgoorlie)
Ben White, Aboriginal Legal Service of WA (Broome)
Brianna Lonnie, Legal Aid WA (Kununurra)
Carol Connelly, State Solicitor's Office
Chief Justice Wayne Martin, Supreme Court of WA
Chief Judge Peter Martino, District Court of WA
Chief Magistrate Steven Heath, Magistrates Court of WA
Christabel Chamarette, Clinical Psychologist
Christine Wild, Child Witness Services
Claire Rossi, Legal Aid WA
Cleo Taylor, Department for Child Protection (Kimberley)
Dave Woodroffe, Aboriginal Legal Service of WA (Kununurra)
Dave Indermaur, Associate Professor, Crime Research Centre
Dee Lightfoot, Kimberley Interpreting Service
Del Collins, community nurse (Kununurra)
Fiona Walsh, Legal Aid WA (Bunbury)
Freda Briggs, Emeritus Professor, University of South Australia
Gary Rogers, Chris Baker & Associates
Gaelyn Shirley, Youth Justice Services, Department of Corrective Services (Broome)
Gerard Webster, President Australian and New Zealand Association for the Treatment of Sexual Abuse
Gerald Xavier, Senior Solicitor, Youth Legal Service
Glen Dooley, Aboriginal Legal Service of WA (Kununurra)
Gordon Bauman, Barrister & Solicitor (Broome)
James Woodford, Mental Health Law Centre
Jeanine Purdy, Senior Legal Research Officer, Chief Justice's Chambers Supreme Court of WA
John O'Connor, O'Connor Lawyers
Johnson Kitto, Kitto & Kitto Lawyers
Judy Seif, Barrister
Judge Denis Reynolds, President Children's Court of WA
Justice Lindy Jenkins, Supreme Court of WA

Justice Peter Blaxell, Supreme Court of WA
Karen Farley, Legal Aid WA
Katie Seidler, Dr, Clinical and Forensic Psychologist (New South Wales)
Kathryn Dowling, Department for Child Protection (Broome)
Katherine Hams, Manager, Kimberley Aboriginal Medical Services Council
Kay Benham, Director Court Counselling and Support Services, Department of the Attorney General
Kellie Williams, Department for Child Protection
Kelly Taylor, Constable, Western Australia Police (Broome)
Kevin Hall, Sergeant, Family Protection Coordinator, Western Australia Police (Kimberley)
Lex McCulloch, Assistant Commissioner Youth Justice Services, Department of Corrective Services
Lindy Porter, Porter Scudds Barristers
Magistrate Catherine Crawford
Magistrate Colin Roberts
Magistrate Greg Benn
Malcolm Penn, Executive Manager, Legislative Services, Western Australia Police
Mara Barone, Aboriginal Legal Service of WA
Marilyn Loveday, Barrister & Solicitor
Marlene Hamilton, Department of Corrective Services
Martyn Clancy-Lowe, State Coordinator, Sex Offenders Management Squad, Western Australia Police
Matt Panayi, Legal Aid WA (Kununurra)
Matthew Bugg, Office of the Director of Public Prosecutions
Meagan Lee, Solicitor, National Children's and Youth Law Centre
Michelle Scott, Commissioner for Children and Young People
Misty Graham, Manager Information Access, Northern Territory Police, Fire and Emergency Services
Nick Espie, Aboriginal Legal Service of WA (Kununurra)
Nick Lemmon, Barrister and Solicitor
Norm Smith, Manager Kimberley Community Justice Services, Department of Corrective Services
Olwyn Webley, Victim Support Services/Child Witness Service (Derby)
Owen Deas, Clerk of Court (Kununurra)
Owen Starling, Clerk of Court (Broome)
Paul Steel, Acting Detective Superintendent, Sex Crime Division, Western Australia Police
Peter Collins, Director Legal Services, Aboriginal Legal Service of WA
Rebecca Reid, Business Analyst CrimTrac
Ruth Abdullah, Victim Support Services/Child Witness Service (Kununurra)
Sally Dechow, Mental Health Law Centre
Sandra Boulter, Principal Solicitor Mental Health Law Centre
Sandie van Soelen, Director Working with Children Screening Unit, Department for Child Protection
Sarah Dewsbury, Legal Aid WA
Sarah Lloyd-Mostyn, Victim Support Services (Broome)
Sarah Moulds, Law Council of Australia
Sean Stocks, Office of the Director of Public Prosecutions
Stephen Herbert, Sergeant, Tasmania Police

Steve Begg, Aboriginal Legal Service of WA (Broome)
Steve Lennox, Supervised Bail Coordinator, Department of Corrective Services
Steve Robins, Assistant Commissioner, Adult Community Corrections, Department of Corrective Services
Simon Holme, Legal Aid WA (Kununurra)
Simon Walker, Victim Support Services
Tara Gupta, General Counsel, Department for Child Protection
Taimil Taylor, Aboriginal Legal Service of WA (Broome)
Trish Heath, Principal Policy Officer, Commissioner for Children and Young People
Thomas Allen, Legal Aid WA (Broome)
Ted Wilkinson, Legal Aid WA (Broome)
Tom Hall, Hall & Hall Lawyers