

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 diverged 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.
- '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.

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 stigma 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:

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).