Community Protection (Offender Reporting) Act 2004

FINAL REPORT

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Law Reform
Commission of
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The Law Reform Commission of Western Australia

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Foreword

THIS Final Report represents the Law Reform Commission of Western Australia's recommendations for reform to the Western Australian sex offender registration scheme established by the *Community Protection (Offender Reporting) Act 2004* (WA) ('the CPOR Act').

After consulting with a variety of individuals and representatives from government and non-government organisations about the operation of the CPOR Act, a Discussion Paper was released in February 2011 to seek the views of the public and, in particular, of those involved with the practical implications of the CPOR Act in Western Australia. The Commission received 22 submissions from a wide range of individuals and organisations. The Commission carefully appraised all of the submissions received before arriving at the 20 recommendations to Parliament for reform of the CPOR Act.

The West Australian registration scheme is part of a national scheme for the registration of individuals found guilty and sentenced for certain types of sexual offences involving children. For specified offences, an individual is automatically placed on a register and required to provide the police with a broad range of information about their identity and movements and to report to the police on a regular basis. These reporting requirements are aimed at enhancing community protection by reducing the likelihood of re-offending and to aid in the investigation and prosecution of any future offences committed by the individual. To date information on the register is only available to the Western Australia Police and other law enforcement agencies in Australia through the Australian National Child Offender Register (ANCOR). However, the recent introduction of the Community Protection (Offender Reporting) Amendment Bill (No 2) 2011 (WA) means that certain information about individuals contained on the register may be disclosed to the public in the future.

In examining the operation of the CPOR Act the Commission found that the Western Australian scheme was relatively strict and applied to a broader range of child sex offenders than any other state or territory in Australia. The Commission concluded that a degree of flexibility should be incorporated into the Western Australian sex offender registration scheme in order to ensure that it is not unfairly applied to low-risk offenders or less-serious offences. In doing so the Commission considered the purpose and operation of the registration scheme and the types of offending behaviour that may lead to registration. Because the primary purpose of the CPOR Act is community protection, offender registration should, as far as practicable, be based on an assessment of risk. As recently stated, the inclusion of those who do not pose any significant risk to the community 'not only works an injustice upon those persons who are then made subject to the onerous conditions of registration, but also dilutes the forensic value of the register as a database of persons who pose a real risk of recidivism'.[1]

The Commission received overwhelming support for its proposed reforms enabling judicial discretion for juvenile reportable offenders and for a limited degree of discretion for adult reportable offenders. The Commission has recommended the establishment of two different regimes – one for juvenile child sex offenders and one for adult child sex offenders. For children the court will be required to consider whether registration is appropriate in every case in recognition of the importance of taking into account the best interests of the child; that children should generally be treated differently than adults; and that most juvenile child sex offenders are different to adult child sex offenders. Ensuring that only those children who pose a risk to the community are included on the register will mean that low-risk offenders are not unfairly penalised and stigmatised by mandatory registration. For adults, the onus will generally be on the offender to initiate an application and further to satisfy the court that his or her circumstances are exceptional and that he or she does not pose a risk to the community. This Report includes an examination of the broad categories of cases that require discretion and provides an extremely useful guide as to the practical implications of the CPOR Act on certain offenders and types of sexual activity.

The Commission received support for its proposal that individuals have a right to review their reportable offender status. The Commission has recommended that the basis for 'deregistration' should be that the offender no longer poses a risk to the community. This is in the best interests of the community because it will promote compliance and rehabilitation; offenders will have an

1. Liberty Victoria, *Submission to the Victorian Law Reform Commission's reference on Sex Offenders Registration Act*, Submission No 18 (August 2011) 2.

incentive to engage in appropriate treatment and refrain from offending. The proposed review procedures are different for children and adults – adult reportable offenders will have the additional burden of satisfying the court that there are exceptional circumstances as well as satisfying the court that they no longer pose a risk. The Commission has further recommended that existing reportable offenders should have an immediate right to apply for a review of their reportable offender status upon the implementation of the recommendations in this Report.

The Commission has also recommended the continuation of the current practice whereby the police initially determine the frequency of periodic reporting under the scheme. The Commission received overwhelming support for the establishment of a process for a right of review of the frequency of reporting. The Commission has recommended a two-stage process for review. In the first instance, it is appropriate to seek a review by a senior police officer and if still aggrieved an individual may seek a review in the Magistrates Court or Children's Court.

The Commission's research and consultations also demonstrated that there was a lack of understanding about reporting obligations by some reportable offenders on account of a range of barriers including age, intellectual disability, language or culture. The Commission has made a number of recommendations to raise awareness and ensure special measures are taken with these groups to ensure they appreciate their reporting obligations.

I would like to acknowledge and thank all of those people who generously gave their time and expertise to assist the Commission. I acknowledge, in particular, the important assistance of the Western Australia Police in providing the Commission with significant information about current practices under the scheme.

The Commissioners who worked with me on this reference – Robert Mitchell SC, Richard Douglas and Alan Sefton – have all made important contributions.

Victoria Williams produced this comprehensive Final Report and the previous Discussion Paper; she has provided invaluable assistance to the Commission. The subject matter of this reference is challenging and could not be addressed in a vacuum without reference to practical real life examples. Ms Williams is to be particularly commended on the thoroughness and care taken with researching and presenting the case studies in this Report and in the Discussion Paper which clearly highlight the inequities in the current scheme.

Executive Officer Heather Kay and Project Manager Sharne Cranston administered and supported the project writer and Commissioners throughout the project. We are also indebted to our technical editor Cheryl MacFarlane for the professional presentation of the material.

The Commission welcomes the opportunity to contribute to this sensitive area of law by offering recommendations for reform.

Mary Anne Kenny
Chair

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Introduction

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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 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

The CPOR Act establishes a registration and reporting regime for offenders who have committed sexual and other serious offences against children (reportable offences). Similar schemes exist in all Australian jurisdictions. In Western Australia, registration and reporting obligations are automatically applied to both juvenile and adult offenders who are found guilty of a reportable offence.[1] Hence, the court sentencing the offender has no power to consider whether registration is justified or appropriate in the particular circumstances. It is the mandatory aspect of the CPOR Act that prompted this reference. 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. The submission also noted that the legislation may unfairly 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.

Scope

The scope of this reference is limited to the application of the CPOR Act to two categories of offenders: reportable offenders who were children when they committed the reportable offence and adult reportable offenders who committed the relevant reportable offence in exceptional circumstances. Moreover, the terms of reference explicitly require the Commission to take into account the 'necessity to preserve the central aims and efficacy of the legislation'. Therefore, the Commission's remit does not extend to a wide-ranging review of the legislation or consideration of its effectiveness.[2] However, in order to properly address the terms of reference the Commission found that it was necessary to consider the general operation of the CPOR Act and how it affects reportable offenders in practice, including consideration of the nature of obligations imposed upon offenders and the consequences of failing to comply with those obligations. For that reason, the Commission examined and described the operation of the CPOR Act (and

1. There is one very limited statutory exception for juvenile offenders under s 6(4) of the CPOR Act. A juvenile offender is not automatically deemed to be a reportable offender as a consequence of committing a single prescribed offence. Currently, the only prescribed offences are child pornography related offences (ie, ss 218-220 of the *Criminal Code*; and s 60 (deleted) and s 101 of the *Classification (Publications, Films and Computer Games) Enforcement Act 1996* (WA)): see *Community Protection (Offender Reporting) Regulations 2004* (WA) reg 8. Further, it is noted that the Commissioner of Police has discretion to suspend the reporting obligations of juvenile offenders who have been sentenced for specified offences.

2. Pursuant to s 115 of the CPOR Act 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. This statutory review has commenced, although the outcome of the review has not yet been made public. As part of this review the Western Australia Police prepared an Issues Paper and sought submissions from stakeholders about various aspects of the legislation, including some of the matters considered by the Commission in its Discussion Paper: Western Australia Police, *Statutory Review: Community Protection (Offender Reporting) Act 2004*, Issues Paper (June 2011).

comparable schemes in other jurisdictions) in some detail in its Discussion Paper.[3]

The Commission explained in its Discussion Paper that there are two matters outside the scope of this reference: the planned introduction of a public sex offender register in Western Australia and the extension of the registration scheme to offenders who commit sexual offences against adults. Presently, no Australian jurisdiction allows for public access to or disclosure of information on the register to members of the public. In contrast, sex offender registration schemes in a number of overseas jurisdictions allow for various forms of community notification.

On 8 November 2011 the Western Australia government introduced draft legislation into Parliament to provide for the public disclosure of information about specified classes of registered sex offenders. The Community Protection (Offender Reporting) Amendment Bill (No 2) 2011 (WA) was passed by the Legislative Assembly on 1 December 2011 and transmitted to the Legislative Council on the same day. From the Commission's perspective, the imminent introduction of a public disclosure scheme is relevant insofar as it constitutes a potential consequence of registration. The fact that an offender's status as a registered sex offender may become public knowledge only serves to increase the need to ensure that the provisions of the CPOR Act are not applied too broadly.

The CPOR Act provides for the registration of offenders who commit sexual offences against adults; however, these provisions have not yet commenced.[4] The Commission 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.[5] In its Discussion Paper, the Commission referred to the absence of reporting obligations for adult sex offenders because, in some circumstances, it is apparent that the exclusion of adult sex offences creates anomalies.[6] However, consideration of whether the reporting requirements under the CPOR Act should be extended to adult sex offenders is clearly beyond the Commission's terms of reference.

3. Law Reform Commission of Western Australia (LRCWA), *Community Protection (Offender Reporting) Act 2004* (WA), Discussion Paper (February 2011) Chapters Two & Three.
4. See s 12 and sch 3 of the CPOR Act. Victoria and Tasmania enable registration of adult sex offenders but registration is not automatic: see *Sex Offenders Registration Act 2004* (Vic) schs 3 & 4; *Community Protection (Offender Reporting) Act 2005* (Tas) sch 1–3. The Commission notes that sch 1 of CPOR Act—which has commenced operation—includes two offences that could potentially involve either an adult victim or a child victim (ie, sexual offences against relatives and sexual offences against incapable persons under ss 329 & 330 of the *Criminal Code*). There are a small number of reportable offenders in Western Australia who are subject to registration as a consequence 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).
5. Banks A, 'Serial Rapists Escape Police Monitoring', *The West Australian* (15 April 2010) 13.
6. LRCWA, *Community Protection (Offender Reporting) Act 2004* (WA), Discussion Paper (February 2011) 6-7. For example, an adult who is convicted of indecently assaulting another adult is not subject to registration at all but a juvenile convicted of indecently assaulting a person under the age of 18 years is subject to mandatory registration.

Methodology

Discussion Paper

In February 2011 the Commission released its Discussion Paper examining the impact of the *Community Protection (Offender Reporting) Act 2004* (WA) ('the CPOR Act') on juvenile reportable offenders and adult reportable offenders who committed the relevant reportable offence in exceptional circumstances. In preparing the Discussion Paper, the Commission undertook research in relation to sex offender registration laws in all Australian states and territories as well as similar schemes in international jurisdictions. The Commission also consulted with a large number and variety of agencies in both the metropolitan area and regional areas in order to properly assess the practical implications of the CPOR Act for those reportable offenders who fit within the Commission's terms of reference. Agencies and individuals consulted included the Western Australia Police, Office of the Director of Public Prosecutions, Legal Aid WA, Aboriginal Legal Service, Mental Health Law Centre, Department of the Attorney General, 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 was also 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 received written comments from the National Children's and Youth Law Centre and was provided with the Law Council of Australia's 'Policy Statement on Registration and Reporting Obligations for Child Sex Offenders'. The Discussion Paper also included numerous case examples which were presented to show the impact of the scheme in practice. Many of these examples evidenced the need for reform. These materials assisted the Commission in formulating its 19 proposals for reform. In summary, the proposals were underpinned by the clear need to insert a degree of flexibility or discretion into the scheme in order to ensure that the reporting and registration requirements under the CPOR Act do not apply unnecessarily to low-risk or less serious offenders.

The Commission requested submissions in response to its proposals (and questions) by 31 May 2011. However, a small number of agencies sought extensions and these were granted in order to ensure that the views of all stakeholders were considered by the Commission in reaching its final recommendations. The final submissions were received in early July 2011. In addition, the Commission sought clarification in respect of the submissions received from two agencies and these responses were not obtained until August and September 2011.

About This Report

The Commission received 22 submissions from a wide range of agencies and individuals. A list of submissions is included in this Report at Appendix C. These submissions have been carefully considered by the Commission in reaching its final recommendations for reform of the CPOR Act.

This Report is divided into five chapters. At the end of this introductory section the Commission outlines the terminology used in this Report and provides an overview of the keys issues impacting reform and the Commission's general approach. For ease of reference, Chapter One presents a brief synopsis of the background to and operation of the CPOR Act; however, the Commission urges those who wish to gain a more detailed understanding of the operation of the Act to read Chapters Two and Three of its Discussion Paper.

Chapter Two sets out the basis for reform and explains why discretion under the CPOR Act is necessary. Chapter Three considers how reportable offender status should be determined including recommendations in relation to rights of review (both retrospective and future). The determination of reporting obligations and the manner in which such reporting obligations should be reviewed is considered in Chapter Four. As a consequence of the Commission's research and consultations and submissions received in response to its Discussion Paper a number of ancillary issues arose during the course of this reference. These issues are discussed in the final chapter.

This Report is intended to be read in conjunction with the Commission's Discussion Paper, which contains a more detailed discussion of the relevant issues and the need for reform (including numerous case examples). The Commission has made a total of 20 recommendations in this Report and a list of recommendations is set out in Appendix A.

Terminology

In Chapter One of the Discussion Paper the Commission carefully explained its use of terminology. While it is unnecessary to repeat the entirety of the discussion here the Commission wishes to highlight the following key terms used in this Report:

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 they were themselves under the age of 18 years.

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

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

Adult reportable offender: a reportable offender under the CPOR Act who was 18 years or over at the time of committing the reportable offence.

Registered offender: an offender who is required to comply with sex offender registration laws (ie, in any jurisdiction).

One matter that requires clarification is the use of the terms '**reportable offender'** and **'registered offender'**. In its submission, the Department of the Attorney General commented that the Commission had used both terms in its Discussion Paper and suggested that the meaning of the term 'registered offender' was not always clear.[1] One difficulty is the different terminology used in each Australian jurisdiction; some refer to 'registrable offenders'[2] while others use 'reportable offenders'.[3] In addition, the general literature on sex offender registration schemes tends to use the term 'registered offender'.

In order to be clear in this Report, the Commission uses the term 'reportable offender' to refer to a reportable offender as defined under the CPOR Act. The term 'registered offender' will be used as a general descriptor of an offender who is required to comply with registration and/or reporting obligations under any comparable legislation (including in overseas jurisdictions). It will then be apparent that when the term 'reportable offender' is used the reference is to the Western Australian jurisdiction. In this regard it is important to note that 'registered offender' has no technical meaning in Western Australia; 'reportable offender' is the correct term under the CPOR Act (although some reportable offenders may have their reporting obligations suspended, they nevertheless remain 'reportable offenders').

Another definitional issue that warrants further explanation is the use of the phrase 'consensual sexual activity'. The Western Australia Police submitted that the Commission's use of the term 'consensual' in its Discussion Paper could be seen as 'diminishing or condoning' offences involving sexual acts with children under the age of 16 years and further stated that Parliament has determined that children under the age of 16 years cannot consent to sexual activity.[4] The Commission appreciates that a child under the age of 16 years cannot legally consent to sexual activity; however, for the purpose of this reference it is necessary to distinguish between sexual activity that occurs in circumstances where there is force, violence, coercion, abuse, gross power imbalance or threatening behaviour and sexual activity that is undertaken willingly (albeit by a person who is under the age of consent). Obviously, for young children whether the complainant was a willing participant has little or no relevance. However, the Commission could not overlook the reality that young people are being placed on a sex offender register as a

1. Department of the Attorney General, Submission No 20 (15 June 2011) 8.

2. *Sex Offenders Registration Act 2004* (Vic) s 6; *Child Sex Offenders Registration Act 2006* (SA) s 6; *Crimes (Child Sex Offenders) Act 2005* (ACT) s 8; *Child Protection (Offenders Registration) Act 2000* (NSW) s 3A.

3. *Child Protection (Offender Reporting) Act 2004* (Qld) s 5; *Child Protection (Offender Reporting and Registration) Act* (NT) s 6.

4. Western Australia Police, Submission No 18 (30 May 2011) 1.

consequence of having sexual relations with an underage person who willingly participated in and, in some cases, instigated the sexual activity. In its Discussion Paper the Commission explained that consent is irrelevant to the determination of criminal responsibility for child-specific sexual offences; however, the fact that a child complainant willingly participated in the sexual activity may be relevant to an assessment of the seriousness of the offence and culpability of the offender. This is especially so the closer the age gap is between the offender and the complainant. The Commission adopted the term 'consensual sexual activity' for ease of reference and in no way intended to condone underage sexual activity by the use of that term.[5] The Commission's recommendations in this Report relate to the question of sex offender registration (and not criminal responsibility). The presence of 'factual consent' is relevant in cases involving similar-aged parties. Therefore, the Commission will continue to use the term 'consensual sexual activity' to refer to sexual activity that was factually (although not legally) consensual. In doing so, the Commission trusts that the reader will appreciate the context in which the term is used.

5. LRCWA, *Community Protection (Offender Reporting) Act 2004* (WA), Discussion Paper (February 2011) 16. The Commission also notes that the phrase 'consensual sexual activity' is used in its terms of reference.

The Commission's approach

In its Discussion Paper the Commission mentioned a number of key issues impacting upon reform in this area. In summary these are that:

- it is necessary to balance the interests of children generally with the interests of an individual child offender;[1]
- juvenile offenders should be treated differently to adult offenders;[2]
- sex offender registration schemes need resources and, therefore, it is desirable that available resources are not drained by dealing with offenders who do not pose a 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; and
- 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 impact of the current scheme.[3]

As canvassed above, the Commission has decided that a degree of flexibility is required under the *Community Protection (Offender Reporting) Act 2004* (WA) ('the CPOR Act'). In reaching this view the Commission has not overlooked the importance of the scheme and the need to monitor the whereabouts and personal circumstances of child sex offenders who pose a risk to the community. However, not all child sex offenders caught by the scheme pose the same risk to the community. The provisions of the CPOR Act apply to a wide range of unlawful sexual behaviour. For example, under the present scheme an 18-year-old who has engaged in consensual sexual activity with his 15-year-old girlfriend is equally a reportable offender as a 40-year-old man who has abducted and sexually abused a very young child. Significantly, the provisions of the CPOR Act capture consensual sexual activity between two young people, experimental behaviour by young children and teenage practices such as 'sexting'. The Commission's research and consultations revealed many examples that demonstrate that mandatory registration is inappropriate. The recommendations in this Report are designed to introduce a degree of discretion into the scheme to ensure that it only applies to those offenders from whom the community must be protected. As one commentator recently argued:

> We must preserve the integrity of this register by reserving it for the individuals who pose an actual threat to society.[4]

1. In her submission the Commissioner for Children and Young People stated that the *Community Protection (Offender Reporting) Act 2004* (WA) should, in relation to juvenile offenders, include the principle that the best interests of the child is a consideration: Commissioner for Children and Young People, Submission No 12 (31 May 2011) 3. A similar view was expressed by the Department of Corrective Services when it stated that the 'judiciary should be given the discretion to determine whether it is in the interests of the child and the community for the child to be placed on the sex offender register': Department of Corrective Services, Submission No 14 (May 2011) 7. Likewise the Victorian Equal Opportunity and Human Rights Commission has recently submitted to the Victorian Law Reform Commission that in relation to child offenders the *Sex Offender Registration Act 2004* (Vic) should be amended to include a provision that the best interests of the child are paramount: Victorian Equal Opportunity and Human Rights Commission, Submission No 17 (August 2011) 2. While the Commission accepts these submissions it is of the view that the express incorporation of the best interests principle is unnecessary because under the Commission's recommendations a juvenile offender will only be subject to registration under the CPOR Act if a court has determined that the juvenile offender poses a risk to the lives or sexual safety of one or more persons, or persons generally another person. In such a case, the best interests of the child must necessarily be balanced against legitimate competing concerns such as the protection of other children or the wider community. As the Australian Human Rights Commission (AHRC) has observed, 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': AHRC, *The Best Interests of the Child*, Human Rights Brief No 1 (March 1999).
2. Although there are some specific provisions for juvenile reportable offenders, in many ways the CPOR Act treats adult and juvenile offenders the same and there are even some instances where juvenile offenders appear to be treated more harshly (eg, a 13-year-old who pinches the buttocks 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).
3. LRCWA, *Community Protection (Offender Reporting) Act 2004* (WA), Discussion Paper (February 2011) 25–31.
4. See Freedman M, 'Opinion', *West Weekend* (24 September 2011) 8.

The Commission has also concluded that the approach for juvenile offenders must be different to the approach for adult offenders. In general terms, it is well recognised that juveniles should be treated differently and separately from adults.[5] One reason is that most juveniles 'grow out' of crime by the time they reach adulthood. Another is the need to focus on rehabilitation and to avoid 'labelling and stigmatisation'.[6] In the context of this reference the Commission highlighted important differences between juvenile child sex offenders and adult child sex offenders, including that juvenile child sex offenders are less likely than adult child sex offenders to commit further sexual offences and, in many instances, juvenile child sex offenders are not subject to registration as a consequence of engaging in deviant or abnormal sexual behaviour.[7] Further, the negative stigma associated with being required to register and report to police as a 'sex offender' is potentially very damaging to a juvenile offender's rehabilitation.

The majority of submissions received in response to the Commission's proposals were in favour of a different (ie, more lenient) approach for juveniles.[8] The Commission remains of the view that there should be a general discretion for courts to consider whether a juvenile offender should be subject to the requirements of the CPOR Act. While the Commission was not asked to consider the merits of a similar general discretion for adults, it was asked to report on whether changes were required to the way that the CPOR Act deals with adults who commit reportable offences in exceptional circumstances. On the basis of its research and submissions, the Commission has concluded that a mechanism to deal with appropriate cases where exceptional circumstances are demonstrated is necessary.

5. See eg, Richards K, 'What Makes Juvenile Offenders Different from Adult Offenders?' (2011) 409 *Australian Institute of Criminology Trends and Issues in Crime and Criminal Justice*, 1.
6. Ibid 6.
7. LRCWA, *Community Protection (Offender Reporting) Act 2004* (WA), Discussion Paper (February 2011) 26–27.
8. The Office of the Director of Public Prosecutions supported limited discretion for both adults and juveniles: Office of the Director of Public Prosecutions, Submission No 17 (2 June 2011) 6.

Chapter One

Overview of the Community Protection (Offender Reporting) Act

Contents

Introduction

The *Community Protection (Offender Reporting) Act 2004* (WA) ('the CPOR Act') commenced operation on 1 February 2005. It establishes a scheme that requires child sex offenders (and certain other serious offenders) to notify police of their whereabouts and other personal details on an ongoing basis. The scheme is designed to enhance community protection by facilitating the investigation of any future sexual offences and by reducing the likelihood of reoffending.[1] The enactment of the CPOR Act followed the development of a national approach for the registration of child sex offenders by the working party for the Australasian Police Ministers' Council (APMC) in 2003. By 2007 every Australian state and territory had enacted similar, though not identical, laws requiring certain child sex offenders and other serious offenders to register their details with and report to police.[2] The Australian National Child Offender Register is the national database that enables jurisdictions to share the information included on each jurisdiction's register. The information registered in each jurisdiction is determined by the applicable legislation in that state or territory.

The number of reportable offenders in Western Australia (and across the nation) continues to rise. At the end of 2009 there were 1,704 reportable offenders in Western Australia. [3] By June 2011, the total number had risen to 2,500.[4] In mid-2010 there were 11,400 registered sex offenders in Australia and by March 2011 the total number had reached 12,596.[5] In a recent paper published by the Victorian Law Reform Commission it was stated that as at 1 June 2011, 3,933 people had been registered in Victoria.[6] The Director of the Office of Police Integrity in Victoria expects that, on the basis of the numbers of offenders subject to registration since the scheme commenced, in the first 30 years more than 20,000 individuals will have been registered in Victoria alone.[7] While an increase in the number of reportable offenders is to be expected over time, it is important—if the register is to achieve its goal of community protection—that the scheme in Western Australia does not become overwhelmed.

1. See the preamble to the CPOR Act. It is also stated that the Act is designed to 'enable courts to make orders prohibiting certain offenders from engaging in specified conduct'. For a discussion of prohibition orders, see LRCWA, *Community Protection (Offender Reporting) Act 2004*, Discussion Paper (February 2011) 41.
2. *Child Protection (Offenders Registration) Act 2000* (NSW); *Sex Offenders Registration Act 2004* (Vic); *Child Protection (Offender Reporting) Act 2004* (Qld); *Child Sex Offenders Registration Act 2006* (SA); *Community Protection (Offender Reporting) Act 2005* (Tas); *Crimes (Child Sex Offenders) Act 2005* (ACT); *Child Protection (Offender Reporting and Registration) Act* (NT).
3. LRCWA, *Community Protection (Offender Reporting) Act 2004*, Discussion Paper (February 2011) 35.
4. Western Australia Police, *Statutory Review: Community Protection (Offender Reporting) Act 2004*, Issues Paper (June 2011) 30.
5. See <http://www.crimtrac.gov.au/our_services/ChildProtectionServices.html>.
6. VLRC, *Sex Offenders Registration*, Information Paper (2011) 23.
7. Victorian Ombudsman, *Whistleblowers Protection Act 2001: Investigation into the failure of agencies to manage registered offenders* (2011) 24.

The Operation of the Community Protection (Offender Reporting) Act

The Commission provided a detailed overview of the operation of the *Community Protection (Offender Reporting) Act 2004* (WA) ('the CPOR Act') in Chapter Two of its Discussion Paper. In this section the Commission summarises the key aspects of the CPOR Act that impact upon the Commission's final recommendations for reform: the range of persons who are subject to mandatory registration and the nature of reporting obligations.

Mandatory Registration

Persons who are 'sentenced' for a Class 1 or Class 2 offence are automatically subject to registration and reporting obligations; that is, they are deemed to be reportable offenders under the CPOR Act.[1] Class 1 and Class 2 offences are listed in Schedules 1 and 2 of the CPOR Act (and these lists are reproduced in the Commission's Discussion Paper).[2] In summary, Class 1 offences are the more serious offences and include murder (of a child); sexual offences against a child under 13 years; sexual offences against a child of or over 13 and under 16 years; and sexual penetration without consent (of a child). Class 2 offences include various child pornography offences; indecent assault (of a child); and indecent recording (of a child).

The CPOR Act defines 'sentence' broadly to cover a wide range of dispositions[3] including orders releasing an offender without sentence; an order imposing no punishment; a pre-sentence order; and a custody order made in relation to an accused who has been acquitted on account of unsoundness of mind.[4] As the Commission observed in its Discussion Paper, anyone found guilty of a Class 1 or Class 2 offence is subject to registration irrespective of the leniency of the sentence imposed or the circumstances of the offence.[5] In the case of adult offenders, even the most lenient disposition available—no punishment and a spent conviction—will still result in mandatory registration and reporting. There is no scope for a court to take exceptional circumstances into account.

There is one exception to mandatory registration for juvenile offenders. A juvenile offender is not a reportable offender merely because he or she committed a single prescribed offence.[6] Broadly speaking, prescribed offences currently include offences relating to child pornography (under both Western Australian and Commonwealth laws).[7] It is noted that this statutory exception would cover child pornography offences arising out of the practice of 'sexting' but only if there was a 'single offence'. Pursuant to ss 6(8) and 5(1) of the CPOR Act, a 'single offence' may include more than one offence provided that the offences were committed within a 24-hour period and were committed against the same person.

Reporting Obligations

Reportable offenders are required to comply with the reporting obligations under the CPOR Act. These obligations are imposed over and above any sentence imposed for the offence. Some reportable offenders are required to comply with the reporting obligations under the CPOR Act simultaneously with obligations imposed

1. The CPOR Act also includes Class 3 offences; however, the relevant provisions have not yet commenced. Class 3 offences are sexual offences committed against adults.
2. LRCWA, *Community Protection (Offender Reporting) Act 2004*, Discussion Paper (February 2011) 37-38.
3. *Community Protection (Offender Reporting) Act 2004* (WA) s 3.
4. Some Class 1 and Class 2 offences are included in Schedule 1 of the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA). This means that a superior court is required to impose a custody order if the accused is acquitted on account of unsoundness of mind. Child-specific sexual offences (eg, sexual offences against a child under the age of 13 years and sexual offences against a child of or over 13 years and under 16 years) are not included in Schedule 1 and, therefore, a court has discretion whether to impose a custody order in these cases. In its submission, the Mental Health Law Centre queried whether the registration scheme should also apply to mentally impaired accused who are found unfit to plead: Mental Health Law Centre, Submission No 4 (29 April 2011) 5. The Commission is of the view that it would be inappropriate to impose registration and reporting obligations upon mentally impaired accused in circumstances where the relevant alleged act or omission has not be proven.
5. LRCWA, *Community Protection (Offender Reporting) Act 2004*, Discussion Paper (February 2011) 36. The Commission noted that a referral to a juvenile justice team appears to be excluded from the reach of the scheme but that this option for juvenile offenders is only available in limited circumstances.
6. *Community Protection (Offender Reporting) Act 2004* (WA) s 6(4).
7. The list of prescribed offences was amended on 1 July 2011 to include three out of four offences that the Commission proposed should be included in Regulation 8 of the *Community Protection (Offender Reporting) Regulations 2004* (WA). The Commission makes a recommendation in regard to Regulation 8 in Chapter Three of this Report: see Recommendation 2.

as part of the sentence. Further, in the case of offenders sentenced to imprisonment, the reporting obligations do not commence until after the offender has been released from custody.

Reporting periods

Different reporting periods apply under the CPOR Act depending on whether the offender has been dealt with for a Class 1 or Class 2 offence and whether the offender has been dealt with for multiple offences. There is no discretion in regard to the applicable reporting period; the periods are set under the legislation. For adult reportable offenders there are three possible reporting periods: life, 15 years or 8 years. For juvenile reportable offenders the adult period is reduced by half (and lifetime reporting is not applicable).[8] In general terms, lifetime reporting is reserved for repeat offenders and the lower reporting period applies to the less-serious (ie, Class 2) offences. The table below reproduces the reporting periods under the CPOR Act.[9]

Once a reportable offender's reporting period ends, he or she is no longer required to comply with the reporting obligations under the Act. However, the offender's name continues to appear on the Australian National Child Offender Register database.

Initial report

A reportable offender is generally required to first report to police within seven days of sentencing or following release from custody. This report must be made in person.[10] An exception applies if the reportable offender intends leaving Western Australia before the expiry of the seven-day period; in these circumstances the offender is required to report to police before leaving the state. Section 26 of the CPOR Act lists the details that are required to be reported at the initial report and this list includes such matters as the offender's name and address, date of birth, telephone numbers, email addresses, internet service providers, alternative names used online, employment details, vehicle details, whether the offender has any tattoos or other distinguishing marks, and the names and ages of any children who generally reside with the offender or with whom the offender has regular unsupervised contact. The Community Protection (Offender Reporting) Amendment Bill 2011 (WA)[11] proposes to add to the list of details which must be reported including passport details; user names, codes and passwords used to gain access to the internet (including a particular website); and the address of any premises at which the offender is regularly present where children generally reside.[12]

Offences	Reporting Period	
	Adult	Juvenile
Only ever been found guilty of a single Class 2 offence	8 years	4 years
Only ever been found guilty of a single Class 1 offence	15 years	7 ½ years
Reportable offender because of a Class 1 offence and then commits and found guilty of another Class 1 or a Class 2 offence	Life	7 ½ years
Reportable offender because of a Class 2 offence and then commits and found guilty of a Class 1 offence	Life	7 ½ years
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 three or more Class 2 offences	Life	7 ½ years

8. *Community Protection (Offender Reporting) Act 2004* (WA) ss 46-47.
9. The table does not include references to Class 3 offences.
10. *Community Protection (Offender Reporting) Act 2004* (WA) s 35(1)(a).
11. This Bill was introduced into Parliament on 30 November 2011.
12. Community Protection (Offender Reporting) Amendment Bill 2011 (WA) cl 13.

In addition, the offender is required to present two forms of identification and provide a passport style photograph.[13] These requirements can be waived if the offender consents to having his or her fingerprints taken or if the police officer receiving the report is otherwise satisfied as to the identity of the offender. The CPOR Act also provides that the police can use reasonable force to obtain fingerprints or photographs if the offender does not voluntarily comply with the relevant requirements.[14] A reportable offender can also be detained by police if it is reasonably necessary to do so to enable the police to give notice to the offender of his or her reporting obligations.[15]

Ongoing reporting

After the initial report, reportable offenders are required to report to police on an ongoing basis. Changes to an offender's personal details must be reported within seven days.[16] To constitute a reportable change in relation to an offender's place of residence, unsupervised contact with children, place of employment or motor vehicle details the change must have been in effect for at least 14 days in any 12-month period. This means that an offender has 21 days in which to report these changes. If passed, the Community Protection (Offender Reporting) Amendment Bill 2011 will amend the CPOR Act so that reportable offenders will be obliged, in practical terms, to report any unsupervised contact with a child or any changes in residential status where a child generally resides with the offender within four days[17] and to report general residential, employment and motor vehicle changes within 14 days. Reportable offenders also have extensive and continuing obligations to report any travel plans (and any changes to those travel plans) for travel inside and outside Western Australia.[18]

Periodic reporting

One of the more contentious features of the reporting obligations under the CPOR Act is the requirement to report periodically to police (even if there have been no changes to the previously reported details). Under s 28(1) all reportable offenders are required to report their details to police at least once a year. However, s 28(3) empowers the police to issue a notice requiring a reportable offender to report at any time.

In Western Australia, the police conduct a risk assessment to determine how frequently each reportable offender should be required to report. An actuarial risk assessment tool, Risk Matrix 2000 (RM2000) is currently used for adult reportable offenders to assess the risk of reoffending.[19] An actuarial tool is not used for juvenile reportable offenders and, instead, the assessment of risk is based solely on the subjective opinion of police. On the basis of information provided by the Western Australia Police the Commission explained in its Discussion Paper that some offenders were required to report weekly, others monthly, some two or four times a year and only a small number of reportable offenders were subject to the minimum requirement to report annually.[20] The Commission had also been told by lawyers that some offenders had been required to report twice a week. In its submission the Western Australia Police clarified that the reporting frequency for reportable offenders is, in normal circumstances:

- at least once a year for low risk offenders;
- at least once every six months for medium risk offenders;
- at least once every three months for high risk offenders; and
- at least once a month for very high risk offenders.

However, if specific concerns are held, an offender may be required to report more often. As at 9 September 2011, the Western Australia Police advised that four reportable offenders were required to report more often

13. *Community Protection (Offender Reporting) Act 2004* (WA) s 38. Regulation 15 of the *Community Protection (Offender Reporting) Regulations 2004* (WA) stipulates the various forms of identification that are permitted and these include an original drivers licence, passport, citizenship document *or* birth certificate (although a certified extract of a birth certificate is allowed) *and* an original credit card, bank statement, Medicare card, utility account, rates notice, pensioner card, seniors card, veterans card, lease agreement, vehicle registration notice, insurance renewal notice, student identity card, student enrolment statement *or* electoral enrolment card.
14. *Community Protection (Offender Reporting) Act 2004* (WA) s 40.
15. *Community Protection (Offender Reporting) Act 2004* (WA) s 72.
16. *Community Protection (Offender Reporting) Act 2004* (WA) s 29(1).
17. This will be achieved by reducing the period which constitutes unsupervised contact from 14 days to 3 days and reducing the time in which the offender is required to report the change from 7 days to 24 hours: see Community Protection (Offender Reporting) Amendment Bill 2011 (WA) cl 14.
18. *Community Protection (Offender Reporting) Act 2004* (WA) ss 29A–32.
19. For a discussion of this risk assessment tool, see LRCWA, *Community Protection (Offender Reporting) Act 2004*, Discussion Paper (February 2011) 47. The only other jurisdiction that appears to use the RM2000 (for assessing risk and categorising offenders) is the Northern Territory: MCPEM, *National Approach to Child Protection Offender Registration – Report from National Working Party* (2009) 10.
20. LRCWA, *Community Protection (Offender Reporting) Act 2004*, Discussion Paper (February 2011) 48.

than once a month, with one of these offenders reporting on a weekly basis.[21]

In contrast, the legislation in all other Australian jurisdictions only stipulates periodic reporting on an annual basis.[22] The approach in other jurisdictions is consistent with the national model developed by the APMC working party. The option of requiring registered offenders to report more often than once a year (in the absence of any changes in their personal circumstances) was rejected because regular reporting may amount to additional punishment, may interfere with rehabilitation and would increase the workload of police.[23]

Consequences of non-compliance

Compliance with reporting obligations is encouraged by ensuring that non-compliant reportable offenders are held to account. A reportable offender who fails to comply with the reporting obligations, without reasonable excuse, commits an offence. The maximum penalty is currently a fine of $12,000 and two years' imprisonment.[24] It is also an offence (with the same maximum penalty) to knowingly provide false or misleading information.[25] The Ministerial Council for Police and Emergency Management national working party reported in 2009 that all jurisdictions had agreed to work toward uniform penalties.[26] The Northern Territory, South Australia, and Tasmania also provide for a maximum penalty of up to two years' imprisonment.[27] However, in New South Wales, Queensland, and Victoria the penalty for non-compliance is a maximum of five years' imprisonment.[28] The Community Protection (Offender Reporting) Amendment Bill 2011 (WA) proposes to increase the maximum penalty for non-compliance in Western Australia to five years' imprisonment.[29]

In determining whether a reportable offender had a reasonable excuse for failing to comply with his or her reporting obligations the court is required to consider the offender's age; whether the offender has a disability that affects his or her ability to understand, or to comply with, the reporting obligations; or whether the offender was adequately notified of the reporting obligations.[30] It is also a defence to establish that the reportable offender had not received notice and was unaware of the reporting obligation.[31] It is important to note that non-compliance with reporting obligations may be deliberate and serious but non-compliance may also arise due to inadvertence or practical difficulties (eg, a reportable offender may simply forget to report a change in personal details or may be unable to attend a police station within the required timeframe because of a lack of transport). In this regard, reporting obligations may be particularly onerous in remote areas and, as the Commission noted in its Discussion Paper, breaching offences appear to be disproportionately higher in regional areas and among Aboriginal reportable offenders.[32]

21. Western Australia Police, Submission 18A (9 September 2011) 2.
22. The Commission noted in its Discussion Paper that in Tasmania the police have asked registered offenders to report more frequently than once a year; however, whether offenders are required to do so under its legislation is unclear and untested: LRCWA, *Community Protection (Offender Reporting) Act 2004*, Discussion Paper (February 2011) 49.
23. Inter-jurisdictional Working Party, *Child Protection Offender Registration with Police: A national approach*, Report to the Australasian Police Ministers' Council (2003) 106.
24. *Community Protection (Offender Reporting) Act 2004* (WA) s 63(1).
25. *Community Protection (Offender Reporting) Act 2004* (WA) s 64.
26. Ministerial Council for Police and Emergency Management, *National Approach to Child Protection Offender Registration – Report from National Working Party* (2009).
27. *Child Protection (Offender Reporting and Registration) Act* (NT) s 48; *Child Sex Offenders Registration Act 2006* (SA) s 44; *Community Protection (Offender Reporting) Act 2005* (Tas) s 33.
28. *Child Protection (Offenders Registration) Act 2000* (NSW) s 17; *Child Protection (Offender Reporting) Act 2004* (Qld) s 50; *Sex Offenders Registration Act 2004* (Vic) s 46.
29. It is also proposed to classify the offences under ss 63 and 64 of the CPOR Act as 'crimes'. In doing so a summary conviction penalty of $12,000 or two years' imprisonment has been included: Community Protection (Offender Reporting) Amendment Bill 2011 (WA) cls 21 & 22.
30. *Community Protection (Offender Reporting) Act 2004* (WA) s 63(2).
31. *Community Protection (Offender Reporting) Act 2004* (WA) s63(3).
32. LRCWA, *Community Protection (Offender Reporting) Act 2004*, Discussion Paper (February 2011) 54.

The national scheme

In its Discussion Paper the Commission provided an overview of sex offender registration schemes overseas and explained the background to the development of nationally consistent sex offender registration laws in Australia.[1] The purpose of national consistency is to ensure that child sex offenders who are registered in one state or territory cannot avoid reporting obligations by moving to a different jurisdiction (or cannot lessen their obligations by moving to a jurisdiction with a less stringent scheme). This was reiterated by the Western Australia Police in its recent Issues Paper prepared for the statutory review of the *Community Protection (Offender Reporting) Act 2004* (WA) ('the CPOR Act'). Reference was made to the remarks of former Senator Chris Ellison:

> [I]t is critical that governments come together to ensure that child sex offenders who travel across borders are treated in a consistent manner and that no State or Territory can be used as a haven for those who wish to commit these crimes.[2]

In its submission for this reference the Western Australia Police also emphasised the importance of national consistency to deter registered offenders from 'jurisdiction shopping'.[3]

The Commission appreciates the need for nationally consistent registration laws in order to ensure that registered child sex offenders cannot avoid reporting obligations by moving from one jurisdiction to another. However, the need to maintain national consistency must not be taken out of context. The legislation in each jurisdiction is broadly consistent in relation to the obligations imposed on offenders, reporting periods, the consequences of non-compliance and the recognition of corresponding reportable offenders.[4] However, there are significant differences between Australian jurisdictions in regard to the laws that determine who is and who is not a registered offender. Given that the focus of this reference is on precisely that question it is important to restate these differences.

Differences Between Australian Jurisdictions in Regard to Registered Offenders

General criminal laws

The first significant difference in regard to who is and who is not subject to sex offender registration in each jurisdiction stems from the disparity in the underlying criminal laws of each state and territory. Before persons are classified as registered offenders they must first be charged and then found guilty of a relevant child sexual offence. The criminal laws in each jurisdiction determine whether a person is guilty of an offence. An entire chapter of the Commission's Discussion Paper was devoted to this issue.[5]

The Commission found that as a consequence of the jurisdictional differences a person may be a reportable offender in Western Australia as a result of engaging in conduct that is lawful in another jurisdiction. For example, three Australian jurisdictions have a 'similarity of age' defence.[6] The effect of this defence is that

1. LRCWA, *Community Protection (Offender Reporting) Act 2004*, Discussion Paper (February 2011) 62-76.
2. Western Australia Police, *Statutory Review: Community Protection (Offender Reporting) Act 2004*, Issues Paper (June 2011) 4.
3. Western Australia Police, Submission No 18 (30 May 2011) 1–2.
4. The Ministerial Council for Police and Emergency Management (MCPEM) reported on national consistency in 2009. Recommendations were made in relation to enhancing national consistency including the need for some jurisdictions (including Western Australia) to increase the penalty for non-compliance to five years' imprisonment; that all jurisdictions require registered offenders to report their email addresses and other electronic identifiers (as is the case in New South Wales and Western Australia); that all jurisdictions require registered offenders to provide a DNA sample; that all jurisdictions limit the number of days of regular unsupervised contact with a child that a registered offender can have before being required to report that contact to three days and that the contact must be reported within 24 hours; and that all jurisdictions require (as is currently the case in Western Australia) that the initial report to police be made within seven days: MCPEM, *National Approach to Child Protection Offender Registration – Report from National Working Party* (2009). The Community Protection (Offender Reporting) Amendment Bill 2011 (WA) reflects some of these recommendations.
5. LRCWA, *Community Protection (Offender Reporting) Act 2004*, Discussion Paper (February 2011) Chapter Four.
6. See *Crimes Act 1914* (Vic) s 45(4); *Crimes Act 1900* (ACT) s 55(3); *Criminal Code Act 1924* (Tas) s 124(3).

consensual sexual activity with an underage person is not unlawful so long as the age difference between the complainant and the accused is within the stipulated age gap (two years in Victoria and the Australian Capital Territory and between three and five years in Tasmania, depending on the age of the complainant). The Commission referred to three Western Australian examples where a juvenile was automatically deemed a reportable offender in circumstances where, if the conduct had occurred in Tasmania, the offender may not have even been convicted of an offence.[7]

In addition, some jurisdictions retain an unlimited defence of an honest and reasonable but mistaken belief that the complainant was of or above the age of consent. In 2002 this defence was significantly restricted in Western Australia and it is now only available if the accused is no more than three years older[8] than the complainant. In practical terms this means it is not available to any accused who is 19 years or over. In Victoria,[9] Queensland,[10] the Northern Territory,[11] the Australian Capital Territory,[12] Tasmania,[13] and New South Wales[14] the defence is available to an accused of any age. The Commission observed in its Discussion Paper that the Western Australian law in this area is more restrictive than all other Australian states and territories other than South Australia.[15]

The Commission's research revealed a number of cases where reportable offenders in Western Australia are subject to the CPOR Act (for 15 years) as a result of engaging in sexual activity with an underage person in circumstances where they believed that the complainant was of or over the age of 16 years.[16] If the conduct had occurred in most other parts of Australia the accused would have had a defence available to the charge.

The above discussion demonstrates that there is a clear link between the general criminal law and whether a person is classified as a registered sex offender. Because of the differences in the general criminal law of each Australian jurisdiction the behaviour underpinning registration in each jurisdiction varies.

Range of 'registrable offences'

In each jurisdiction the applicable sex offender registration laws include a list or description of registrable offences (ie, offences for which a person is registered). The Ministerial Council for Police and Emergency Management working party observed in 2009 that a 'key point of difference between registers in each jurisdiction is the range of registrable offences'.[17] For example, child murder is a registrable offence in all jurisdictions other than Victoria. Even so, jurisdictions vary in regard to the types of child murders that are captured. In Western Australia, New South Wales, Queensland and the Northern Territory any murder of a child is a registrable offence;[18] however, in the Australian Capital Territory, South Australia and Tasmania the murder of a child is only registrable if it is connected to the commission or attempted commission of a sexual offence. Moreover, some jurisdictions include kidnapping and manslaughter (if the victim is a child) but these offences are not currently included in Western Australia.

The Western Australia Police indicated in its Issues Paper that it was planned to include the offences of kidnapping and stealing of a child (but not a child who is a defacto or lineal relative of the offender) as reportable offences under the CPOR Act. These changes have been incorporated into the Community Protection (Offender Reporting) Amendment Bill 2011 (WA).[19] The Bill also proposes to add the offence under s 204A of the Code (showing offensive material to a child under the age of 16 years) to the list of reportable offences. It has been noted by the Western Australia Police that no other jurisdiction includes an offence similar to the offence created by s 204A.[20]

7. LRCWA, *Community Protection (Offender Reporting) Act 2004*, Discussion Paper (February 2011) Case Examples 1, 2 & 3.
8. *Criminal Code* (WA) s 321(9).
9. *Crimes Act 1914* (Vic) s 45(4).
10. *Criminal Code* (Qld) s 215(5).
11. *Criminal Code* (NT) s 127(4). However, the defence is only available in the Northern Territory if the complainant is actually 14 years or older.
12. *Crimes Act 1900* (ACT) s 55(3).
13. *Criminal Code Act 1924* (Tas) s 124(2).
14. See *Johnston v R* [2009] NSWCCA 82 [8].
15. LRCWA, *Community Protection (Offender Reporting) Act 2004*, Discussion Paper (February 2011) 91. In South Australia the mistaken age defence is only available if the complainant is actually aged between 16 and 17 years and the accused believed that the complainant was 17 years or over (the age of consent in South Australia is 17 years): *Criminal Law Consolidation Act 1935* (SA) s 49.
16. LRCWA, *Community Protection (Offender Reporting) Act 2004*, Discussion Paper (February 2011) Case examples 5, 6 & 8. In one of these cases the complainant lied about his age (to the offender and others) and told the offender that he was studying at a tertiary institution. In another case the complainant told the offender that she was over the age of consent and he believed her because she was living independently from her parents.
17. MCPEM, *National Approach to Child Protection Offender Registration – Report from National Working Party* (2009) 11.
18. For example, a mother who smothered her newborn baby would be included on the sex offender register in these jurisdictions.
19. Community Protection (Offender Reporting) Amendment Bill 2011 (WA) cl 38.
20. Western Australia Police, *Statutory Review: Community Protection (Offender Reporting) Act 2004*, Issues Paper (June 2011) 26. It was stated that the provisions of the New South Wales legislation might cover an offence of showing offensive material to a child.

Definition of a 'registered offender'

Each jurisdiction defines 'registered offender' and this definition determines who is and who is not required to be included on the register. As the Commission explained in its Discussion Paper there are major differences in these definitions and, therefore, the range of circumstances that may result in registration is not uniform throughout Australia. The Commission expressed the view that the sex offender registration scheme established by the CPOR Act is relatively strict and that it potentially applies to a broader range of child sex offenders than any other scheme in Australia.[21] In its submission, the Western Australia Police took issue with this observation:

> Whilst Tasmania has a relatively relaxed scheme in place, Western Australia's scheme does not vary dramatically from other key states such as New South Wales, South Australia and Queensland. Each State and Territory has degrees of differences in its legislation, but on the whole they adhere to the national scheme. It is simply not the case to infer that Western Australia's scheme applies to a broader range of offenders without providing the context for which that assertion is made.[22]

In Chapter Three of the Discussion Paper the Commission provided a detailed analysis of the differences between jurisdictions to explain why it considered that Western Australia's scheme potentially applies to a broader range of child sex offenders than any other comparable scheme in Australia. It is worth reiterating these differences because it is important that the Commission's recommendations in this Report are not viewed as a major departure from the approach in some other jurisdictions. The key differences in other jurisdictions relate to:

- **Discretion for juveniles:** Four Australian jurisdictions do not impose mandatory registration on juvenile offenders. Victoria, South Australia and the Northern Territory have judicial discretion so that the sentencing judge determines if a juvenile offender should be subject to registration and reporting obligations, and can only do so if satisfied that the offender poses a risk to members of the community.[23] In Tasmania the sentencing court has a more limited discretion; an order requiring registration must be made unless the court 'is satisfied that the person does not pose a risk of committing a reportable offence in the future'.[24] Therefore, only New South Wales, Queensland, the Australian Capital Territory and Western Australia have mandatory registration for juvenile offenders.

- **Minimum sentencing thresholds:** In line with the national model developed by the Australasian Police Ministers' Council working party, New South Wales, Queensland, the Australian Capital Territory and the Northern Territory include 'minimum sentencing thresholds'. In these jurisdictions offenders who are sentenced to certain non-conviction orders (eg, dismissal and bonds without conviction) are not subject to mandatory registration.[25] In its Discussion Paper the Commission described two cases in Western Australia where the adult offenders were sentenced to 'no punishment' and a spent conviction order was made. In both of these cases the offenders were automatically subject to registration under the CPOR Act for 15 years.[26] If these cases had occurred in New South Wales, Queensland, the Australian Capital Territory or the Northern Territory the offenders would not have been subject to mandatory registration. 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 imposed did not include imprisonment or supervision.[27]

- **Statutory exception for juveniles:** In the four jurisdictions that impose mandatory registration on juveniles, a limited statutory exception is available. In Western Australia this statutory exception is restricted to a 'single' offence relating to child pornography.[28] However, in the three other jurisdictions (New South Wales, Queensland and the Australian Capital Territory) the exclusion also covers a single offence involving an act of indecency

21. LRCWA, *Community Protection (Offender Reporting) Act 2004*, Discussion Paper (February 2011) vii.
22. Western Australia Police, Submission No 18 (30 May 2011) 2.
23. The applicable test is slightly different in each jurisdiction: see *Sex Offenders Registration Act 2004* (Vic) ss 6(3) & 11; *Child Protection (Offender Reporting and Registration Act* (NT) ss 11 & 13; *Child Sex Offenders Registration Act 2006* (SA) ss 6 & 9.
24. *Community Protection (Offender Reporting) Act 2005* (Tas) s 6.
25. *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.
26. LRCWA, *Community Protection (Offender Reporting) Act 2004*, Discussion Paper (February 2011) Case Examples 5 & 8.
27. *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.
28. A single offence includes more than one offence arising from the same incident. Offences arise from the same incident if they occur within a 24-hour period and involve the same complainant: *Community Protection (Offender Reporting) Act 2004* (WA) ss 5 & 6(8).

or indecent dealing.[29] As reported in the Discussion Paper, the Commission was informed of three Western Australian cases where the offender was subject to mandatory registration but would have fallen under the statutory exclusions applicable in these other jurisdictions.[30]

The Commission maintains its view that the Western Australian scheme is relatively strict and applies to a broader range of child sex offenders than every other Australian state and territory. The Commission acknowledges that in Western Australia the Commissioner of Police has discretion to suspend reporting obligations for some juvenile reportable offenders,[31] but even if the reporting obligations are suspended the offender remains on the register.

29. *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.
30. LRCWA, *Community Protection (Offender Reporting) Act 2004*, Discussion Paper (February 2011) Case Examples 1, 3 & 14.
31. *Community Protection (Offender Reporting) Act 2004* (WA) s 61.

Chapter Two

Why Discretion is Needed

Contents

Introduction

As canvassed at the beginning of this Report, the Commission has concluded that a degree of flexibility should be incorporated into the Western Australian sex offender registration scheme in order to ensure that it is not unfairly applied to low-risk offenders or less-serious offences. The case for flexibility or discretion in sex offender registration schemes appears to be gaining momentum. For example, the Victorian Law Reform Commission has considered the impact of sex offender registration and whether the applicable legislation in that state should be amended to enable individual circumstances to be taken into account rather than the blanket imposition of registration and reporting requirements on all adult child sex offenders. In addition, recent media reporting of 'sexting' cases involving teenagers has caused the Victorian Parliament to ask its Parliamentary Law Reform Committee to conduct an inquiry into 'sexting' to consider (among other things) the appropriateness of applying sex offender registration laws to such behaviour.

In its Discussion Paper the Commission referred to numerous case examples in both Western Australia and other Australian jurisdictions to demonstrate why discretion is necessary under the *Community Protection (Offender Reporting) Act 2004* (WA). The Commission does not intend to reproduce those case examples in this Report; however, a summary of the types or categories of cases that call for a discretionary approach is included in this chapter. Some examples of cases that have occurred since the publication of the Commission's Discussion Paper are also included to show that the need for discretion remains current.

The Commission received overwhelming support for its proposed reforms enabling judicial discretion for juvenile reportable offenders and for a limited degree of discretion for adult reportable offenders. However, the Western Australia Police remain opposed to any form of judicial discretion in the determination of reportable offender status and it relied on a number of arguments to support the continuation of the current mandatory approach. In this chapter, the Commission responds to these arguments.

Recent developments

Other Inquiries

In May 2010 the Victorian Ombudsman reviewed aspects of the equivalent of the *Community Protection (Offender Reporting) Act 2004* (WA) ('the CPOR Act') in that state.[1] This review was promoted by an allegation that police had failed to advise the Department of Human Services that over 300 registered sex offenders had been living with or had unsupervised contact with children.[2] The sex offender registration laws in Victoria provide for discretion for juvenile offenders; however, registration is mandatory for adult offenders. In the course of the review the Director of the Office of Police Integrity (an independent anti-corruption and oversight organisation) informed the Ombudsman that:

> [T]he circumstances of sex offending, and of sex offenders, vary enormously. Some offenders represent so slight a continuing risk to the community that, in the consideration of law enforcement priorities, the cost of long term monitoring surely cannot be justified. Moreover, if we are to have tens of thousands of registered offenders in the future, the truly dangerous offenders may be overlooked in the vast sea of registrants. ...
>
> As a judge of 20 years standing.... I can attest to a view broadly held by my former judicial colleagues that the indiscriminate nature of this scheme, and the absence of judicial discretion, has produced, in far too many cases, outcomes that are absurd, unnecessary, unfair and a waste of resources of Victoria Police. I myself have imposed sentences on offenders (particularly youthful offenders) which have resulted in lifetime registration, yet in circumstances where, in my view, the offender represented no greater risk to the community than the majority of those in his or her age group.
>
> ... Registration should be subject to judicial discretion ...[3]

As a result of the Ombudsman's recommendations, the Victorian Law Reform Commission (VLRC) received a reference from the Attorney General in April 2011 to review and report on the registration of sex offenders under the *Sex Offenders Registration Act 2004* (Vic). While the focus of this reference is on the 'management and use of information about registered sex offenders by law enforcement and child protection agencies',[4] the VLRC sought submissions about whether a degree of judicial discretion should be incorporated into the scheme for adult offenders (both in terms of determining registration status and reporting obligations).[5] The VLRC received 31 submissions in response, 27 of which are available on its website.[6]

An analysis of these 27 submissions reveals that of the 23 submissions that addressed the issue of discretion, 22 supported the provision for discretion in the determination of whether an offender is required to register and report under the Act.[7] In one submission it was stated that:

1. That is, the *Sex Offenders Registration Act 2004* (Vic).
2. Victorian Ombudsman, *Whistleblowers Protection Act 2001: Investigation into the failure of agencies to manage registered offenders* (2011) 6.
3. Ibid 24.
4. See <http://www.lawreform.vic.gov.au/wps/wcm/connect/justlib/Law+Reform/Home/Current+Projects/Sex+Offenders+Registration/LAWREFORM+-+Sex+Offenders+Registration+-+Terms+of+Reference>.
5. VLRC, *Sex Offenders Registration*, Information Paper (2011) 20.
6. See <http://www.lawreform.vic.gov.au/wps/wcm/connect/justlib/Law+Reform/Home/Current+Projects/Sex+Offenders+Registration/LAWREFORM+-+Sex+Offenders+Registration+-+Received+Submissions>. The final report was delivered to the Attorney General on 22 December 2011 and will be publicly available once it has been tabled in Parliament.
7. These submissions were: Law Council of Australia; Name withheld; Professor Terry Thomas; Sonya Karo; Troy McDonald; CASA Forum; ACSO (Australian Community Support Organisation); Victorian Privacy Commissioner; CEASE; Victoria Legal Aid; Law Institute of Victoria; Inside Access & Mental Health Law Centre; Victorian Equal Opportunity and Human Rights Commission; Liberty Victoria; Royal Children's Hospital Melbourne; Professor Paul Mullen; Criminal Bar Association of Victoria; Children's Court of Victoria; Institute of Legal Executives (Victoria); Monash Law Students' Society Just Leadership Program; Name Withheld; and Name Withheld. The Royal Australian and New Zealand College of Psychiatrists (Victorian Branch) expressed support for automatic registration for Class 1 and Class 2 offences; however, it was also stated that there should be a minimum reporting period of three years after which the court should have discretion to determine if the registered offender should be removed from the register. They also submitted that the court should have discretion to determine the content of reporting obligations. Further, it was recommended that child pornography should *not* lead to automatic registration.

> [T]he failure of the Act to provide a discretionary power for judicial officers to refuse to make a registration order with regard to Class 1 and Class 2 offences has the potential to result in persons being registered who do not pose any significant risk to the community. This not only works an injustice upon those persons who are then made subject to the onerous conditions of registration, but also dilutes the forensic value of the register as a database of persons who pose a real risk of recidivism.[8]

It has also recently been reported that the South Australian Attorney General is considering possible reform of the *Child Sex Offenders Registration Act 2006* (SA) (the equivalent of the CPOR Act in that state). In South Australia, like Victoria, there is judicial discretion for juvenile offenders but registration is applied automatically to adult offenders.[9] It appears that the proposed reforms contemplate the introduction of judicial discretion for adult offenders.[10]

Sexting Cases

In July this year, two Victorian cases involving 'sexting' were discussed in the media. The federal Joint Select Committee on Cyber-safety has recently described sexting as:

> The practice among some young women and men of creating, sharing, sending or posting sexually suggestive or explicit messages or images via the Internet or mobile phones. This material often portrays the individual sending the message.[11]

The Sunday Age reported that an 18-year-old male was sent images by mobile phone of girls aged between 15 and 18 years who were either topless or wearing underwear. The images were sent to him by a female friend. The male downloaded the images to his computer at the same time as other images and videos were downloaded from his phone. When investigating an unrelated (and non-sexual) matter (for which he was never charged), the police discovered the images. He was charged with one count of possessing and one count of making child pornography. The 18-year-old pleaded guilty and was placed on a good behaviour bond without a conviction being recorded. He is subject to registration as a sex offender for eight years.[12]

In the second case, a 17-year-old male and his 17-year-old girlfriend filmed themselves having sex. After the male had turned 18 the relationship ended and he subsequently emailed two still images from the video to some of his friends. He was charged with making and transmitting child pornography. He pleaded guilty and was fined $1,000 without conviction. This offender is also subject to sex offender registration and reporting for eight years.[13] The majority of online comments posted in response to this media coverage expressed support for a discretionary approach to sex offender registration.[14] One pertinent comment was made in regard to mandatory schemes:

> [T]hey are the legal equivalent of a cluster bomb; you may hit the target, but a great many innocent people get caught by the shrapnel.[15]

On 1 September 2011 the Victorian Parliamentary Law Reform Committee was formally requested to conduct an inquiry into 'sexting'. The terms of reference require it to consider, among other things, the 'appropriateness and adequacy of existing laws, especially criminal offences and the application of the sex offenders register, that may apply to the practice of sexting'.[16] The Committee is due to report by 30 June 2012. It has been reported that the chairman of the Committee has 'singled out the listing of young people on the sex offenders register for sexting offences as in need of urgent review'.[17]

8. Liberty Victoria, Submission No 18 (August 2011) 2.
9. There is an exception to the mandatory registration of adult offenders under the *Child Sex Offenders Registration Act 2006* (SA). Certain offences (eg, unlawful sexual intercourse) are not classified as a reportable offence if they were committed in prescribed circumstances. The term 'prescribed circumstances' is defined as circumstances where the victim consented and the offender was either 18 (and the victim was not younger than 15) or 19 years (and the victim was not younger than 16): see *Child Sex Offenders Registration Act 2006* (SA) sch 1.
10. See <http://www.abc.net.au/news/stories/2011/05/25/3226276.htm?site=adelaide>; Law Society of South Australia, *Letter to Hon John Rau, Attorney General* (1 August 2011).
11. Joint Select Committee on Cyber-safety, *High-Wire Act: Cyber-Safety and the Young* (2011) 136. 'Sexting' has also been defined as 'the electronic communication of non-professional images or videos portraying one or more persons in a state of nudity or otherwise in a sexual manner': Svantesson D, "Sexting' and the Law – How Australia Regulates Electronic Communication of Non-Professional Sexual Content' (2010) 22(2) *Bond Law Review* 41, 41.
12. See <http://www.theage.com.au/victoria/sexting-youths-placed-on-sex-offenders-register-20110723-1hugu.html>.
13. See <http://www.theage.com.au/victoria/sexting-youths-placed-on-sex-offenders-register-20110723-1hugu.html>.
14. Out of a total of 24 responses there were 11 responses favouring a discretionary approach to sex offender registration; eight were against discretion and the remaining five didn't address the issue at all: see <http://www.theage.com.au/victoria/sexting-youths-placed-on-sex-offenders-register-20110723-1hugu.html?comments=24#comments>.
15. Ibid.
16. Victorian Parliamentary Law Reform Committee, *Inquiry into Sexting*, Terms of Reference (1 September 2011).
17. <http://www.theage.com.au/technology/technology-news/inquiry-ordered-as-law-lags-behind-teen-sexting-20110820-1j3x8.html>.

Categories of cases that require discretion

The Commission's examination of cases in Western Australia and elsewhere, coupled with the views expressed during consultations, led to the conclusion that mandatory sex offender registration is inappropriate. The Commission has found that many of these cases share common features and it is, therefore, useful to summarise the types of cases that most commonly call for a discretionary approach. Having said that, these broad categories (discussed below) are by no means exhaustive; there remains the potential for a different set of circumstances to justify a discretionary approach, particularly in the case of juvenile offenders.

Juveniles

The Commission's terms of reference require it to examine the impact of the *Community Protection (Offender Reporting) Act 2004* (WA) ('the CPOR Act') on all juvenile reportable offenders. In assessing this question the Commission has had particular regard to the 'best interests of the child' principle and the need to differentiate between adult and juvenile offenders in the justice system.[1] The focus for juvenile offenders is generally on rehabilitation and reintegration; any stigma associated with being labelled a 'sex offender' may undermine these goals. In its Discussion Paper, the Commission concluded that when assessing if sex offender registration and reporting laws should apply to juvenile offenders the potential harmful effects of being labelled a 'sex offender' cannot be ignored. For more serious high-risk juvenile child sex offenders the need to protect the community may outweigh such concerns; however, for low-risk or less serious offenders registration is likely to be counterproductive.[2]

Underage consensual sexual activity

The Commission's research revealed that the provisions of the CPOR Act potentially apply to a wide variety of unlawful sexual behaviour ranging from serious or deviant sexual abuse to consensual sexual activity between young people of a similar age. As explained in the preceding chapter, the Commission acknowledges that a person under the age of 16 years cannot legally consent to sexual activity and the use of the phrase 'consensual sexual activity' is not intended to condone or encourage unlawful behaviour.[3] It must be emphasised that the Commission is not commenting on whether such behaviour should or should not be unlawful;[4] instead the Commission is tasked to consider whether such behaviour should result in registration as a sex offender and reporting obligations that continue for a number of years after the sentence for the offence is completed. A number of case examples in the Commission's Discussion Paper demonstrate that the mandatory application of the provisions of the CPOR Act to this category of offending behaviour is inappropriate.[5] In these case examples the age difference between the parties ranged from one to five years. Also, anecdotally, the Commission was informed that numerous juvenile offenders are subject to registration as a result of underage consensual sexual activity.

Soon after the release of the Commission's Discussion Paper an article featured on *WA Today* referred to a case in Western Australia where four 16-year-old males were dealt with for reportable offences under the CPOR Act. Three of these males were charged as a result of engaging in sexual activity with a 14-year-old girl and the fourth was charged for filming the sexual activity. This video was subsequently forwarded to others. The males pleaded guilty but explained that the sexual activity had been consensual. The fact that these boys found themselves subject to sex offender registration was the main focus of

1. It is acknowledged that the CPOR Act does contain special rules for juvenile reportable offenders (eg, the reporting period for juveniles is half of the applicable reportable period for adults; juveniles are never subject to lifetime reporting; and the Commissioner of Police has the power to suspend the reporting obligations for certain juvenile reportable offenders): see LRCWA, *Community Protection (Offender Reporting) Act 2004*, Discussion Paper (2011) 102–103.
2. Ibid 112–15.
3. See Chapter One, 'Terminology'.
4. Although, it is arguable that the law in relation to child-specific sexual offences (including child pornography offences) is in need of review in order to determine whether these laws are appropriately applied to persons under the age of 18 years. In its submission Legal Aid stated that the option of a 'similarity of age' defence should be given 'further law reform consideration': Legal Aid WA, Submission No 11 (24 May 2011).
5. See LRCWA, *Community Protection (Offender Reporting) Act 2004*, Discussion Paper (2011) Case Examples 1–4 & 9–13.

the article. It was also reported that the 'mother of the 14-year-old girl at the centre of the scandal also did not believe the boys deserved to go on the register'. Of the 82 comments posted online in response to this article, 46 discussed the issue of sex offender registration and the majority of these responses (over 70%) expressed opposition to the inclusion of these offenders on the sex offender register (although many agreed that the offenders should be appropriately punished for their behaviour).[6] These views emphasise one of the points noted by the Commission in its Discussion Paper: that there is an important distinction between criminal responsibility and sex offender registration. Being held accountable under the criminal law and dealt with for an offence is appropriate, but it does not necessarily follow that sex offender registration is necessary.[7]

Sexting

The Commission explained in its Discussion Paper that the application of the CPOR Act may extend to non-sexually motivated behaviour.[8] One example of this is the practice of 'sexting'. Young people may exchange explicit images or post such material online as a joke or possibly for more sinister reasons such as bullying or harassment; however, such conduct does not necessarily amount to sexually deviant or sexually abusive behaviour that warrants registration as a sex offender.

Sexting may give rise to child-pornography related offences under either state or federal laws. Chapter XXV of the *Criminal Code* (WA) deals with offences involving child exploitation material (which includes child pornography) and a child is defined in s 217A as a child under the age of 16 years. In contrast, child pornography offences under the *Criminal Code* (Cth) are defined by reference to circumstances involving a child under the age of 18 years (or a person who appears to be under the age of 18 years).[9]

It has been observed that child pornography laws have been used to charge 'teenagers who voluntarily capture and communicate images or videos of themselves' and, that the 'victims' of and parties responsible for the offending behaviour may be the same; 'a somewhat absurd situation bearing in mind the serious purpose for which child pornography laws exist'.[10] It has also been argued that categorising sexting teenagers as child sex offenders weakens the significance of any sex offender register.[11]

The issue is further complicated by the difference between the age of consent in some jurisdictions and the definition of a child for the purpose of federal child pornography laws. For example, a 17-year-old female could be charged for a child pornography-related offence (eg, distributing child pornography material outside Australia under s 273.5 of the *Criminal Code* (Cth) or using a carriage service for child pornography under s 474.19) as a consequence of sending photos via email of herself and her 17-year-old boyfriend engaging in sexual activity even though the sexual activity was itself lawful because both parties were above the age of consent. If convicted and sentenced for either one of these offences she would be subject to registration under the CPOR Act for eight years.[12]

The Commission recognises that currently there is a limited statutory exception under the CPOR Act for juvenile offenders who are dealt with for a 'single' offence of child pornography. However, if the person is charged with two or more child pornography offences and these offences did not occur within a 24-hour period or they did not relate to the same complainant this statutory exception is not applicable. In April 2011 it was stated in the Western Australian Parliament that no juvenile reportable offenders have been subject to sex offender registration as a consequence of engaging in 'sexting';[13] however, it appears that a number of juveniles have been spoken to or investigated by the police or otherwise dealt with for such behaviour. In November 2010 it was reported in the media that a 13-year-old girl had been cautioned by police for sending a text message with a nude photo of herself to a 17-year-old boy. The boy also received a caution. In another case, it was reported that a 14-year-old boy who received images on his phone of a 14-year-old girl having sex with other teenagers was referred to the juvenile justice team.[14] Given the apparent increasing prevalence of this type of behaviour it seems inevitable that young people in Western Australia will

6. See Styles A, 'They Were Sacrificial Lambs Led to the Slaughter', *WA Today* (4 March 2011) <http://www.watoday.com.au/wa-news/they-were-sacrificial-lambs-led-to-the-slaughter-20110228-1bbhl.html>.
7. LRCWA, *Community Protection (Offender Reporting) Act 2004*, Discussion Paper (2011) 88.
8. Ibid 111.
9. *Criminal Code* (Cth) s 473.1.
10. Svantesson D, "Sexting' and The Law – How Australia Regulates Electronic Communication of Non-Professional Sexual Content' (2010) 22(2) *Bond Law Review* 41, 42.
11. Ibid 44.
12. The offences under ss 273.5 and 474.19 of the *Criminal Code* (Cth) are Class 2 offences under the CPOR Act: see *Community Protection (Offender Reporting) Regulations 2004* (WA) reg 11. These offences are not presently included in the list of prescribed offences for the purpose of the statutory exception for juveniles (discussed immediately below).
13. Western Australia, *Parliamentary Debates*, Legislative Council, 12 April 2011, 2774 (Hon Peter Collier).
14. See LRCWA, *Community Protection (Offender Reporting) Act 2004*, Discussion Paper (2011) 105. It is noted that a referral to a juvenile justice team arguably does not constitute a 'sentence' under the CPOR Act and therefore this male offender would not have been subject to registration.

find themselves subject to sex offender registration as a result of charges arising from sexting.

Young juvenile offenders

Cases examined by the Commission revealed that offenders as young as 13 were subject to registration and reporting obligations. In addition, one case involved a 21-year-old male who was subject to registration as a consequence of offending that occurred when he was only 11 years old.[15] Information provided by the Western Australia Police showed that, as at 31 December 2009, of the 74 reportable offenders who were under the age of 18 years, there were five 13-year-olds and one 14-year-old.[16] The Commission has serious concerns about the automatic registration of such young offenders without any consideration of the individual circumstances of the offence and the offender, and the risk (if any) that these children pose to the community. Information provided to the Commission revealed that young juvenile reportable offenders may experience anxiety and depression and even suicidal thoughts as a consequence of registration.[17] Moreover, as noted above, the labelling of young children as 'sex offenders' and subjecting them to ongoing obligations to report to police is likely to be detrimental to their future rehabilitation.

Juvenile offenders with mental health issues

During its consultations the Commission was told of cases involving sexual activity between two children where the offender was intellectually disabled and the complainant, although chronologically younger, had a similar intellectual age as the offender.[18] For example, in one such case, a 17-year-old was dealt with for indecent dealing offences committed against a 10-year-old; however, the offender had a mental age akin to a 10- to 12-year-old.[19]

15. Ibid, Case Example 15.
16. It is noted that the figure of 74 juvenile reportable offenders as at 31 December 2009 does not include all reportable offenders who have been subject to registration as a result of offending behaviour that occurred when they were under the age of 18 years (there were 212 offenders who had been subject to registration as a result of offending behaviour that occurred when they were under the age of 18 years): see Malcolm Penn, Executive Manager, Legislative Services, Legal and Legislative Services Unit, Western Australia Police, email attaching report from the Sex Offenders Management Squad, Western Australia Police (17 May 2010).
17. Chamarette C, 'Opinion Provided to the Law Reform Commission of Western Australia' (10 October 2010).
18. See LRCWA, *Community Protection (Offender Reporting) Act 2004*, Discussion Paper (2011) 110.
19. Ibid, Case Example 16.

In its submission the Mental Health Law Centre emphasised that offenders with intellectual disabilities and/or mental illness are 'likely to experience great difficulty in complying with sex offender registration obligations' and that these difficulties will be compounded by other factors such as homelessness or transient living arrangements, remoteness and language or cultural barriers.[20] The Commission agrees and notes that discretion is important in order to ensure that mentally impaired or intellectually disabled juvenile offenders are only subject to sex offender registration where it is established that they pose a risk to other members of the community.

Adults

The Commission's terms of reference are limited in regard to adult offenders; only those adult offenders who have committed a reportable offence in exceptional circumstances are within the scope of this review. The terms of reference provide only one example of what may constitute exceptional circumstances: 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 offence was committed. The Commission's research and consultations revealed other examples which it believes are appropriately captured by the term 'exceptional circumstances' and which call for a more flexible approach to sex offender registration.

Mistake about age

As directed by its terms of reference, the Commission has given detailed consideration to the defence of honest and reasonable but mistaken belief as to the age of the complainant for child-specific sexual offences.[21] In 2002 the law in Western Australia was amended so that the availability of the defence was significantly curtailed. It is now only available where the accused is no more than three years older than the complainant. This means, in effect, that the defence cannot be argued by any accused who is 19 years or older irrespective of how reasonable his or her belief that the complainant was of or over the age of consent. A number of cases were drawn to the Commission's attention where an adult offender had received a relatively lenient penalty as a result of engaging in consensual sexual activity with an underage person in circumstances where the offender honestly and reasonably believed that the complainant was of or over the age of 16 years.[22] In two of these cases the offenders

20. Mental Health Law Centre (WA), Submission No 4 (29 April 2011) 6.
21. LRCWA, *Community Protection (Offender Reporting) Act 2004*, Discussion Paper (2011) 89–94.
22. Ibid, Case Examples 5, 6 & 9.

received a spent conviction order and no sentence yet they were automatically subject to reporting obligations under the CPOR Act for 15 years.

As the High Court has observed, it would be 'absurd to suggest that honest and reasonable mistakes' about the age of a young person do not occur.[23] A young person's appearance and behaviour may suggest that they are much older or a young person may be deliberately deceptive about their age.[24] In such circumstances, automatic sex offender registration without any consideration of the individual circumstances of the case and the risk (if any) posed by the offender is clearly inappropriate.

Consensual sexual activity

The Commission has already discussed cases of consensual sexual activity between two people who are both under the age of 18 years. It is also clear from the Commission's research and consultations that there are cases involving consensual sexual activity where the offender is a young adult but the age disparity and circumstances do not suggest that there was any coercion, force, manipulation, intimidation or abuse.[25] It is important to bear in mind that the law criminalises sexual activity with a person under the age of consent irrespective of the closeness in age between the parties. Hence it is unlawful for an 18-year-old to have sexual relations with a person who is almost 16 but it is lawful for a 60-year-old to have sexual relations with a person on their 16th birthday.[26]

Some recent cases serve to illustrate the need to provide a mechanism to exclude certain adult offenders from the ambit of sex offender registration. In *State of Tasmania v W*[27] the offender pleaded guilty to three counts of sexual intercourse with a young person under the age of 17 years (the age of consent being 17 in Tasmania). The offender who was 23 years of age and the complainant who was 15 were in a relationship with the approval of the complainant's family; they planned to get engaged and the offender was living with the complainant and her family. It is not clear from the sentencing remarks why the offender was charged and who, if anyone, lodged a complaint. The judge noted that the relationship was caring and there was no manipulation or coercion of the complainant by the offender. The offender was sentenced to 12 months' probation and no order was made under the *Community Protection (Offender Reporting) Act 2005* (Tas) because the judge concluded that the offender did not pose the relevant risk. In Western Australia this offender would have been subject to registration and reporting for 15 years.[28]

In August 2011 a 20-year-old soldier was sentenced in Victoria to a 12-month community based order for four counts of sexual penetration of a child under 16. The offences occurred when the offender was 19 years old and the two complainants were aged 14 and 15 years respectively. The offender had no prior criminal record. The complainants willingly engaged in the sexual activity but one subsequently complained to the police. It was reported that the sentencing judge described the automatic inclusion of the offender on the sex offender's register as a 'travesty' and highlighted the lack of judicial discretion. While recognising the seriousness of the offences, the judge expressed the view that the offender had excellent prospects of rehabilitation and did not pose a risk to the community. According to the media reporting of this case, the judge referred to the Victoria Law Reform Commission review and stated that consideration should be 'given to revisiting cases like [this] so justice can be done'.[29]

Ignorance of the law

As the Commission explained in its Discussion Paper, ignorance of the law does not provide a defence to a criminal charge but it may provide some mitigation depending on the circumstances. The Commission was informed of a number of cases where the offender did not appreciate that it was unlawful to engage in consensual sexual activity with a person under the age of 16 years.[30] These examples have tended to occur in

23. *CTM v The Queen* [2008] HCA 25, [15] (Gleeson CJ, Gummow, Crennan and Kiefel JJ).
24. For an example of this, see LRCWA, *Community Protection (Offender Reporting) Act 2004*, Discussion Paper (2011) Case Example 5.
25. Ibid 145 and Case Examples 24 & 25.
26. Unless the adult is in a position of trust such as a teacher or there is a familial relationship. Although this section is dealing with adult offenders it is worth noting that a 16- or 17-year-old would also be guilty of an offence for having sexual relations with a person who is almost 16 years.
27. Unreported, Supreme Court of Tasmania, Sentencing Transcript (3 October 2011) Wood J.
28. Similarly, in *State of Tasmania v BJP* (Unreported Supreme Court of Tasmania, Sentencing Transcript (28 July 2011) Evans J), the offender was charged with maintaining a sexual relationship with a person under 17 years. The offender was 19 years and the complainant was 14 years. The relationship was described as consensual and based on mutual affection. The sentencing judge declined to make an order under the Tasmanian legislation because it was not considered that the offender posed a risk of committing a reportable offence in the future. Again this offender would have been automatically subject to 15 years reporting if the offence had occurred in Western Australia.
29. Lowe A, 'Judge Raps Sex Sentence 'Travesty'', *The Age*, 20 August 2011, see <http://www.theage.com.au/victoria/judge-raps-sex-sentence-travesty-20110819-1j2ov.html>. See also <http://www.theage.com.au/victoria/judge-laments-rigid-sexregister-laws-20110819-1j1d2.html>.
30. LRCWA, *Community Protection (Offender Reporting) Act 2004*, Discussion Paper (2011) Case Examples 21–23.

remote communities where a full appreciation of the age of consent laws may be limited.[31]

Adult offenders with mental health issues

Adult offenders with mental health issues pose particular problems in relation to the appropriateness of sex offender registration laws. As acknowledged in the Discussion Paper, such offenders may pose a risk to the community and therefore registration may well be necessary. On the other hand, the culpability of intellectually disabled or mentally impaired offenders may be significantly reduced, especially in cases where the mental age of the offender is similar to the age of the complainant. Moreover, as noted earlier such offenders may find it very difficult to comply with the reporting obligations in practice.[32]

Other

The above categories represent the types of cases involving adults that will most commonly demand a discretionary approach; however, there may be other exceptional cases which fall outside the parameters of these categories.[33] A recent case in Tasmania provides a useful example. In this case[34] the offender pleaded guilty to one charge of possessing child exploitation material. A conviction was recorded and the offender was placed on a good behaviour bond. He was also ordered to comply with the reporting obligations under the *Community Protection (Offender Reporting) Act 2005* (Tas) for a period of two years. He appealed this decision. The 54-year-old offender who was married with four adult children had no prior convictions. The offence was an unusual example of child pornography. In the process of downloading lawful pornography the offender came across and downloaded a publication called the 'The Pearl' which was an electronic version of a Victorian-era magazine and it contained journal-style entries describing children as young as 12 years engaging in sexual activity with other children and adults. It was fictional and contained no images or pictures. The magistrate accepted that the offender had obtained this material recklessly rather than deliberately although he did admit to being familiar with its contents. During the appeal it was observed that it had since been discovered that the publication could be purchased online and from bookshops from mainstream suppliers. It was also emphasised that because the publication was fictional no child had been exploited and there was no suggestion that the offender was a paedophile. Given the circumstances of the offence and the offender it was decided on appeal that a conviction should not have been recorded and that the offender should not be subject to the provisions of the *Community Protection (Offender Reporting) Act 2005*. If this case had occurred in Western Australia the offender would have automatically been subject to registration as a sex offender for eight years.

In March 2011, a young adult offender in Western Australia received a fine of $1,500 for one count of indecently recording a child of or over the age of 13 years and under the age of 16 years.[35] At the time of the offence he was 21 years old. The offence took place when two 17-year-old males were staying at the offender's house; they all were communicating via MSN with the complainant (and one of the males was also talking to her on the phone). The complainant's age is not apparent from the transcript of proceedings; however, defence counsel stated that the offender thought the complainant was 16 years or older. The complainant was persuaded to lift her top and expose her breasts on a webcam and, without her knowledge or consent, the offender pressed the print screen capturing a still image on his computer. The offender then assisted the other two males to edit the image and words were inserted to create a poster with the photo, the complainant's name, her phone number and some very unsavoury words. The other two males distributed the poster at and outside the complainant's school. They also placed the photo on Facebook and MySpace. The incident caused the complainant severe embarrassment and distress and as a consequence she had to move schools. The sentencing judge concluded that although the two juvenile male co-offenders were more actively involved in producing and distributing the poster (they had been fined $300), this did not reduce the offender's culpability because he enabled it to happen by capturing the still image. The offender had no prior convictions other than one minor unrelated matter for which he had received a spent conviction. The sentencing judge made the following observation:

> Young people like you must understand the dangers of modern technology. What may be considered a prank or a joke between mates can cause irreparable damage.

The judge also commented that:

31. Although the Commission is aware of a Tasmanian case (*State of Tasmania v H*, 29 September 2011, Wood J) where a 33-year old offender was dealt with for engaging in a sexual relationship with a 16-year-old who was friends with offender's son. The sexual relationship was initiated by complainant and the offender mistakenly believed that the age of consent was 16 (in Tasmania the age of consent is 17).
32. LRCWA, *Community Protection (Offender Reporting) Act 2004*, Discussion Paper (2011) 146–148.
33. See, eg, ibid, 152–53 and Case Example 27.
34. [Case name withheld] [2011] TASSC 41.
35. [Case name withheld] Transcript of Proceedings, Sleight J, 30 March 2011.

> As opposed to the other two boys, you will have recorded against you a conviction of a serious sexual offence, which will require you to be subject to community reporting provisions. And I accept that the nature of this conviction will be, to some extent, misleading. You are not a sexual pervert or someone who is in need of sexual counselling. You are simply a young man who has acted immaturely and irresponsibly.[36]

This offender is subject to the CPOR Act for a period of eight years and while his behaviour is reprehensible, the registration of this offender as a sex offender does not seem appropriate.

36. The two juvenile co-offenders may have avoided sex offender registration because their offences fell within the limited statutory exception provided for juveniles under the CPOR Act (ie, a single child pornography related offence).

The Commission's response to arguments in support of a mandatory approach

The Commission is of the opinion that the evidence included in its Discussion Paper (in particular, the various case examples which have been summarised in the preceding section) demonstrates the need for reform and why discretion is necessary. Furthermore, the Commission received overwhelming support for its proposals to introduce discretion into the sex offender registration scheme. However, the Western Australia Police remain opposed to a discretionary approach. In its submission the Western Australia Police provided a number of arguments in support of the current mandatory registration of child sex offenders and these were reproduced in its recent Issues Paper prepared for the statutory review of the *Community Protection (Offender Reporting) Act 2004* (WA) ('the CPOR Act').[1]

A number of the final recommendations for reform in this Report deal with the question of discretion.[2] Rather than repeatedly addressing the arguments raised in support of the status quo throughout this Report, the Commission has decided to set out below its response to the arguments. This will ensure that the Commission's basis for supporting a discretionary approach is clear at the outset.

Uniformity, Consistency and Fairness

In its submission the Western Australia Police explained that one reason for its support for the current mandatory approach is because 'it ensures that the law is clear and is applied predictably, uniformly and consistently'.[3] While it may be true that the mandatory application of sex offender registration laws is clear and predictable (because every person found guilty of a reportable offence is automatically a reportable offender), such an approach does not guarantee uniformity or consistency. As is evident from an examination of the different types of cases that lead to sex offender registration, not all people found guilty of a reportable offence are the same and not all pose the same risk to the community. By failing to enable individual circumstances to be taken into account, the mandatory registration of every offender found guilty of a reportable offence results in inconsistency because low-risk offenders or less-serious offences are treated in exactly the same way as high-risk offenders.

It was also argued that the mandatory approach is fair because all persons found guilty for child sexual offences 'are subject to the same reporting obligations regardless of their background or status'.[4] The Commission disagrees that equal treatment in this context is fair for the same reason as stated above – not all persons found guilty of committing a child sexual offence are the same. Some are serious predators who have abused very young children while others are children themselves or young adults who have engaged in consensual sexual activity with older underage teenagers or who have mistakenly believed that an underage complainant was over the age of consent. Treating different cases alike is neither fair nor consistent.

Nationally Consistent Sex Offender Registration Laws

As discussed in Chapter One, the Western Australia Police rely on the need for national consistency to justify its support for the current position.[5] In its submission it expressed the view that the position in Western Australia has been adopted by all Australian jurisdictions other than Tasmania. However, this is not correct. In addition to Tasmania, three other Australian jurisdictions (Victoria, South Australia and the Northern Territory) have judicial discretion for juveniles so that the sentencing judge determines if a juvenile offender should be subject to registration and reporting obligations.[6] Therefore, only New South Wales, Queensland, the Australian Capital Territory and Western Australia have mandatory registration for juvenile offenders. However, unlike Western Australia, New South Wales, Queensland, the

1. See Western Australia Police, *Community Protection (Offender Reporting) Act 2004*, Issues Paper (June 2011) 7–8. Nonetheless, this Issues Paper noted that the review may consider whether the current mandatory approach should continue and submissions were invited on this issue.
2. See Chapters Three and Four.
3. Western Australia Police, Submission No 18 (30 May 2011) 4.
4. Western Australia Police, Submission No 18 (30 May 2011) 5.
5. See Chapter One, 'The National Scheme'.
6. *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.

Australian Capital Territory and the Northern Territory include 'minimum sentencing thresholds' so that in these jurisdictions offenders who are sentenced to certain non-conviction orders (eg, dismissal and bonds without conviction) are not subject to mandatory registration.[7] Further, Queensland, South Australia and the Australian Capital Territory exclude from mandatory registration offenders sentenced for a single Class 2 offence if the sentence imposed did not include imprisonment or supervision.[8] Finally, in the four jurisdictions that impose mandatory registration on juveniles, a limited statutory exception is available. In Western Australia this statutory exception is restricted to a 'single' offence relating to child pornography.[9] However, in New South Wales, Queensland and the Australian Capital Territory the exclusion also covers a single offence involving an act of indecency or indecent dealing.[10]

As can be seen from the above, it is misleading to rely on the concept of national consistency as a basis for retaining a mandatory scheme because one jurisdiction has a degree of judicial discretion for all offenders; half of Australia's states and territories provide for judicial discretion for juvenile offenders; and the remaining jurisdictions include exceptions to mandatory registration that are broader than the limited statutory exception available in Western Australia. In the Commission's view this makes the Western Australian scheme the strictest of all Australian sex offender registration schemes.

Resources

It is also argued by the Western Australia Police that the automatic registration of offenders saves police and court resources 'by removing the need for a court process to establish reportable offender status on every occasion a person commits a child sex offence'.[11] The impact on resources was also relied upon by the national working party for the Australasian Police Ministers' Council in 2003 when it recommended that registration should generally be applied automatically following sentencing.[12] While the Commission acknowledges that the incorporation of judicial discretion into the scheme will have an impact on police and court resources, it does not consider that cost savings are a sufficient basis for unnecessarily subjecting low-risk offenders to registration and onerous reporting obligations. In addition, it is noted that under the Commission's recommendations it will not be necessary for the court to determine reportable offender status on every occasion a person is dealt with for a child sexual offence.[13]

Moreover, the registration of low-risk offenders has resource implications of its own. Under the CPOR Act all reportable offenders must undergo a risk assessment by police; police are required to record all of the personal details notified by reportable offenders onto a database (including all reported changes to those details and any travel plans); and, when necessary, police are required to verify the accuracy of the information that has been provided by reportable offenders. Due to the vast geographical distances in this state police also visit reportable offenders on a regular basis in remote locations. As contended by the Director of the Office of Police Integrity (Victoria) '[s]ome offenders represent so slight a continuing risk to the community that, in the consideration of law enforcement priorities, the cost of long term monitoring surely cannot be justified'.[14]

Community Protection

As explained in Chapter One, the sex offender registration scheme established by the CPOR Act is designed to enhance community protection by facilitating the investigation of any future sexual offences and by reducing the likelihood of future offending. This is achieved by requiring convicted child sex offenders (and other serious offenders) to report their personal details to police on an ongoing basis.[15]

7. *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.
8. *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.
9. A single offence includes more than one offence arising from the same incident. Offences arise from the same incident if they occur within a 24-hour period and involve the same complainant: *Community Protection (Offender Reporting) Act 2004* (WA) s 5 & 6(8).
10. *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.
11. Western Australia Police, Submission No 18 (30 May 2011) 4–5.
12. Inter-jurisdictional Working Party, *Child Protection Offender Registration with Police: A national approach*, Report to the Australasian Police Ministers' Council (2003) 60.
13. For adult offenders the court will not be required to determine reportable offender status on every occasion because an adult offender found guilty of a reportable offence will continue to be deemed a reportable offender unless he or she makes an application for an order that he or she is not a reportable offender (an adult exemption order) or the court decides on its own motion to consider whether such an order should be made. The court may only *consider* whether to make an adult exemption order if satisfied that there are exceptional circumstances: see Recommendation 3.
14. Victorian Ombudsman, *Whistleblowers Protection Act 2001: Investigation into the failure of agencies to manage registered offenders* (2011) 24.
15. See Chapter One, 'Introduction'.

In this context, the Western Australia Police assert that the automatic registration of child sex offenders enables the police to respond quickly in locating and serving offenders with the Notice of Reporting Obligations and 'allows police to immediately begin monitoring reportable offenders without delay'.[16] The Commission does not agree with this reasoning. Currently, under the CPOR Act a child sex offender does not become a reportable offender (and hence is not required to comply with the reporting obligations under the legislation and cannot be notified of his or her reporting obligations) until such time as he or she is 'sentenced' for a reportable offence.[17] The Commission's recommendations to introduce a degree of judicial discretion into the process do not alter the point at which a person becomes a reportable offender (ie, at the time a person is sentenced for a reportable offence). The Commission acknowledges that there may be some delays in the sentencing process caused by the need to adjourn proceedings to obtain further information in regard to whether the offender should be subject to sex offender registration. However, these delays will be relatively insignificant compared to the delay between the commission of a child sexual offence and the point at which an offender is ordinarily sentenced for the offence.[18]

The Western Australia Police also contended that:

> Whilst criticism has been raised on a small number of occasions where certain 'types' of offenders do not necessarily fit into the 'child sex offender' paradigm, WA Police do not believe this is sufficient justification to deviate from the national approach. The consequences of incorporating the exercise of judicial discretion on the basis of risk is that in some instances a person may not be registered and then go on to commit another offence against a child.[19]

This argument presumes that the community will be protected from future offending by registration; however, the scheme created by the CPOR Act does not guarantee that registered offenders will remain offence free. In addition, underpinning the argument is the view that automatic registration is preferable to judicial decision-making because there will be less room for error. In other words, if courts are empowered to determine who is and who is not required to comply with the CPOR Act there is a chance that mistakes will be made and dangerous offenders will escape registration and reporting obligations. While the Commission acknowledges this argument, it equally applies in reverse; just as discretion may result in some high-risk offenders avoiding registration, mandatory registration may result in low-risk offenders being subject to registration. In other words, mistakes can be made under either type of scheme. Having said that, the argument that the introduction of discretion into the scheme will result in mistakes being made seemingly suggests that judicial decision-making is somehow more inherently unreliable than the current approach (ie, a predetermined list of offences that result in mandatory registration). No evidence has been provided in support of this contention.[20]

Conclusion

Having considered the arguments in support of the current mandatory registration of child sex offenders in Western Australia, the Commission remains convinced that incorporating a degree of discretion or flexibility into the scheme is appropriate and necessary. As will be discussed in detail in the forthcoming chapters, the Commission is recommending a very strict test for adult offenders and hence it does not believe that

16. Western Australia Police, Submission No 18 (30 May 2011) 4–5.
17. See *Community Protection (Offender Reporting) Act 2004* (WA) s 6(1).
18. In 2010 the District Court of Western Australia reported that the 'median delay from the date on which the accused was committed for sentence to the sentencing hearing was around 13 weeks'. The median delay from time of committal to trial across the state was 12 months: District Court of Western Australia, *Annual Review* (2010) 11. These periods do not take into account the time from arrest until the charge is committed to the District Court so the actual periods from the commission of an offence to the time of sentencing would be even longer. Hence, the Commission does not agree with the argument that judicial input into the decision whether an offender should be required to comply with the reporting obligations under the CPOR Act will significantly impact upon how quickly the police can monitor reportable offenders under the CPOR Act.
19. Western Australia Police, Submission No 18 (30 May 2011) 5. Linked to this discussion, the Western Australia Police express concern about the processes to be used for establishing risk under a discretionary scheme. This is discussed further in Chapters 3 and 4.
20. In fact, the available evidence appears to support the contrary. Currently, Tasmania is the only Australian jurisdiction that provides for judicial discretion in its sex offender registration laws for both adults and juveniles. An examination of relevant Tasmanian cases over a seven-month period demonstrates that judges did not overuse the discretion with approximately 80% of offenders being given a registration order. The Commission has analysed all of the sentencing cases involving child-related sexual offences posted on the Supreme Court of Tasmania's website over the four-month period from 17 May to 17 December 2011 (37 cases). In only eight cases the judge declined to make an offender reporting order. It should be noted that these cases are posted on the website temporarily and then replaced by more-recent cases see <http://www.supremecourt.tas.gov.au/decisions/sentences/latest_sentences>. Those cases where no registration order was made were, overall, similar to the types of cases that have been highlighted by the Commission as appropriate for a discretionary approach. For example, cases involving consensual sexual activity between an older albeit underage child and a young adult; cases where the offender held an honest and reasonable but mistaken belief that the complainant was of or over the age of consent; and inappropriate behaviour involving social networking sites where no sexual deviancy was involved.

this approach will undermine the goal of community protection. Furthermore, the Commission is of the view that it is entirely appropriate to recommend a broader discretion for juvenile offenders because of the need to ensure that juveniles are not unnecessarily subject to onerous reporting obligations for engaging in consensual or experimental sexual activity with other young people and that the stigma associated with sex offender registration does not damage their future prospects for rehabilitation.

Chapter Three

Determining Reportable Offender Status

Contents

Introduction

As explained in Chapter One of this Report, a person sentenced[1] for a reportable offence is automatically deemed to be a reportable offender under the *Community Protection (Offender Reporting) Act 2004* (WA) ('the CPOR Act'). There are two main consequences that flow from being deemed a reportable offender. Firstly, the person's name (as well as other personal details) is included on the Australian National Child Offender Register and this information is accessible by specified police across the nation.[2] Secondly, the person is required to comply with various reporting obligations. These obligations are set by legislation except for the frequency of the periodic reporting requirement which is decided by police. However, a reportable offender may, in some circumstances, be relieved of the obligation to comply with reporting obligations but nevertheless remain listed on the register.[3] The Commission has determined that a person's status as a reportable offender and the precise content of reporting obligations should be examined separately because different processes may be appropriately employed in respect of each issue.

In the preceding chapter the Commission explained in detail the basis for its view that a degree of judicial discretion should be incorporated into the scheme so that a person's status as a reportable offender is no longer entirely determined solely by reference to the legislative provisions. In this chapter the Commission considers the first issue mentioned above; that is, the determination of reportable offender status. Appropriate reforms required to introduce judicial decision-making for both juvenile and adult offenders are discussed in this chapter as well as reforms to enable a court to review reportable offender status at a later time. Following that discussion, Chapter Four considers the manner in which reporting obligations should be determined and reviewed.

1. The term 'sentence' is defined in s 3 of the CPOR Act to include dispositions that would not ordinarily be regarded as a sentence; eg, a custody order under the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) or a pre-sentence order under the *Sentencing Act 1995* (WA).
2. Although, it is noted that if the Community Protection (Offender Reporting) Amendment Bill (No 2) 2011 (WA) is passed, members of the public will have access to certain information on the register in defined circumstances. This Bill was passed by the Legislative Assembly on 1 December 2011 and transmitted to the Legislative Council on the same day.
3. For example, the Commissioner of Police has the power under s 61 of the CPOR Act to suspend the reporting obligations of certain juvenile reportable offenders and under s 53 the District Court may suspend the reporting obligations of a reportable offender who is subject to lifetime reporting after a qualifying period (generally, 15 years) has elapsed.

Initial determination of reportable offender status: juveniles

Presently, the mechanism for determining reportable offender status under the *Community Protection (Offender Reporting) Act 2004* (WA) ('the CPOR Act') is essentially the same for juveniles as it is for adults. Apart from the limited statutory exception for juvenile offenders who have been sentenced for a single prescribed offence (ie, a child pornography related offence),[1] the registration of adults and juveniles is applied automatically irrespective of the individual circumstances of the offence or the offender.[2]

The failure of the CPOR Act to differentiate between juveniles and adults in this regard is particularly concerning bearing in mind that the justice system treats juveniles differently, and focuses on their rehabilitation and reintegration. Moreover, as the Commission explained in its Discussion Paper, juvenile child sex offenders are not the same as adult child sex offenders and, overall, they are less likely to reoffend.[3] Most significantly, it is clear from the case examples included in the Discussion Paper and the material discussed in Chapter Two of this Report that there are a considerable number of cases where the automatic registration of juveniles has been unfair or inappropriate. In the absence of reform, these types of cases are likely to continue.

It is also highlighted that now that the Western Australian Government has introduced draft legislation to provide for a limited form of public notification it is even more essential for flexibility to be incorporated into the scheme.[4] Although the Community Protection (Offender Reporting) Amendment Bill (No 2) 2011 (WA) precludes the public disclosure of any information relating to a reportable offender who is a child;[5] this does not mean that information cannot be disclosed in relation to a person who is now an adult but who committed an offence when he or she was under the age of 18 years.[6]

1. See LRCWA, *Community Protection (Offender Reporting) Act 2004*, Discussion Paper (February 2011) 39.
2. The Commission acknowledges that there are special provisions under the CPOR Act for juveniles (eg, shorter reporting periods; the provision for a parent or guardian to make a report on behalf of a juvenile reportable offender; and the power of the Commissioner of Police to suspend the reporting obligations for certain, but not all, juvenile reportable offenders): ibid 102–103.
3. Ibid 26–27.
4. The Community Protection (Offender Reporting) Amendment Bill (No 2) 2011 (WA) provides for three different levels of public disclosure. The first applies to reportable offenders who are non-compliant with their reporting obligations under the CPOR Act and whose whereabouts are unknown to the Commissioner of Police. The Commissioner of Police may publish all or any of the reportable offender's personal details other than details that would identify a child. The second level applies to dangerous and serious offenders (ie, a person who is subject to a dangerous sex offender supervision order; a reportable offender who has reoffended by committing a Class 1 offence or an indecent assault or aggravated indecent assault against a child; and a person who has been found guilty of an offence punishable by imprisonment for five years or more and where the Minister of Police is satisfied that the person poses a risk to the lives or sexual safety of one or more persons or persons generally). Interestingly, a person who has been found guilty of an offence punishable by imprisonment for five years or more may not necessarily be a reportable offender or even have committed a child sexual offence. The Minister of Police may be satisfied that a person who has been found guilty of a serious violent offence poses a risk to the lives of one or more persons or persons generally. The final level applies to specified individuals about whom a request has been made by a parent or guardian. Upon satisfaction that the named person has unsupervised contact with the applicant's child or children who are under their care, the Commissioner of Police has discretion to inform a parent or guardian that the specified individual is a reportable offender. The proposed new s 85J(5) provides that if the Commissioner of Police is satisfied that the specified person has regular unsupervised contact with a child of the applicant, the Commissioner may inform the applicant whether or not the specified person is a reportable offender. There is nothing in the Bill to authorise the Commissioner of Police to inform the parent or guardian of the circumstances of the relevant offending. Therefore, it is possible that disclosure of reportable offender status will be made about individuals who are subject to the reporting obligations under the CPOR Act as a consequence of an offence that was committed when they were under 18 years or where the circumstances involved consensual sexual activity with a person of a similar age without any explanation of those circumstances.
5. See Community Protection (Offender Reporting) Amendment Bill (No 2) 2011 (WA) cl 5 and proposed new ss 85F(2), 85G(2) & 85J(2).
6. The term 'child' is defined in the CPOR Act as a person who is under the age of 18 years. A reportable offender who is a child is a reportable offender who *is* under the age of 18 years and this would not include a reportable offender who is now over the age of 18 years but who committed the reportable offence whilst under the age of 18 years.

Judicial Discretion for Juveniles

As a result of its consultations and research the Commission proposed that the determination of reportable offender status for juveniles is best undertaken by a judicial officer. As already noted, this is consistent with the approach in four other Australian jurisdictions. The Commission's proposal excluded juvenile offenders from mandatory registration and provided that a court sentencing a juvenile offender for a Class 1 or Class 2 offence has a duty to consider whether it should make an order that the offender comply with the reporting obligations under the CPOR Act ('a juvenile offender reporting order').[7] As discussed in detail in Chapter Two of this Report, only the Western Australia Police opposed the introduction of judicial discretion into the scheme.[8] Every other submission that responded to this issue favoured judicial input into the decision about reportable offender status for juveniles.[9] In particular, the President of the Children's Court commented that:

> All members of this Court have noted with growing concern the adverse effect of the mandatory reporting provisions of the CPOR [Act] particularly in relatively less serious factual examples of sexual offending and particularly in connection with underage 'consensual' activity between children of the same or similar age.[10]

While the overwhelming majority of submissions agreed with Proposal 7 in its entirety, there was a small number of submissions that expressed reservations about particular aspects of the proposal. These are discussed below.

The appropriate test

The Commission's proposal stipulated that a court sentencing a juvenile offender for a reportable offence may only make an order that the offender comply with reporting obligations under the CPOR Act if satisfied that the offender poses a risk to the lives or the sexual safety of one or more persons, or persons generally. This test—which is reproduced from the existing discretionary provisions under the CPOR Act—requires the state to establish that a particular juvenile offender poses the relevant risk and the test appropriately enables the court to consider the individual circumstances of the offence and the offender.[11] In regard to this formulation it has been held that reference 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' and that the phrase 'a risk to the lives or sexual safety of a person or persons' is 'a reference to a risk of a person or persons being the victim of a serious physical assault that may threaten a person's life or a risk of a person or persons being the victim of a sexual offence'.[12]

The Office of the Director of Public Prosecutions ('the DPP') was the only respondent suggesting that the parameters of the discretionary provisions should be more limited than those proposed by the Commission. It was stated that the test should be expressed in similar terms to the test proposed for adult offenders (ie, that the offender must establish exceptional circumstances in addition to the requirement to demonstrate that he or she does not pose a risk to the lives or the sexual safety of one or more persons, or persons generally). Additionally, it was suggested that the occasions where the non-registration of juveniles is warranted will be infrequent and exceptional.[13]

In the Commission's view, the DPP has underplayed the frequency with which juveniles may be unfairly caught by the provisions of the CPOR Act and the importance of taking an individualised approach for offenders under the age of 18 years. It must not be overlooked that these offenders are children themselves and the imposition of onerous reporting obligations over and above the sentence imposed for the offence and the resulting stigma associated with being registered as a sex offender

7. LRCWA, *Community Protection (Offender Reporting) Act 2004*, Discussion Paper (February 2011) proposal 7.
8. Western Australia Police, Submission No 18 (30 May 2011).
9. Paul Beatts, Submission No 1 (10 March 2011); Dr Katie Seidler, Clinical and Forensic Psychologist, Submission No 2 (11 April 2011); Magistrate Steve Wilson, Submission No 3 (6 May 2011); Mental Health Law Centre (WA), Submission No 4 (29 April 2011); Chief Judge Peter Martino, District Court of Western Australia, Submission No 6 (24 May 2011); Judge DJ Reynolds, President of the Children's Court of Western Australia, Submission No 7 (24 May 2011); Law Council of Australia, Submission No 9 (30 May 2011); Aboriginal Legal Service of Western Australia, Submission No 10 (May 2011); Legal Aid WA, Submission No 11 (30 May 2011); Commissioner for Children and Young People, Submission No 12 (31 May 2011); Department of Corrective Services, Submission No 14 (30 May 2011); Chief Justice Wayne Martin, Supreme Court of Western Australia, Submission No 15 (1 June 2011); Commissioner for Equal Opportunity, Submission No 16 (1 June 2011); Office of the Director of Public Prosecutions, Submission No 17 (2 June 2011); Department of Child Protection, Submission No 19 (17 June 2011); Department of the Attorney General, Submission No 20 (15 June 2011); Law Society of Western Australia, Submission No 21 (21 June 2011); Department of Indigenous Affairs, Submission No 22 (5 July 2011). One submission argued that juveniles should be fully exempt from the scheme: Reverend Peter Humphris, Submission No 5 (4 May 2011).
10. Judge DJ Reynolds, President of the Children's Court of Western Australia, Submission No 7 (24 May 2011).
11. See *Community Protection (Offender Reporting) Act 2004* (WA) ss 13 & 19.
12. *Commissioner of Police v ABC* [2010] WADC 161, [16]–[18] (Martino CJDC).
13. Office of the Director of Public Prosecutions, Submission No 17 (2 June 2011).

should be avoided unless absolutely necessary. Moreover, treating juvenile child sex offenders and adult child sex offenders in exactly the same way defies longstanding and accepted principles of juvenile justice. In this regard, the Commission notes that the Chief Justice of Western Australia expressed his agreement with the proposal 'that in the case of juveniles, the discretion should be cast in significantly wider terms than in the case of adult offenders'.[14] The Commission maintains its position that the discretion provided for juveniles should be significantly wider than what is recommended (and discussed in the next section) for adults.

In contrast, Legal Aid and the Law Society argued that it should be more difficult for the state to satisfy the proposed test for juveniles. They submitted that for juvenile offenders 'a group of at risk persons ought [to] at least be identified'.[15] No reason was put forward in support of this contention and the Commission remains of the view that its proposed test is appropriate. If the state is able to establish that a particular juvenile offender poses a risk to the lives or sexual safety of one or more persons, or persons generally, then the justification for registration is made out. For example, an offender may have previously committed sexual offences against a number of different children who were previously unknown to the offender and who were unrelated or unconnected to each other in any way. In such circumstances it may be impossible to establish that the offender poses a risk to an identifiable 'group of persons' because the offender's modus operandi is to offend opportunistically against strangers. If the evidence shows that the offender is a risk of committing similar offences (ie, against persons generally) in the future, then registration is warranted.

While expressing support for the Commission's proposal, the Department of the Attorney General argued that it might be a better approach to enable a court to exempt a juvenile offender from complying with the reporting obligations under the CPOR Act. The basis for this suggestion appears to be that if a court makes an order that the offender complies with the reporting obligations under the Act it may be necessary to provide for a review or appeal to a higher court.[16] A right to appeal, available to both parties, was included in the Commission's original proposal (and is discussed further below). For present purposes the Commission notes that consideration of the need for an appeal against the court's decision is equally relevant, whether an order is framed in terms of an exemption or an order requiring compliance.

The Department further stated that an order to comply (as distinct to an order to exempt an offender from the requirement to comply) *with the reporting obligations* under the CPOR Act may result in the need to provide for a review of the content of the reporting obligations before a higher court. The Commission notes that the phrase 'reporting obligations' is defined in s 3 of the CPOR Act as the obligations imposed by Part 3 of the CPOR Act. Thus the reporting obligations are set by legislation and are not presently subject to any right of review. The Commission does not believe that an order requiring an offender to comply with the reporting obligations under the Act would of itself result in any need to review the content of those obligations.

Also, the Department's suggestion to provide for an exemption order (rather than an order to comply with the reporting obligations) would reverse the onus of proof. Under the Commission's proposal an order that the offender comply with the reporting obligations may only be made if the court is satisfied that the offender poses the relevant risk. However, if the court was given discretion to exempt an offender from the reporting obligations it could presumably only do so if satisfied that the offender does not pose the relevant risk. Hence, the offender would be required to establish that he or she is not a risk and, in the case of juveniles, the Commission does not consider that this is a balanced or fair approach. While the Commission has not gone so far as to suggest that there should be a presumption against registration for juveniles, it is of the view that a decision to impose registration and reporting obligations upon a child should only be made if there is sufficient evidence to establish that he or she poses a risk to the community. Further, juvenile offenders would be considerably disadvantaged in comparison to the state in respect of the provision of expert evidence and other relevant information.

In regard to the manner of establishing risk, the Western Australia Police expressed significant concern about the difficulties in practice of providing evidence that a particular offender poses a risk to the lives or sexual safety of any person or persons generally. This concern applied equally to cases involving adult offenders. The Commission therefore considers this issue below in the context of discussing reforms to ensure that the court is properly informed of relevant information for the determination of reportable offender status.[17]

14. Chief Justice Wayne Martin, Supreme Court of Western Australia, Submission No 15 (1 June 2011).
15. Legal Aid WA, Submission No 11 (30 May 2011) 3; Law Society of Western Australia, Submission No 21 (21 June 2011) 2.
16. Department of the Attorney General, Submission No 20 (15 June 2011) 4.
17. See 'Provision of Information to the Court', below.

The definition of a reportable offender

Section 6 of the CPOR Act defines a 'reportable offender' as a person sentenced by a court for a 'reportable offence'. A 'reportable offence' is in turn defined by s 9 to include a Class 1 or Class 2 offence. Under the Commission's proposal for juvenile offender reporting orders, a juvenile offender is not a reportable offender merely because he or she as a child committed a reportable offence. The Commission has reconsidered its proposal in light of this exclusion to ensure that a juvenile who is made subject to a juvenile offender reporting order for a Class 1 or Class 2 offence is appropriately defined as a reportable offender for the purpose of the Act. The making of an order that a juvenile offender comply with the reporting obligations under the Act is not of itself sufficient to ensure that the offender is classified as a 'reportable offender'. This is crucial because otherwise the offender would be required to comply with the reporting obligations under the Act but would not be included in the register.[18]

The wording of the Commission's proposal originated from the wording currently used in relation to the discretionary 'offender reporting orders'. These orders can be made in relation to non-Class 1 or non-Class 2 offences.[19] The Commission notes that s 9 of the CPOR Act defines the term 'reportable offence' to include an offence that results in the making of an offender reporting order and, therefore, a person against whom such an order is made becomes a reportable offender by virtue of the defining provision in s 6 of the Act.[20] The Commission has concluded that its original proposal should be amended to ensure that an offender against whom a juvenile offender reporting order is made is included within the definition of 'reportable offender' and, therefore, Recommendation 1 below includes an amendment to s 9 of the CPOR Act so that the definition of a reportable offence includes 'an offence that results in the making of a juvenile offender reporting order'. This will mean that, upon the making of a juvenile offender reporting order, the offender will be subject to the reporting obligations under the CPOR Act and will also be included on the register.

When reportable offender status should be determined

In its Discussion Paper, the Commission formed the view that the sentencing stage of the criminal justice process is the most appropriate point at which reportable offender status should be determined. Currently, a person is deemed to be a reportable offender at the time the person is sentenced and a person's status as a reportable offender cannot be determined until such time as he or she is found guilty of the offence.[21] As part of a sentencing hearing the court will be informed of the circumstances of the offence and the offender's antecedents. In addition, relevant reports (eg, pre-sentence reports, psychological reports and psychiatric reports) will often be prepared. In particular, in relation to juveniles, the Commission was informed that psychological reports and/or psychiatric reports are invariably provided for matters involving sexual offending. The Commission has also taken into consideration the fact that sentencing courts are accustomed to considering an offender's risk of future offending in determining the appropriate sentence[22] and that judicial officers are required to evaluate risk during other criminal justice processes. For example, in bail proceedings one of the factors to be taken into account is whether the accused is likely to commit an offence in the future or endanger the safety, welfare or property of any person.[23]

The Commission's view—that whether a particular offender poses a risk to the lives or sexual safety of one or more persons or persons generally is a question appropriately determined by a judicial officer—was affirmed by the majority of respondents to the Discussion

18. Section 80(2) of the CPOR Act states that the Community Protection Offender Register must contain certain information about each 'reportable offender'.
19. See *Community Protection (Offender Reporting) Act 2004* (WA) s 13. For example, a court may make an order that an offender comply with the reporting obligations under the CPOR Act in relation to an offence such as burglary or stalking if the circumstances indicate that the offender poses a risk to the lives or sexual safety of any person or persons generally.
20. It is noted that in Victoria where judicial discretion exists in relation to juvenile offenders, s 11(2) of the *Sex Offender Registration Act 2004* (Vic) provides that a court sentencing a person for a Class 1 or Class 2 offence committed as a child may order that the person comply with the reporting obligations under the Act. A 'registrable offence' is defined in s 7 to include an offence that results in the making of a sex offender registration order (which is an order made under s 11 of the Act).
21. Pursuant to s 4 of the CPOR Act, a finding of guilt is defined to include a finding that a person is not guilty on account of unsoundness of mind.
22. Section 6(4)(a) of the *Sentencing Act 1995* (WA) provides that a court must not impose a sentence of imprisonment on an offender unless the seriousness of the offence justifies imprisonment *or* the protection of the community requires it. The Hon Justice Murray has explained that the aim of a sentencing court 'should be to achieve a disposition which is best calculated to protect the community by stopping the offending behaviour occurring in the future': Murray M, 'Sentencing and Dealing with Mentally Impaired Offenders' (paper presented at the Supreme and Federal Court Judges' Conference, Wellington, New Zealand, 22–26 January 2011) 3. See also Murray M, 'The Challenges of Reporting Psychiatric Opinions to the Court' (John Poucher Memorial Lecture presented to the Royal Australian and New Zealand College of Psychiatrists, 16 October 2010) 12.
23. *Bail Act 1982* (WA) cl 1(a), Part C, Sch 1.

Paper, as well as by others. For example, the Victorian Privacy Commissioner has stated:

> A court, on sentencing, is uniquely placed as the best arbiter to determine this question. At or post-sentencing, a court will have before it the facts of the offence as well as the offender's past offending history. It will be able to receive submissions from the prosecution, defence and victims as to the appropriateness of an order for registration, and be in the uniquely best position to determine the main question: whether the offender 'poses a risk to the sexual safety' of others.[24]

Judicial officers clearly have the skills and experience to properly assess whether an offender poses a risk to the lives or sexual safety of any person, or persons generally.

Having concluded that reportable offender status should be determined as part of the sentencing process, the Commission acknowledged that in some cases it may be necessary to adjourn proceedings in order to enable the parties to provide (or the court to request) additional information. However, the impact of any delay upon the victim of the offence was relied upon by the national working party as one reason against a discretionary scheme.[25] To overcome this concern, the Commission proposed that if the court determines that it is necessary to adjourn the proceedings for the purpose of determining reportable offender status, it may impose the sentence for the offence before the CPOR Act proceedings are adjourned. Therefore, under the Commission's proposal, the court can make a juvenile offender reporting order either at the time the person is sentenced for the offence or at the time the matter is heard after the proceedings have been adjourned.

While there were no submissions directly opposing this aspect of the proposal, the Mental Health Law Centre noted that the provisions of the CPOR Act are intended to apply, where appropriate, to a person who has been found not guilty of an offence on account of unsoundness of mind and such a person is not being 'sentenced' for an offence. Certain mentally impaired offenders are brought within the scope of the CPOR Act as a consequence of the definition of the term 'sentence' in s 3 of the Act (this section defines the term 'sentence' to include a custody order under Part 4 of the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA)). The Commission has reworded its final recommendation to use the phrase 'at the time the *sentence* is imposed' (instead of 'at the time the person is sentenced for the offence') to ensure that the definition of 'sentence' applies.

24. Privacy Commissioner Victoria, Submission No 10 (July 2011) 6.
25. LRCWA, *Community Protection (Offender Reporting) Act 2004*, Discussion Paper (February 2011) 127.

The obligation to consider reportable offender status

The terms of the Commission's original proposal squarely places the obligation to consider reportable offender status upon the court. This was a deliberate decision by the Commission to ensure that offenders were not able to avoid registration as a consequence of inadvertence or negligence on the part of the prosecution or police. This had reportedly occurred under a discretionary scheme in Canada where only 50% of offenders convicted of a designated offence were ordered to comply with registration. During a review of that scheme, it was observed that the low levels of registration resulted from a failure by prosecutors (as a result of excessive workloads or neglect) to seek registration in appropriate cases. Out of those cases where an application was lodged by the prosecution, the court ordered registration in approximately 90% of cases.[26]

To address this issue the Commission proposed that if a court has found a person guilty of a relevant offence, it *must* consider whether it should make a juvenile offender reporting order. This was designed to alleviate the need for the prosecution to make an application. The Commission anticipates that if the recommendations in this Report are implemented, judicial officers would be made aware of the requirement to determine reportable offender status in every relevant case. However, it remains possible for a court to fail to consider reportable offender status in a particular case (especially if the parties also neglect to mention the issue). In order to accommodate this possibility, the Commission proposed that if the court fails to consider the issue of reportable offender status, the prosecution can apply for the relevant order at any time within six months after the date of sentence.

In response, the Commission received three submissions opposing this part of the proposal. The Aboriginal Legal Service stated that 'given the need for finality in sentencing and the principles of juvenile justice' (in particular the requirement for 'child appropriate time frames' under the *Young Offenders Act 1994* (WA)) the prosecution should have a duty to make the relevant application at the time of sentencing.[27] Legal Aid submitted that a period of six months is a long time for a child and the prosecution should have to make the application immediately (and, if necessary, the application can be adjourned for further information to be obtained).[28] The Law Society also

26. 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 & 36.
27. Aboriginal Legal Service of Western Australia, Submission No 10 (May 2011).
28. Legal Aid WA, Submission No 11 (24 May 2011).

stated that the prosecution should be required to make the application at the time of sentencing.[29]

However, as explained above, the Commission did not propose that the prosecution should be required to make an application for a juvenile offender reporting order. Rather, it proposed that the court be required to consider the appropriateness or otherwise of a juvenile offender reporting order in *every* case involving a juvenile found guilty of a Class 1 or Class 2 offence. In the normal course this decision will be made as part of the sentencing process and there is unlikely to be any significant postponement of sentencing as a result. In the event that further information is required, as noted above, the court may impose the sentence before the determination of reportable offender status is made. The six-month period will only be relevant if the court fails to consider the issue and in such circumstances it simply enables an application to be brought within a specified time. The Commission is of the view that a six-month period is not unduly excessive in these circumstances because it may take some time for the relevant authorities to realise that the court failed to consider reportable offender status. For example, if the police become aware and are concerned that a particular juvenile offender is not subject to registration and reporting obligations, inquiries will need to be made (eg, ordering the transcript of the proceedings) to determine if the court made a decision that the offender should not be subject to a juvenile offender reporting order or simply failed to consider the question at all. The Commission expects that any failure on the part of the court to consider reportable offender status would be a very rare occurrence and the risk of this occurring can be easily reduced by the provision of appropriate information about any legislative changes to judicial officers.

Appeal against determination of reportable offender status

The Commission proposed that the offender or the state should have a right to appeal the decision of the court to make (or not to make) a juvenile offender reporting order. There was no direct opposition to this aspect of the proposal although the Department of Corrective Services commented that a right of appeal 'may lead to a more complex system with unacceptable delays and costs'.[30] One of the key benefits of judicial decision-making is that it is undertaken with transparency and accountability. While the right to appeal may increase costs and cause delays, an appeal process ensures that decisions can be tested and overturned where necessary.

29. Law Society of Western Australia, Submission No 21 (21 June 2011).
30. Department of Corrective Services, Submission No 14 (30 May 2011).

The Commission can see no reason to exclude a right of appeal against a decision to impose or not to impose a juvenile offender reporting order. Fairness dictates that both parties should be entitled to appeal such a decision.

Further, it is noted that there are appeal rights in relation to the three current discretionary orders under the CPOR Act (offender reporting orders, past offender reporting orders and prohibition orders). Of these three current discretionary orders, the Commission's proposed juvenile offender reporting order is most similar to offender reporting orders under s 13 of the CPOR Act because both are made as part of the sentencing process.[31] In contrast, past offender reporting orders and prohibition orders are made subsequent to the imposition of the sentence and following an application by the Commissioner of Police.[32]

The CPOR Act is silent on the right to appeal a decision to make or not to make an offender reporting order. However, Part 17 of the *Sentencing Act 1995* (WA) provides that, despite an offender reporting order not being part of the sentence imposed for the offence, an *offender* may appeal against an offender reporting order as if it was part of the sentence imposed. These provisions do not provide for mechanism for the prosecution to appeal a decision not to make an offender reporting order. It is arguable that an appeal lies from such a decision under the provisions of the *Criminal Appeals Act 2004* (WA) (in the case of a magistrate in the Children's Court to a single judge of the Supreme Court[33] and in the case

31. Pursuant to s 13 of the CPOR Act an offender reporting order can be made by a court in relation to a person who has been found guilty of an offence which is not a Class 1 or Class 2 offence 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. The order is to be made at the time the person is sentenced for the offence. It is noted that pursuant to clause 6 of the Community Protection (Offender Reporting) Amendment Bill 2011 (WA) it is proposed that if an offender reporting order is not made at the time the person is sentenced for the offence, the Commissioner of Police may apply for an order at any time within six months after the sentence is imposed or if a custodial sentence is imposed within six months after the person is released from custody.
32. A past offender reporting order may be made in relation to an offender who has been sentenced for an offence before the commencement of the CPOR Act and, therefore, such an order is quite separate to the sentencing proceedings (and in some instances might be made many years after the offender was sentenced for the relevant offence). Likewise, a prohibition order under s 90 of the CPOR Act may be made in relation to a reportable offender upon an application by the Commissioner of Police and is designed to place additional restrictions upon the offender over and above the ordinary reporting obligations under the Act.
33. Sections 6 and 7 of the *Criminal Appeals Act 2004* (WA) provide that a person aggrieved by a decision of a court of summary jurisdiction may appeal to a single judge of the Supreme

of a decision of the President to the Court of Criminal Appeal).[34] Although, in the latter case, it is questionable whether a decision to make or not to make an offender reporting order following an acquittal on account of unsoundness of mind can be appealed.[35]

Further, the general appeal provisions under the *Criminal Appeals Act* that are applicable to decisions of a magistrate are subject to Part 5 of the *Children's Court of Western Australia Act 1988* (WA). Section 40 of that Act provides for a review[36] to the President of the Children's Court of an order against or in relation to a person made by a magistrate in consequence of a finding that a charge against the person is proved. However, it does not appear that this provision would apply to a juvenile offender reporting order made by a magistrate in relation to a person who had been acquitted on account of unsoundness of mind (because there has not be a finding that a charge is proved). Moreover, s 40 only enables a review of an order made so it would not be possible for the prosecution to seek a review of a decision not to make a juvenile offender reporting order in this manner.

In contrast to offender reporting orders, the CPOR Act expressly provides for a right of appeal against a decision to make or not to make a past offender reporting order and a prohibition order. In essence, ss 22 and 102 of the CPOR Act provide that if the decision was made by the District Court an appeal lies to the Court of Appeal; if the decision was made by a Children's Court magistrate an appeal lies to a single judge of the Supreme Court; and if the decision was made by the President of the Children's Court an appeal lies to the Court of Appeal.[37] It is likely that an express appeal provision was inserted in relation to past offender reporting orders and prohibition orders because, unlike an offender reporting order, the decision is made quite separately from the sentencing proceedings for the relevant offence and the general appeal provisions under the *Criminal Appeals Act* may not apply.

In determining the appropriate recommendation in relation to a right to appeal, the Commission is attracted to the current approach in regard to offender reporting orders under the CPOR Act; that is, not making an express reference to the right to appeal in the CPOR Act itself. However, there is a degree of uncertainty as to whether an offender reporting order made by a superior court in regard to a person who has been acquitted on account of unsoundness of mind fits within the parameters of the appeal provisions under the *Criminal Appeals Act*. In addition, the intermediate step of applying for a review of a magistrate's decision to the President of the Children's Court may not be available in the case of a refusal by a magistrate to make an offender reporting order. The Commission has concluded that, in relation to the decision to make or not to make a juvenile offender reporting order, these potential discrepancies are best rectified by making it clear in the CPOR Act that a right to appeal is available under the *Criminal Appeals Act* and a right of review is available under s 40 of the *Children's Court of Western Australia Act*.

Court. A decision of a court of summary jurisdiction includes a sentence imposed or order made as a result of a conviction or acquittal. An offender reporting order may well be considered 'an order made as a result of a conviction or acquittal'. A decision of a court of summary jurisdiction also includes 'a refusal to make an order that might be made as a result of a conviction or acquittal'.

34. Sections 23 and 24 of the *Criminal Appeals Act 2004* (WA) provide that an offender and the prosecutor may appeal a sentence imposed; or any order made as a result of the conviction; or a refusal to make an order that might be made as a result of a conviction by a Superior Court to the Court of Criminal Appeal.

35. Sections 23 and 24 of the *Criminal Appeals Act 2004* (WA) do not cover an appeal against an order made as a result of an acquittal and therefore they may not apply to an offender reporting order made following an acquittal on account of unsoundness of mind. It is noted that s 25 of the *Criminal Appeals Act 2004* provides for a separate right to appeal an acquittal on account of unsoundness of mind and an order made under the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) but this would not apply to an order made under the CPOR Act.

36. Under s 40 an application can be made by the offender or the prosecutor within one month of the order being made. As a separate issue, the Office of the Director of Public Prosecutions noted that if the Commission maintained its proposal to enable the prosecution to apply for a juvenile offender reporting order at any time within six months after the date of sentence consequential amendments to s 40 of the *Children's Court of Western Australia Act 1988* (WA) may be necessary: Office of the Director of Public Prosecutions, Submission No 17 (2 June 2011). The Commission does not agree because the one-month time period under s 40 runs from the date an order is made in consequence of a finding that a charge is proved.

37. These sections provide that if the decision was made by the District Court the appeal is to the Court of Appeal in accordance with s 79(1)(a) of the *District Court of Western Australia Act 1969* (WA). If the decision was made by a Children's Court magistrate the appeal is to be dealt with in accordance with s 41 of the *Children's Court of Western Australia Act 1988* (WA). If the decision was made by a judge of the Children's Court the appeal is to be made as if the decision were a decision to which s 43 of the *Children's Court of Western Australia Act 1988* (WA) applies.

RECOMMENDATION 1

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),[38] 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 (a juvenile offender reporting order).

   (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 sentence is imposed 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 of the date the sentence is imposed.

3. That a new section be inserted into the *Community Protection (Offender Reporting) Act 2004* (WA) to provide that:

   (a) The offender and the prosecution may seek a review of a decision of a magistrate of the Children's Court of Western Australia to make or not to make a juvenile offender reporting order under s 40 of the *Children's Court of Western Australia Act 1988* (WA).

   (b) The offender may appeal against a decision of a magistrate of the Children's Court of Western Australia to make a juvenile offender reporting order in accordance with s 7 of the *Criminal Appeals Act 2004* (WA).

   (c) The prosecution may appeal against a decision of a magistrate of the Children's Court of Western Australia to not make a juvenile offender reporting order in accordance with s 7 of the *Criminal Appeals Act 2004* (WA).

   (d) The offender may appeal against a decision of a judge of the Children's Court of Western Australia to make a juvenile offender reporting order in accordance with s 23 of the *Criminal Appeals Act 2004* (WA).

   (e) The prosecution may appeal against a decision of a judge of the Children's Court of Western Australia to not make a juvenile offender reporting order in accordance with s 24 of the *Criminal Appeals Act 2004* (WA).

4. That s 9(d) of the *Community Protection (Offender Reporting) Act 2004* (WA) be amended to provide that a reportable offence includes an offence that results in the making of a juvenile offender reporting order (under 2 above).

38. Subsection (3) refers to a person who is a corresponding reportable offender or a New South Wales reportable offender. Thus the Commission's recommendation to provide for judicial discretion in relation to juvenile offenders will not change the reportable offender status of offenders from other jurisdictions who move to Western Australia.

Current Statutory Exception for Juvenile Offenders

As explained in Chapter One, the CPOR Act currently provides for a limited statutory exception for juvenile offenders. Section 6(4) of the CPOR Act provides that:

> Unless he or she 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 single offence (including an offence under the laws of a foreign jurisdiction) that falls within a class of offences that are prescribed by the regulations to be offences for the purposes of this subsection.

The offences prescribed for the purpose of this statutory exception are contained in regulation 8 of the *Community Protection (Offender Reporting) Regulations 2004* (WA) ('the CPOR Regulations'). The prescribed offences are all offences related to child pornography. This exclusionary category is based upon the Australasian Police Ministers' Council working party's national model which suggested that juvenile offenders convicted of a single pornography or indecency offence should not be subject to mandatory registration.[39]

In its Discussion Paper the Commission proposed that regulation 8 of the CPOR Regulations be amended to include the newly enacted child pornography related offences under ss 217–220 of the *Criminal Code* (WA)[40] to ensure that the statutory exception for juveniles properly and adequately reflected the current law. This proposal was made as a contingency in the event that the option of incorporating judicial discretion into the scheme was not supported by respondents and especially to respond to young people being caught by the mandatory provisions as a consequence of engaging in conduct such as 'sexting'.

Regulation 8 was amended on 1 July 2011 following the release of the Commission's Discussion Paper to include ss 218–220 of the *Criminal Code*; however, it does not include s 217 of the Code. Section 217 of the Code creates an offence for 'involving a child in child exploitation'. A person 'involves' a child in child exploitation if, among other things, the person invites or causes a child to be in any way involved in the production of child exploitation material. The maximum penalty for the offence is 10 years' imprisonment. A child is defined in s 217A of the Code as a person under the age of 16 years. 'Child exploitation material' is defined to include child pornography which is, in turn, defined to mean 'material that, in a way likely to offend a reasonable person, describes, depicts or represents a person, or part of a person, who is, or appears to be a child' engaging in sexual activity or in a sexual context. Section 218 creates an offence for producing child exploitation material (and also has a maximum penalty of 10 years' imprisonment). Section 219 deals with the distribution of child exploitation material and includes sending or transmitting child exploitation material to another person. Again the maximum penalty is 10 years' imprisonment. Finally, s 220 creates an offence for possessing child exploitation material and the maximum penalty is seven years' imprisonment.

The Western Australia Police explained in its submission (which was received by the Commission in May 2011) that amendments were being progressed to include ss 218–220 in regulation 8 of the CPOR Regulations.[41] However, no explanation was provided for the omission of s 217 from these proposed amendments. As a consequence the Commission wrote to the Western Australia Police seeking clarification. The Western Australia Police responded that the elements of the offence created by s 217 'are such that it would not be consistent with the intent of the legislation to prescribe it as an offence for the purposes of s 6(4)' of the CPOR Act.[42] It was argued that ss 218–220 can be distinguished from s 217 because these offences do not have any 'contact' element, unlike s 217 which applies to inviting, causing or procuring a child to be involved in child exploitation material.

However, in the context of consensual sexual relationships between young people who are close in age the presence of a contact element may not necessarily make the offence more serious. For example, a 15-year-old boy may invite his 15-year-old girlfriend to participate in making a video recording of their sexual activities and in doing so he would be guilty of an offence against s 217. However, if he then forwarded that video to a number of friends or posted it on Facebook he would also be guilty of an offence against s 219 (distributing child exploitation material). The initial conduct of recording the sexual activity is not necessarily more serious than the subsequent widespread distribution of the material. Bearing in mind that the maximum penalty for an offence against s 217 is the same as the maximum penalty for an offence against ss 218 and 219, the Commission maintains its view that s 217 should be included in the statutory exception provided for juveniles under the CPOR Act. The Commission also notes that apart from

39. Inter-jurisdictional Working Party, *Child Protection Offender Registration with Police: A national approach,* Report to the Australasian Police Ministers' Council (2003) 85.
40. LRCWA, *Community Protection (Offender Reporting) Act 2004*, Discussion Paper (February 2011) Proposal 1.
41. Western Australia Police, Submission No 18 (30 May 2011).
42. Western Australia Police, Submission No 18A (9 September 2011).

the Western Australia Police, all other submissions fully supported this proposal.

The Department of the Attorney General submitted that further offences should be included in the list of prescribed offences covered by the statutory exception. Specifically, the Department stated that ss 273.5–273.7 of the *Criminal Code* (Cth)[43] should be included in Regulation 8 because they are similar in nature to the current offences included in that regulation.[44] The Commission agrees that the two Class 2 offences noted by the Department (as well as certain other Class 2 offences) should be added to Regulation 8 of the CPOR Regulations. However, given the intended purpose of the statutory exception, the Commission does not consider that it is appropriate to add s 273.7 to the list of prescribed offences because this offence (which is designed to target paedophile or criminal networks and is currently prescribed as a Class 1 offence) applies where the relevant child pornography related conduct has occurred on three or more occasions and involves two or more people.

Further, the Department suggested that if any additional offences were included as Class 1 or Class 2 offences before the finalisation of this Report, consideration should be given to whether they should also be listed as prescribed offences. In this regard, the Commission notes the recent plan to add s 204A of the *Criminal Code* (WA) (showing offensive material to a child under 16) to Schedule 2 of the CPOR (making it a Class 2 offence).[45] Section 204A makes it an offence to show offensive material[46] to a child under the age of 16 years with intent to commit a crime (and the maximum penalty is five years' imprisonment). Given that such an offence may be committed by a child, it is appropriate for s 204A to be included in regulation 8 of the CPOR Regulations. However, since the Bill is not yet passed the Commission has not included s 204A in its recommendation. Clearly it will be necessary to continue to monitor the list of Class 2 offences to determine if further offences should be added to the list of prescribed offences for the purpose of the statutory exception. Accordingly, the Commission makes such a recommendation. However, it is important to bear in mind that if the Commission's recommendation for the introduction of judicial discretion for juvenile offenders (Recommendation 1) is implemented there will be no need to maintain (or extend) this limited statutory exception.

RECOMMENDATION 2

Limited statutory exception for juveniles

1. That regulation 8 of the *Community Protection (Offender Reporting) Regulations 2004* (WA) be amended to include ss 217 of the *Criminal Code* (WA) and ss 273.5, 273.6, 471.16, 471.17, 471.19 and 471.20 of the *Criminal Code* (Cth).
2. That the Western Australia Police continue to monitor on a regular basis any changes to the list of Class 2 offences to ensure that any newly prescribed Class 2 offences that involve child pornography are included in Regulation 8 in appropriate circumstances so that a juvenile offender convicted of a single child pornography offence continues to be excluded from the definition of a reportable offender under s 6(4) of the *Community Protection (Offender Reporting) Act 2004* (WA).

43. By virtue of regulation 11A of the CPOR Regulations a number of offences under the *Criminal Code* (Cth) are currently prescribed as Class 1 offences (ie, s 272.8; s 272.10; s 272.11; s 272.12; s 273.7; s 471.22; and s 474.24A). Similarly, regulation 11 lists of number of commonwealth offences that are prescribed as Class 2 offences (ie, s 271.4; s 271.7; s 279.9; s 272.13; s 272.14; s 272.15; s 272.18; s 272.19; s 272.20; s 273.5; s 273.6; s 471.16; s 471.17; s 471.19; s 471.20; s 471.24; s 471.25; s 471.26; s 474.19; s 474.20; s 474.22; s 474.23; s 474.25A; s 474.25B; s 474.26; s 474.27; and s 474.27A). Regulations 11A and 11 of the CPOR Regulations were last amended in January 2011.
44. Department of the Attorney General, Submission No 20 (15 June 2011) 1.
45. Clause 38 of the Community Protection (Offender Reporting) Amendment Bill 2011 proposes to add s 204A of the *Criminal Code* to Schedule 2 of the CPOR Act. This Bill was introduced into Parliament on 30 November 2011.
46. Offensive material includes, among other things, material that deals with matters of sex in a 'manner that is likely to cause offence to a reasonable adult'. It is expressly defined to include, among other things, an X-rated 18+ film (which is a film that depicts explicit sexual activity between two consenting adults): see <http://www.comlaw.gov.au/Details/F2008C00126>. Thus, offensive material does not necessarily have to relate to sexual activity involving a minor. It would seem possible for a person to be guilty of this offence by showing a child under the age of 16 years an X-rated film if it was shown with the intention of encouraging that child to engage in sexual activity (ie, intention to commit offence of engaging in sexual activity with a child under the age of 16 years).

Initial determination of reportable offender status: adults

Following its consultations and extensive research in relation to the impact of the *Community Protection (Offender Reporting) Act 2004* (WA) ('the CPOR Act') upon adult offenders, the Commission formed the view that there should be a mechanism to exclude some adult offenders from the mandatory sex offender registration scheme in limited circumstances. Many of the case studies considered by the Commission (and the material referred to in Chapter Two of this Report) demonstrate the inappropriateness of mandatory registration for all adult offenders found guilty of a reportable offence.

A Limited Discretion for Adults

Bearing in mind the differences between adult and juvenile offenders, it was proposed that adult offenders who are sentenced for a Class 1 or Class 2 offence should remain subject to the automatic registration process unless they can establish exceptional circumstances and that they do not pose a risk to the lives or sexual safety of one or more persons, or persons generally. The Commission did not consider that it was necessary for a court to determine reportable offender status in every instance where an adult was sentenced for a reportable offence; to do so would place an unnecessary burden on the resources of the courts and police because the majority of adult child sex offenders should be subject to registration and reportable obligations.[1] All bar one submission (the Western Australia Police) supported the Commission's proposal for a degree of judicial discretion to be available for some adult offenders. There were, however, some minor comments made in relation to the wording of the Commission's proposal and these are considered below.

The appropriate test

As noted above, the Commission's proposal creates a two-stage test for adult offenders: the court must be satisfied that there are exceptional circumstances and that the offender does not pose the relevant risk. The Aboriginal Legal Service expressed the view that 'exceptional circumstances' is too high a threshold and instead the phrase 'special circumstances' should be adopted.[2] The Commission does not agree that 'special circumstances' is necessarily any less stringent a test than 'exceptional circumstances' and sees no justification for departing from its original proposal in this respect.

The Commission's proposal envisaged that in the absence of an application by the offender the mandatory provisions of the CPOR Act would continue to apply. This was designed to ensure that resources were not overburdened by requiring the police to justify the need for registration and by requiring the court to determine reportable offender status in every case involving an adult offender found guilty of a Class 1 or Class 2 offence. In response, Chief Judge Peter Martino submitted that there should be a provision for the court 'of its own motion to be able to consider whether it is appropriate to make an order'. He further stated that:

> The power to give consideration to that question should not be limited to cases in which the offender makes an application. It is possible that there will be cases, for example cases involving an intellectually impaired offender who does not make an application, in which the Court would wish to consider whether or not it should make the offender a reportable offender.[3]

While it would be expected that the vast majority of offenders being dealt with for a reportable offence would be legally represented, the Commission appreciates that this may not always be the case.[4] Therefore, the Commission agrees that provision must be made for the court to make an order that a particular offender is not a reportable offender (an 'adult exemption order') in the absence of an application being made by the offender.

1. LRCWA, *Community Protection (Offender Reporting) Act 2004*, Discussion Paper (February 2011) Proposal 15. In its submission, the Law Council of Australia advocated for full judicial discretion for adult offenders: Law Council of Australia, Submission No 9 (30 May 2011). It is noted that the proportion of adult reportable offenders is considerably higher than juvenile reportable offenders. From the commencement of the CPOR Act until end of December 2009 there had been a total of 1,704 reportable offenders of which 212 were under the age of 18 years when they committed the reportable offence.
2. Aboriginal Legal Service of Western Australia, Submission No 10 (May 2011).
3. Chief Judge Peter Martino, District Court of Western Australia, Submission No 6 (24 May 2011).
4. Legal representation is usually provided (by Legal Aid if the person does not have sufficient funds to pay for a private lawyer) for persons appearing on criminal charges before the Supreme and District Courts; however, the position is different in the Magistrates Court: Department of the Attorney General, *Equality before the Law Benchbook* (21 December 2009) [8.1.3.2]. The Commission notes that the majority of Class 1 and Class 2 offences under the CPOR Act would be dealt with by a superior court.

This has been incorporated into the Commission's final recommendation below.

Appeal against determination of reportable offender status

In regard to juvenile offender reporting orders (discussed above) the Commission noted that there is arguably some difficulty in applying the ordinary appeal provisions under the *Criminal Appeals Act 2004* (WA). In particular, a decision to make (or not to make) an offender reporting order following an acquittal on account of unsoundness of mind may not be appealable if the decision was made by a superior court judge. Hence, in order to remove any uncertainty, the Commission recommended that an express appeal provision be inserted into the CPOR Act. The Commission makes a similar recommendation below in relation to adult exemption orders.

RECOMMENDATION 3

Adult exemption orders

1. That the *Community Protection (Offender Reporting) Act 2004* (WA) provide that:
   (a) 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, on its own motion or upon an application by the offender, consider whether it is appropriate to make an order that the offender is not a reportable offender (an adult exemption order).
   (b) The court can only consider whether it is appropriate to make an adult exemption order if it is satisfied that there are exceptional circumstances.
2. That the *Community Protection (Offender Reporting) Act 2004* (WA) provide 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 *Community Protection (Offender Reporting) Act 2004* (WA) provide that:
   (a) The court can only make an adult exemption 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.
   (b) For the purposes of deciding if the offender poses a risk to the lives or sexual safety of one or more persons, or persons generally, 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.
   (c) An application by the offender for an adult exemption order must be made before the sentence is imposed.
   (d) The court may adjourn the sentencing proceedings if necessary to enable relevant information to be presented to the court.
   (e) If the court determines that it is necessary to adjourn the proceedings for the purpose of determining if an adult exemption 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 adult exemption order either at the time the sentence[5] is imposed for the offence or at the time the proceedings are heard after being adjourned (pursuant to (d) above).

5. The Commission has altered the wording of its proposal to ensure that the broader meaning of 'sentence' as defined under the CPOR Act is applicable: see 'When Reportable Offender Status Should be Determined', above.

4. That the *Community Protection (Offender Reporting) Act 2004* (WA) provide that:

   (a) The offender may appeal against a decision of a magistrate not to make an adult exemption order in accordance with s 7 of the *Criminal Appeals Act 2004* (WA).

   (b) The prosecution may appeal against a decision of a magistrate to make an adult exemption order in accordance with s 7 of the *Criminal Appeals Act 2004* (WA).

   (c) The offender may appeal against a decision of a judge of a superior court not to make an adult exemption order in accordance with s 23 of the *Criminal Appeals Act 2004* (WA).

   (d) The prosecution may appeal against a decision of a judge of a superior court to make an adult exemption order in accordance with s 24 of the *Criminal Appeals Act 2004* (WA).

Procedural issues

Sex Offender Registration Is Not Mitigation

As is apparent from the above discussion, the Commission has concluded that the sentencing stage of the proceedings is the optimal time to consider reportable offender status. However, the appropriate sentence for the offence and the determination of reportable offender status are two separate issues. While there will be some crossover in relation to the factors considered for each decision (and as noted above, both involve consideration of the offender's risk of reoffending) the applicable 'test' for each is different. The sentence imposed must be proportionate to the seriousness of the offence and this is determined by taking into account the statutory penalty for the offence, the seriousness of the circumstances of the commission of the offence, any aggravating factors and any mitigating factors.[1] In contrast, the relevant question for determining reportable offender status is whether the offender poses a risk to the lives or sexual safety of one or more persons, or persons generally. Moreover, registration and reporting obligations under the *Community Protection (Offender Reporting) Act 2004* (WA) ('the CPOR Act') are not designed as further punishment and are instead imposed to protect the community.

In order to make the distinction between the court's decision about the appropriate sentence and its decision as to whether the offender should be subject to registration and reporting obligations, the Commission proposed that the *Sentencing Act 1995* (WA) should be amended to provide that the fact that an offender is or may be subject to reporting obligations under the CPOR Act is not a mitigating factor.[2] While this proposal reflects the current law,[3] the Commission considered that it was necessary to make it clear in the legislation to ensure that the boundary between the two issues did not become blurred with the introduction of judicial decision-making in regard to reportable offender status. The Commission received strong support for this proposal.[4]

Only the Aboriginal Legal Service opposed the proposal in its entirety arguing that reporting obligations can be extremely onerous for some offenders (especially for those in remote locations) and that reporting obligations 'have a direct link to the recognised sentencing principles of deterrence, denunciation and punishment'.[5]

The Commission disagrees that reporting obligations should be taken into account in determining the appropriate sentence. While it is acknowledged that reporting obligations can be particularly difficult for some offenders, the Commission is of the view that the sentence imposed for the offence should not be reduced for this reason. Instead, there needs to be an appropriate mechanism under the CPOR Act for an offender's reporting obligations to be reviewed. This issue is considered in the following chapter.

The Department of Corrective Services disagreed with the Commission's proposal insofar as it suggested amending s 8 of the *Sentencing Act*. Instead, the Department submitted that the intent of the proposal could be achieved by amending s 124A of the *Sentencing Act* and this option would cause 'less disruption' to the *Sentencing Act*.[6] The Commission has considered this option and found that an amendment to s 124A of the *Sentencing Act* is not sufficient to reflect the intent of the proposal. Section 124A is contained in Part 17 of the Act and this Part deals with orders not forming part of the sentence. An amendment to s 124A could apply to juvenile offender reporting orders (Recommendation 1) but it would not apply to those adult reportable offenders who remain subject to the mandatory provisions of the

1. *Sentencing Act 1995* (WA) s 6.
2. LRCWA, *Community Protection (Offender Reporting) Act 2004*, Discussion Paper (February 2011) Proposal 6.
3. See *ABW v The State of Western Australia* [2009] WACC 4.
4. Legal Aid WA, Submission No 11 (30 May 2011); Department of Corrective Services, Submission No 14 (30 May 2011); Chief Justice Wayne Martin, Supreme Court of Western Australia, Submission No 15 (1 June 2011); Office of the Director of Public Prosecutions, Submission No 17A (23 August 2011); Western Australia Police, Submission No 18 (30 May 2011); Department of Child Protection, Submission No 19 (17 June 2011); Department of the Attorney General, Submission No 20 (20 June 2011); Law Society of Western Australia, Submission No 21 (21 June 2011); Department of Indigenous Affairs, Submission No 22 (1 July 2011).
5. Aboriginal Legal Service of Western Australia, Submission No 10 (May 2011).
6. Department of Corrective Services, Submission No 14 (30 May 2011). The Commission does not consider that its proposal is any different conceptually than s 8(3) of the *Sentencing Act 1995* (WA) which provides that the 'fact that criminal property confiscation has occurred or may occur is not a mitigating factor'.

CPOR Act.[7] Therefore, the Commission maintains its view that an amendment to s 8 of the *Sentencing Act* is required to ensure it is made clear that the imposition of registration and reporting obligations is not a mitigating factor irrespective of whether those obligations are imposed automatically or on a discretionary basis.

RECOMMENDATION 4

Sex offender registration is not a mitigating factor

That s 8 of the *Sentencing Act 1995* (WA) be amended to provide that the fact that an offender is or may be a reportable offender and subject to reporting obligations under the *Community Protection (Offender Reporting) Act 2004* (WA) is not a mitigating factor.

Provision of Information to the Court

In its Discussion Paper the Commission invited submissions about how best to ensure that all relevant information is available to the court for the purpose of determining reportable status.[8] As suggested by many of the people consulted by the Commission, information provided to the court for the purpose of sentencing (eg, the details of the offence, the offender's antecedents, any pre-sentence reports including psychological reports and/or psychiatric reports) would ordinarily also be relevant for the purpose of determining reportable offender status. This is one of the main reasons for recommending that the decision in relation to reportable offender status should be made as part of the sentencing process.[9] It was also suggested to the Commission that if relevant information was not provided to the court prior to sentencing, an adjournment could be sought for additional information to be provided.

In order to ensure that relevant information is sought before the preparation of any pre-sentence reports (including any psychological and psychiatric reports) the Commission proposed amendments to the *Sentencing Act* and the *Young Offenders Act 1994* (WA).[10] Specifically, the proposed amendments followed the wording of s 21(2a) of the *Sentencing Act* which presently enables a court to instruct that a pre-sentence report include matters that are relevant to the making of an offender reporting order under s 13 of the CPOR Act. In this regard, the Commission sees merit in the suggestion of Legal Aid: pre-sentence reports could have a separate section addressing the relevant factors for the determination of whether a juvenile offender reporting order or an adult exemption order should be made.[11]

The Commission received considerable support for its proposed amendments with only the Western Australia Police expressing opposition to the proposal. However, the Western Australia Police's position is based upon its general opposition to the introduction of any judicial discretion into the process for determining reportable offender status,[12] rather than any specific disagreement with the provision of relevant information via pre-sentence reports.

RECOMMENDATION 5

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 or that are relevant to the making of an adult exemption 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.

7. As discussed above in relation to Recommendation 3, an adult offender sentenced for a Class 1 or Class 2 offence will continue to be automatically deemed a reportable offender unless the offender applies for an adult exemption order or the court decides, on its own motion, to consider whether an adult exemption order should be made.
8. LRCWA, *Community Protection (Offender Reporting) Act 2004*, Discussion Paper (February 2011) Questions D & H.
9. See above Recommendations 1 and 3.
10. LRCWA, *Community Protection (Offender Reporting) Act 2004*, Discussion Paper (February 2011) Proposals 9 & 17.
11. Legal Aid WA, Submission No 11 (30 May 2011).
12. Western Australia Police, Submission No 18 (30 May 2011).

The determination of risk

The central question to be decided when considering reportable offender status is whether the offender poses a risk to the lives or sexual safety of one or more persons, or persons generally. In its submission the Western Australia Police explained that it had experienced considerable difficulties in the past in 'proving' risk for the purpose of applications that had been made for past offender reporting orders, prohibition orders and offender reporting orders under the CPOR Act. It was stated that, ideally, psychological or psychiatric reports would provide the best evidence of risk but that there 'is no provision in the Act to require the reportable offender to undergo assessment by a psychologist or other qualified person'.[13] This is further expanded upon in the Western Australia Police's Issue Paper prepared for the statutory review of the CPOR Act in June 2011, where it was explained that evidence of risk provided by individual police officers does not carry the same weight as evidence from experts with qualifications and experience in behaviour studies (eg psychologists and psychiatrists). Further, because of the restriction on providing copies of pre-sentence reports to other parties under s 22 of the *Sentencing Act* it is difficult to obtain expert evidence for the purpose of discretionary decisions under the CPOR Act.[14]

Sections 22(4) and 22(5) of the *Sentencing Act* respectively provide that:

> (4) A written pre-sentence report must not be given to anyone other than the court by or for which it was ordered and the CEO (corrections).
>
> …
>
> (5) A court may make a pre-sentence report available to the prosecutor and to the offender, on such conditions as it thinks fit.

Because of these sections, the Western Australia Police cannot obtain a copy of a pre-sentence report. In the context of applications under the CPOR Act for past offender reporting orders and prohibition orders the Commission appreciates the problem that s 22 of the *Sentencing Act* creates. These applications are made after the sentence has been imposed. Therefore, without access to the material provided to the court for the purpose of the original sentencing proceedings[15] or to a legislative provision requiring the offender to undergo a psychiatric or psychological assessment, it is understandable why the police may have experienced some difficulty in establishing risk for the purpose of these applications.

Unlike past offender reporting orders and prohibition orders, offender reporting orders are made at the time of sentencing and reports prepared for the purpose of sentencing can include material relevant to the making of an offender reporting order.[16] Given that offender reporting orders under s 13 of the CPOR Act are made in relation to an offence that is not a Class 1 or Class 2 offence it is expected that such orders would be rare.[17] The Commission was informed, for the purpose of its Discussion Paper, that in 2009 only two such orders were made and both were made against adult offenders.[18] The Western Australia Police did not provide any specific evidence in its submission or in its Issues Paper to explain its concerns in regard to proving risk for these orders (as distinct to the other discretionary orders under the CPOR Act).

Overall the Commission is of the view that the recommended changes in regard to the provision of pre-sentence and other reports should enable the court to request relevant information in a timely and efficient manner, and enable the offender to undergo an assessment by an expert in regard to risk. There does not appear to be any justification, for the purpose of juvenile offender reporting orders or adult exemption orders, to insert a specific provision in the CPOR Act requiring the offender to undergo a psychiatric or psychological assessment. Although it is understood that such a provision exists under the *Dangerous Sexual Offenders Act 2006* (WA),[19] this scheme can be easily distinguished from the current context. Under the *Dangerous Sexual Offenders Act* an application for a continuing detention order or a supervision order is made towards the end of the offender's term of imprisonment and accordingly any previous risk assessment undertaken at the time of

13. Western Australia Police, Submission No 18 (30 May 2011).
14. Western Australia Police, *Statutory Review: Community Protection (Offender Reporting) Act 2004*, Issues Paper (June 2011).
15. In *Commissioner of Police v ABC* [2010] WADC 161 the police applied for a past offender reporting order. The application was made in 2010 in relation to an offence committed in 2003 (ie, before the commencement of the CPOR Act). The offender had been sentenced in the District Court in relation to further offences of a sexual nature (against adults) in 2005. The evidence presented to the court in relation to the offender's risk of future offending came from two police officers attached to the Sex Offenders Management Squad. Chief Judge Peter Martino noted at [20] that '[n]either party sought to tender evidence of the reports prepared for the respondent's sentencing. There were limitations on their ability to do so, by reason of the restrictions contained in s 22 of the *Sentencing Act 1995*'. Nonetheless, because the respondent had been sentenced in the District Court the Chief Judge could have read the reports but neither party submitted that he should do so.
16. *Sentencing Act 1995* (WA) s 21(2a).
17. Such offences are not overtly sexual but the circumstances indicate that the offender poses a risk to the lives or sexual safety of one or more persons, or persons generally.
18. LRCWA, *Community Protection (Offender Reporting) Act 2004*, Discussion Paper (February 2011) 40–41.
19. *Dangerous Sexual Offenders Act 2006* (WA) ss 23A & 37.

sentencing would be out of date.[20] In contrast, under the Commission's recommended discretionary scheme under the CPOR Act the decision is made during the sentencing proceedings and the sentencing court will be able to order the provision of psychological and/or psychiatric reports addressing the degree of risk posed by the offender to the lives or sexual safety of any person. This is in line with a number of submissions which stated that evidence of the offender's risk should be provided by an expert such as a psychologist or psychiatrist.[21]

Other information

Some individuals consulted by the Commission expressed differing opinions about the type of information that should be provided to the court for the purpose of determining reportable offender status. Some suggested that the court should hear from different individuals and agencies and the victim of the offence. As a consequence the Commission sought submissions about this suggestion and, in particular, whether the Commissioner of Police should be empowered to direct other agencies to provide the police with relevant information about the offender for the purpose of making submissions to the court.[22] This latter option is currently available under s 105 of the CPOR Act in relation to prohibition orders. Section 105 provides that the Commissioner of Police may direct any public authority to provide the Commissioner with any information held by the authority that is relevant to an assessment of whether the reportable offender poses a risk to the lives or sexual safety of children.

The Commission cautions against making direct comparisons between the appropriate procedures to accompany the recommendations in this Report and the procedures applicable to prohibition orders under the CPOR Act and other orders (such as those available under the *Dangerous Sexual Offenders Act*). As noted above, these orders are sought well after the sentencing process has been completed. It may be warranted for the Commissioner of Police to direct public agencies to provide information held by the public authority in the context of post-sentencing applications because the offender's circumstances may have changed and because the police do not have access to the original sentencing reports (as a consequence of s 22 of the *Sentencing Act*).

The Western Australia Police explained in its submission that it is currently progressing amendments to the CPOR Act to expand current information sharing provisions.[23] On 30 November 2011 the Community Protection (Offender Reporting) Amendment Bill 2011 (WA) was introduced into Parliament and it contains an expanded provision dealing with disclosure of information by public authorities to the Commissioner of Police. The proposed new s 110A of the CPOR Act provides that:

> (1) In this section —
>
> *application* means —
>
> (a) an application under section 13(7A) for the imposition of an offender reporting order; or
>
> (b) an application under section 15 for an order that a person comply with the reporting obligations of this Act; or
>
> (c) an application for an order under Part 5;
>
> *management*, of a reportable offender, includes monitoring the reportable offender's compliance with the reporting obligations of this Act.
>
> (2) 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 —
>
> (a) the assessment and management of a reportable offender; or
>
> (b) the Commissioner's determination whether to make an application; or
>
> (c) the Commissioner's making or responding to an application.
>
> (3) A public authority given a direction under subsection (2) is authorised and required to provide to the Commissioner the information sought by the direction.
>
> (4) A public authority is not required to give information that is subject to legal professional privilege.

These proposed amendments appear to specifically address the difficulties faced by police when seeking orders under the CPOR Act after the sentencing

20. *Dangerous Sexual Offenders Act 2006* (WA) s 8(3).
21. Dr Katie Seidler submitted that registration should be based upon an assessment of risk and this assessment should be conducted by a 'suitably accredited forensic psychologist or forensic psychiatrist': Dr Katie Seidler, Submission No 2 (11 April 2011). The Aboriginal Legal Service stated that 'only qualified experts in prediction and assessment of risk of sexual reoffending' should provide evidence about risk for the purpose of determining reportable offender status: Aboriginal Legal Service of Western Australia, Submission No 10 (May 2011). Other submissions highlighted that expert reports from psychologists and/or psychiatrists are frequently ordered for sentencing matters involving child sex offenders, especially in the Children's Court: Judge Denis Reynolds, President of the Children's Court, Submission No 7 (24 May 2011). See also Legal Aid WA, Submission No 11 (30 May 2011); Department of Corrective Services, Submission No 14 (30 May 20110.
22. Ibid Questions D & H.
23. Western Australia Police, Submission No 18 (30 May 2011).

proceedings have ended. Although, as noted earlier, offender reporting orders are imposed at the time of sentencing, the proposed amendments enable the Commissioner of Police to apply for an offender reporting order six months after the sentence is imposed or six months after the offender is released from a custodial sentence imposed for the original offence.[24] The amendments also apply to the assessment and management of reportable offenders and, again, the question of assessment and management of reportable offenders only arises post-sentencing.

The majority of respondents who addressed this question did not support the inclusion of a provision (based on s 105 of the CPOR Act) that would empower the Commissioner of Police to direct public authorities to provide information in relation to the risk posed by the offender to the lives or sexual safety of the community.[25] Only the Department of Corrective Services expressed support noting that such a provision already exists in s 105.[26] However, as stated above, the current s 105 (and the proposed new s 110A) relates to post-sentencing applications and circumstances.

The overall tone of those submissions which opposed the inclusion of a provision based on s 105 is that the Commissioner of Police should be empowered to request but not direct the provision of relevant information. For example, the Office of the Director of Public Prosecutions submitted that if the Commissioner of Police is unable to obtain relevant information the court can make an order for its production. Likewise, the Department of the Attorney General stated that the Commissioner of Police should be empowered to request information and if this information is not provided a court order to compel production could be made if the court deemed it necessary.[27] Overall the Commission does not consider that the proposed new s 110A should cover juvenile offender reporting orders or adult exemption orders because these orders are made at the time of sentencing and relevant and sufficient information can be provided as part of the sentencing process.

In particular, in regard to whether the court should hear from a wide variety of agencies when determining reportable offender status,[28] a significant number of respondents expressed the preference for relevant information held by other agencies to be incorporated into the pre-sentence report.[29] The Department of Corrective Services stated in response to the Commission's question concerning juvenile offenders that:

> It is the role of the youth justice officer to consult with those who have a meaningful relationship with the offender and who are involved in the day to day management of that offender. The information thus obtained is relayed to the court via a pre-sentence report and/or psychological report. However, the police should be able to advise the court on matters specific to the sex offender register.[30]

The Department expressed a similar sentiment in response to the question concerning adult offenders. The Commission notes that there are provisions covering the exchange of information between the Department and other public authorities for the purpose of performing functions under the *Sentencing Act* (eg, preparation of a pre-sentence report).[31] Without specifically referring to the contents of a pre-sentence report, Chief Judge Peter Martino stated that there is no need for the court to hear from a wide variety of agencies and the information provided by the prosecution, the offender and the Department of Corrective Services is sufficient.[32]

In general terms, the Commission is satisfied that the current law together with Recommendation 5 above will enable the court to be properly informed of all relevant matters for the determination of reportable offender status. The court can request specific matters to be addressed in the pre-sentence report including any psychological and psychiatric reports to include an

24. Community Protection (Offender Reporting) Amendment Bill 2011 (WA) cl 6.
25. Mental Health Law Centre, Submission No 4 (29 April 2011); Office of the Director of Public Prosecutions, Submission No 17 (2 June 2011); Department of the Attorney General, Submission No 20 (20 June 2011); Law Society of Western Australia, Submission No 21 (21 June 2011).
26. Department of Corrective Services, Submission No 14 (30 May 2011).
27. The Commission notes that in its submission the Department of the Attorney General mentioned another issue concerning the exchange of information. It stated that s 106 of the CPOR Act prevents the Public Advocate from providing the State Administrative Tribunal with information without the approval of the District Court: Department of the Attorney General, Submission No 20 (20 June 2011). Section 106 relates only to child prohibition orders and is therefore not strictly within the scope of the Commission's terms of reference.
28. Mental Health Law Centre, Submission No 4 (29 April 2011); Department of Indigenous Affairs, Submission No 22 (5 July 2011). The Department of the Attorney General stated in regard to juveniles that evidence or submissions should only be provided by the defence and prosecution yet in relation to adults it was submitted that the court should only make the decision about reportable offender status after hearing from a wide range of agencies including the victim and the Public Advocate (where relevant): Department of the Attorney General, Submission No 20 (20 June 2011).
29. Legal Aid WA, Submission No 11 (30 May 2011); Department for Child Protection, Submission No 19 (17 June 2011); Law Society WA, Submission No 21 (21 June 2011); Department of Corrective Services, Submission No 14 (30 May 2011).
30. Department of Corrective Services, Submission No 14 (30 May 2011).
31. See for example, *Sentence Administration Act 2003* (WA) s 97B.
32. Chief Judge Peter Martino, Submission No 6 (24 May 2011).

assessment of the offender's risk to the lives or sexual safety of one or more persons, or persons generally. In addition, the offender and the prosecution are able to present relevant evidence and make submissions in the normal manner. In order to ensure that the court determining reportable offender status can consider all relevant matters, the Commission sees merit in including a provision based upon s 13(4) of the CPOR Act that currently applies to offender reporting orders.[33]

RECOMMENDATION 6

Matters to be taken into account by the court when determining if a juvenile offender reporting order or an adult exemption order should be made

1. That a new section be inserted into the *Community Protection (Offender Reporting) Act 2004* (WA) to provide that when a court is deciding if a juvenile offender reporting order or an adult exemption order should be made in relation to an offence the court may take into account the following –
   (a) any evidence given during proceedings for the offence;
   (b) any document or record (including any 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; and
   (h) any other matter the court considers relevant.

33. A similar provision exists in Tasmania where the court has a limited discretion for both adult and juvenile offenders: *Community Protection (Offender Reporting) Act 2005* (Tas) s 10.

Calculation of Reporting Periods

In formulating its proposals in the Discussion Paper, the Commission took into account the arguments raised during consultations by the Western Australia Police against a discretionary approach. One such argument was that a discretionary process may undermine the effectiveness of the scheme because if an offender avoids registration and then subsequently reoffends he or she will not be subject to the increased reporting period that would have applied if the discretion had not been exercised in his or her favour.[34] For example, if an adult exemption order is made in relation to an offender who was found guilty of a Class 2 offence for which exceptional circumstances existed and that offender then subsequently commits a Class 1 offence he or she would be subject to a reporting period of 15 years. However, if the adult exemption order had not been made the offender would be subject to reporting obligations for life.

The Commission proposed that, with respect to both juvenile and adult offenders, if a court determined that an offender should not be considered a reportable offender under the CPOR Act and that offender subsequently committed a Class 1 or Class 2 offence (and was then made subject to the Act) the applicable reporting period should be calculated on the basis that the offender had been a reportable offender with respect to the first offence.[35]

The majority of respondents supported these proposals; however, the Aboriginal Legal Service and the Western Australia Police disagreed. The Aboriginal Legal Service stated that:

> A determination that an offender should not be a reportable offender ought to be final (save for appeal). Increasing the reportable period for a subsequent offence necessarily ignores those reasons why an offender was not required to be placed on the register for the original offence.[36]

The different reporting periods under the CPOR Act are seemingly based on the seriousness of the offence and the perceived degree of risk – repeat offenders and those who commit more-serious offences are subject to longer reporting periods. The rules created under s 46 of the CPOR Act that determine the applicable length of the reporting period are extremely cumbersome. The Commission has examined these rules in detail and has

34. LRCWA, *Community Protection (Offender Reporting) Act 2004*, Discussion Paper (February 2011) 127–28.
35. Ibid Proposals 8 and 16.
36. Aboriginal Legal Service of Western Australia, Submission No 10 (May 2011).

considered various different permutations. It found that in most instances a repeat offender who previously avoided registration would be subject to the longer reporting period in any event,[37] but in some the offender would be subject to a lesser period of reporting. From the Commission's analysis it appears that its proposal in relation to the calculation of reporting periods only has practical relevance for those adult offenders who would have been subject to lifetime reporting under the current mandatory scheme. In the absence of this proposal, such offenders would be liable to a reporting period of 15 years instead of life (a significant period in any event).

The Western Australia Police submitted that any change to the current legislated reporting periods 'is not in accordance with the national approach to consistent reporting periods' and that change 'would also present administrative issues'.[38] Given this opposition and bearing in mind that its proposal would be unlikely to have a major impact in practice (because it would only affect adult offenders and it is expected that adult exemption orders would be relatively infrequent) the Commission has decided not to confirm its proposal as a recommendation.

37. The calculation of reporting periods under s 46 are, in some instances, based upon whether the offender 'has ever' been found guilty of a reportable offence but in others the reporting period is determined on the basis of whether the offender was previously 'a reportable offender'.
38. Western Australia Police, Submission No 18 (30 May 2011).

Right of review

The previous sections of this chapter deal with the initial determination of reportable offender status. Once this decision is made an important question arises: should the reportable offender remain subject to registration and reporting obligations for the duration of the applicable reporting period (eg, 8 years, 15 years or life for adults and 4 years or 7½ years for juveniles) or should there be some avenue to seek a review of reportable offender status at a subsequent time?

Currently under the *Community Protection (Offender Reporting) Act 2004* (WA) ('the CPOR Act') reportable offenders who are subject to reporting obligations for life are entitled to apply for an order suspending their obligations and such an application can only be made after at least 15 years has elapsed.[1] If successful the offender is no longer required to comply with the reporting obligations under the Act but he or she remains a reportable offender and remains listed on the register.

A Prospective Right of Review

In its Discussion Paper the Commission formed the view that a reportable offender should be entitled to apply for a review of his or her status as a reportable offender.[2] Circumstances change and it is possible that an offender's risk to the community may also change over time. Importantly, a right of review provides incentive for rehabilitation. Considering that the sex offender registration scheme does not include any therapeutic intervention it does not provide any direct motivation for an offender to engage in rehabilitation programs or counselling.[3] What the scheme does provide is a 'threat' of prosecution for non-compliance; at best this means that there is an incentive for the offender to continue to report to police as required and provide accurate and up-to-date personal details. In contrast, a right to apply for a review of reportable offender status may encourage offenders to engage in appropriate treatment programs to address offending behaviour and thereby reduce their risk of reoffending.

The Commission's proposals in this respect were similar for juveniles and adults and both required the court to be satisfied that the offender no longer posed a risk to the lives or sexual safety of one or more persons, or persons generally. However, in order to maintain consistency with the proposal for a limited exemption for adult offenders (Recommendation 3) it was specified that an adult must also satisfy the court that at the time of the original sentencing proceedings there were exceptional circumstances.[4] The Commission also concluded that there should not be an ongoing or continual right of review given the inclusion of discretion at the front-end and the need to ensure that the impact on police and court resources was not excessive. Therefore, it was proposed that an offender should be entitled to apply for a review once and that this should be available only after half of the reporting period had expired (or in the case of juveniles halfway through the reporting period or when the offender reached the age of 18).

The Commission received overwhelming support for these proposals[5] with the only opposition coming

1. *Community Protection (Offender Reporting) Act 2004* (WA) s 52 and see LRCWA, *Community Protection (Offender Reporting) Act 2004*, Discussion Paper (February 2011) 55.
2. LRCWA, *Community Protection (Offender Reporting) Act 2004*, Discussion Paper (February 2011) 134–5 & 163, Proposals 10 & 18.
3. However, the Community Protection (Offender Reporting) Amendment Bill 2011 (WA) (which was introduced into Parliament on 30 November 2011) includes amendments to enable a court to order as part of a protection order (currently a prohibition order) that the reportable offender comply with the orders of the Commissioner of Police in relation to assessment and/or treatment by a medical practitioner, psychiatrist, psychologist or social worker (proposed s 94A).
4. The Commission notes that the Department for Child Protection submitted that any review process available for adult offender should be 'subject to rigorous procedures such as those set out in Proposal 15': Department for Child Protection, Submission No 19 (17 June 2011).
5. Paul Beatts, Submission No 1 (10 March 2011); Mental Health Law Centre, Submission No 4 (6 May 2011); Reverend Peter Humphris, Submission No 5 (4 May 2011); Chief Judge Peter Martino, District Court of Western Australia, Submission No 6 (24 May 2011); President of the Children's Court of Western Australia, Submission No 7 (24 May 2011); Law Council of Australia, Submission No 9 (30 May 2011); Aboriginal Legal Service of Western Australia, Submission No 10 (May 2011); Legal Aid WA, Submission No 11 (24 May 2011); Department of Corrective Services, Submission No 14 (30 May 2011); Chief Justice Wayne Martin, Supreme Court of Western Australia, Submission No 15 (1 June 2011); Department for Child Protection, Submission No 19 (17 June 2011); Department of the Attorney General, Submission No 20 (20 June 2011); Law Society of Western Australia, Submission No 21 (21 June 2011); Department of Indigenous Affairs Submission No 22 (5

from the Western Australia Police; in fact, many of the respondents stated that the right of review should not be as restrictive as that proposed by the Commission. Chief Judge Peter Martino stated that:

> While there would need to be some limitation on an offender bringing multiple applications, in my view the proposal that only one application for review could be brought is unduly restrictive. It may be for example that an offender's circumstances may change. I suggest that after an application has been made no further application can be made within a specified period of years or such other period as the Court may order when dismissing the application.[6]

Likewise, the Aboriginal Legal Service stated that it 'is unreasonable to limit the number of reviews available'.[7] The Department of Corrective Services also submitted that the review process available for juveniles should not be restricted to a once only application (although the Commission's proposal for adults was fully supported).[8] The Department of the Attorney General suggested that if an offender is unsuccessful he or she should be able to seek the leave of the court to apply again.[9] The Department also stated that in regard to adults the proposal should read:

> That upon application the court may order that the offender is no longer a reportable offender if it is satisfied that since the offence occurred, circumstances have significantly changed and the offender does not pose a risk to the lives or sexual safety of one or more persons, or persons generally.[10]

While support for a more liberal right of review is understandable, the Commission is mindful of the impact upon police and court resources if reportable offenders were to be entitled to apply to a court for a review of their reportable offender status on an ongoing basis. Limitations such as a requirement to obtain 'leave of the court' or to establish a 'change in circumstances' will not significantly relieve this burden. It is also important to emphasise that under the Commission's recommended scheme, no juvenile will be subject to the reporting obligations under the CPOR Act unless a court has determined that he or she poses a risk to the lives or sexual safety of one or more persons, or persons generally. Adults will remain subject to the reporting obligations unless they do not pose a risk and there are exceptional circumstances. By having judicial discretion at the front end, the Commission believes that there is less need for an ongoing or extensive right of review.

One practical issue arises in respect of the wording of the Commission's proposal in relation to juveniles. The proposal stipulated that a juvenile reportable offender can apply for a review of his or her reportable offender 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'. The intent was to provide juvenile offenders with an appropriate incentive for rehabilitation. However, it was pointed out to the Commission by the Office of the Director of Public Prosecutions that the wording of the proposal meant that if a juvenile offender was placed on the register just before he or she turned 18 the offender could seek an immediate review without having complied with 'anything like' half of the applicable reporting period.[11] Similarly, the Department of Corrective Services suggested that a requirement that a juvenile offender must have served at least 24 months of the reporting period before being entitled to seek a review provides a more appropriate timeframe.[12] The Commission agrees with this suggestion and has made an appropriate amendment to its recommendation.

The Department of Corrective Services suggested that two criteria should be included to assess risk for the purpose of the proposed review: an absence of a breach of reporting requirements for 24 months prior to the review and evidence of rehabilitation.[13] The Commission does not agree that any additional criteria are required over and above the requirement to establish that the offender does not pose the relevant risk and, in the case of adults, that the circumstances were exceptional. Whether or not an offender has breached the reporting obligations is clearly one factor that the court would take into account in determining if the applicant should remain a reportable offender but the presence of a breach conviction does not necessarily demonstrate risk. As explained by the Commission in its Discussion Paper, non-compliance with reporting obligations may result from inadvertence or disadvantages such as language difficulties, mental health problems or geographical

July 2011). It is also noted that the Law Council of Australia has contended that after a period of time a registered offender should be entitled to apply to a court or tribunal for removal off the register: Law Council of Australia, *Policy Statement on Registration and Reporting Obligations for Child Sex Offenders* (2010) 4.

6. Chief Judge Peter Martino, District Court of Western Australia, Submission No 6 (24 May 2011).
7. Aboriginal Legal Service of Western Australia, Submission No 10 (May 2011).
8. Department of Corrective Services, Submission No 14 (30 May 2011).
9. Department of the Attorney General, Submission No 20 (20 June 2011).
10. Ibid.
11. Office of the Director of Public Prosecutions, Submission No 17 (2 June 2011).
12. Department of Corrective Services, Submission No 14 (30 May 2011).
13. Ibid.

remoteness.[14] A requirement to show compliance for a period of at least 24 months may therefore be unduly restrictive.

Finally, being mindful of the problems discussed earlier in relation to the provision of information to the court post-sentencing, the Commission has included a provision in its recommendation below to enable the court to have regard to any pre-sentence reports (including any psychiatric or psychological reports) prepared for the original sentencing proceedings as well as other relevant material when determining reportable offender status during the review proceedings.

RECOMMENDATION 7

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 Recommendation 1 above) may apply to the President of the Children's Court or to the District Court for a review of his or her reportable offender status at any time after he or she has attained the age of 18 years so long as he or she has been subject to the reporting obligations under this Act for at least 24 months or if he or she has complied with the reporting obligations for at least half of the applicable 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 only 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 in determining the application the court may take into account the following –
   (a) any evidence given during proceedings for the offence;
   (b) any document or record (including any 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; and
   (h) any other matter the court considers relevant.
5. The offender may appeal against the decision in accordance with s 23 of the *Criminal Appeals Act 2004* (WA).
6. The prosecution may appeal against the decision in accordance with s 24 of the *Criminal Appeals Act 2004* (WA).

RECOMMENDATION 8

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 reportable offender 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 only order that the offender is no longer a reportable offender 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 and at the time the offender was sentenced there were exceptional circumstances.
4. That in determining the application the court may take into account the following –
   (a) any evidence given during proceedings for the offence;
   (b) any document or record (including any electronic document or record) served on the offender by the prosecution;

14. LRCWA, *Community Protection (Offender Reporting) Act 2004*, Discussion Paper (February 2011) 115 & 155. In particular, it was observed that regional and Aboriginal reportable offenders appear to be overrepresented in breach proceedings under the CPOR Act.

(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; and

(h) any other matter the court considers relevant.

5. The offender may appeal against the decision in accordance with s 23 of the *Criminal Appeals Act 2004* (WA).

6. The prosecution may appeal against the decision in accordance with s 24 of the *Criminal Appeals Act 2004* (WA).

A Retrospective Right of Review

The Commission recognised that its recommended discretionary scheme will not alleviate any injustice or unfairness to those reportable offenders who have already been inappropriately caught under the mandatory provisions of the CPOR Act. While the right to apply for a review after a qualifying period (Recommendations 7 and 8 above) will enable some existing reportable offenders to have their case reconsidered in the future, it is not appropriate that existing reportable offenders are required to wait until half of the reporting period has expired. The requirement to satisfy the qualifying period is included for the purpose of the review process on the basis that it has already been determined that the offender poses a risk to the community. However, existing reportable offenders have been made subject to the registration and reporting requirements without any consideration of the circumstances of their case or their level of risk to the community.

As a consequence, the Commission proposed that there should be a retrospective right of review for existing juvenile and adult reportable offenders in order to ensure that they are in the same position as any person who is found guilty of Class 1 or Class 2 offences after the recommendations in this Report are implemented.[15]

15. LRCWA, *Community Protection (Offender Reporting) Act 2004*, Discussion Paper (February 2011) Proposals 11 and 19.

In reaching this view the Commission was particularly persuaded by a number of the Western Australian case examples referred to in its Discussion Paper. Many of these offenders should, at the very least, have the right to have their reportable offender status reconsidered at the earliest opportunity. Also, as the Department of Corrective Services observed in its submission:

> The *Community Protection (Offender Reporting) Act 2004* has retrospective provision in that the Act captures offenders who were sentenced before its commencement. Accordingly, it is only fair that any newly created rights are also made retrospective.[16]

The Commission received very strong support for these proposals[17] with the Western Australia Police expressing the only opposition.[18] Even so, the Western Australia Police conceded that there may be some merit in reducing the current 15-year-period for which adult reportable offenders subject to lifetime reporting are required to wait before seeking an order for suspension of their reporting obligations.[19]

The Office of the Director of Public Prosecutions neither opposed nor supported the proposals for a retrospective right of review but commented that the likely outcome is that every reportable offender would seek a review and 'processing a large number of retrospective review applications is likely to place a considerable burden on the Courts and agencies involved in the review process'.[20] It was suggested therefore that some limitation should be placed on this right.[21]

16. Department of Corrective Services, Submission No 14 (30 May 2011).
17. Paul Beatts, Submission No 1 (10 March 2011); Dr Katie Seidler, Submission No 2 (11 April 2011); Mental Health Law Centre, Submission No 4 (29 April 2011); Reverend Peter Humphris, Submission No 5 (4 May 2011); Chief Judge Peter Martino, Submission No 6 (24 May 2011); Judge Denis Reynolds, President of the Children's Court of Western Australia, Submission No 7 (24 May 2011); Law Council of Australia, Submission No 9 (30 May 2011); Aboriginal Legal Service of Western Australia, Submission No 10 (May 2011); Legal Aid WA, Submission No 11 (30 May 2011); Department of Corrective Services, Submission No 14 (30 May 2011); Department for Child Protection, Submission No 19 (17 June 2011); Department of the Attorney General, Submission No 20 (20 June 2011); Law Society of Western Australia, Submission No 21 (21 June 2011); Department of Indigenous Affairs, Submission No 22 (5 July 2011).
18. The Western Australia Police, Submission No 18 (30 May 2011). Again, the opposition was based upon the general view that there should not be any judicial discretion included in the scheme.
19. The Western Australia Police, Submission No 18 (30 May 2011).
20. Office of the Director of Public Prosecutions, Submission No 17 (2 June 2011).
21. Ibid.

In contrast, some respondents suggested that the retrospective right of review should extend beyond the single application proposed by the Commission. As noted earlier, Chief Judge Peter Martino expressed the opinion that the provision for only one application for review is 'unduly restrictive'.[22] Likewise, the Aboriginal Legal Service stated that there should be no limitation on the number of reviews available.[23] The Department of the Attorney General submitted that 'there should be provision for the ability to seek leave of the court to apply for a subsequent review'.[24] While the Commission understands (but does not necessarily agree with) these sentiments in regard to the general right to seek a review after half of the reporting period has expired (as set out in Recommendations 7 and 8 above), it does not follow the reasoning in regard to the proposed retrospective right of review. These submissions appear to have overlooked that the purpose of the retrospective right of review is to place existing reportable offenders in the same position as any future offenders found guilty of a reportable offence, and that this retrospective right of review operates over and above the general right to apply for a review after half the reporting period has expired. If an existing reportable offender seeks a review of his or her reportable offender status in accordance with the Commission's recommendation and the application fails, the offender remains entitled to seek a review after the qualifying period has expired.

RECOMMENDATION 9

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 reportable offender 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 offender reporting order (as set out in Recommendation 1).
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 the reporting obligations under the *Community Protection (Offender Reporting) Act 2004* (WA) and is no longer a reportable offender 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 in determining the application the court may take into account the following –
   (a) any evidence given during proceedings for the offence;
   (b) any document or record (including any 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; and
   (h) any other matter the court considers relevant.
6. The offender may appeal against the decision in accordance with s 23 of the *Criminal Appeals Act 2004* (WA).
7. The prosecution may appeal against the decision in accordance with s 24 of the *Criminal Appeals Act 2004* (WA).
8. That if the court hearing the application determines that the applicant should remain subject to the juvenile offender reporting order and the reporting obligations under the *Community Protection (Offender Reporting) Act 2004* (WA) the applicant remains entitled to apply for a review in accordance with Recommendation 8.

22. Chief Judge Peter Martino, Submission No 6 (24 May 2011).
23. Aboriginal Legal Service of Western Australia, Submission No 10 (May 2011).
24. Department of the Attorney General, Submission No 20 (20 June 2011).

RECOMMENDATION 10

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 reportable offender 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 under this section can only be made once.
4. That upon an application the court may order that the offender is no longer a reportable offender and is no longer subject to reporting obligations under the *Community Protection (Offender Reporting) Act 2004* (WA) 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 in determining the application the court may take into account the following –
   (a) any evidence given during proceedings for the offence;
   (b) any document or record (including any 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; and
   (h) any other matter the court considers relevant.
6. The offender may appeal against the decision in accordance with s 23 of the *Criminal Appeals Act 2004* (WA).
7. The prosecution may appeal against the decision in accordance with s 24 of the *Criminal Appeals Act 2004* (WA).
8. That if the court determines that the applicant should remain a reportable offender and subject to reporting obligations under the *Community Protection (Offender Reporting) Act 2004* (WA) the applicant remains entitled to apply for a review in accordance with Recommendation 9.

Removal From the Register

At the beginning of this chapter the Commission noted that there are two key questions in this reference: the determination of reportable offender status and the determination of the frequency of reporting obligations. The two are interrelated: an offender cannot be subject to the reporting obligations under the CPOR Act without first being classified as a reportable offender; however, a reportable offender can remain listed on the register yet be relieved of the obligation to comply with the reporting obligations under the Act.[25] In the next chapter the Commission examines the manner in which the frequency of reporting obligations should be determined including the option of suspending reporting obligation's in some circumstances.

However, the Commission wishes to make it clear that if (as recommended in this Chapter) a court has determined that an offender should not be subject at all to registration and reporting obligations under the Act that person should no longer be listed on the Australian National Child Offender Register. If a reportable offender seeks a review of his or her reportable offender status and is successful there must be a mechanism for that person's name to be removed from the Western Australian and national registers.

Currently, there is no provision under the CPOR Act for the person's name to be removed from the register once his or her reporting period has expired. In regard to the Victorian legislation, the Victorian Law Reform Commission (VLRC) observed that:

25. Currently this occurs if the Commissioner of Police suspends the reporting obligations of certain juvenile reportable offenders or if the District Court suspends the reporting obligations of a reportable offender who is subject to lifetime reporting after the qualifying (usually 15 years) period.

> How long a person is included in the Sex Offenders Register – as opposed to how long they must comply with the reporting obligations – is also unclear. At the conclusion of the reporting period, the Chief Commissioner is directed to destroy certain materials obtained from the registered sex offender, but not any of the information held on the Register itself. The Act does not provide for the registration to expire automatically and nor does it direct the Chief Commissioner to remove the registered offender's name from the Register when the reporting period ends.[26]

In its submission to the VLRC the Victorian Privacy Commissioner stated that the Act should be amended to provide that once a registered offender's reporting period has finished that person's name and all entries should be removed from the register and all information should likewise be removed from ANCOR.[27]

It is the Commission's view that if a court is satisfied that a reportable offender no longer poses a risk to the lives or sexual safety of one or more persons or persons generally, there is no justification for retaining that person's name on the sex offender register. Thus if a decision is made in accordance with Recommendations 7 to 10 that the offender should no longer be subject to the reporting obligations under the CPOR Act there must be a provision to ensure that his or her name (as well as other details) is removed from the register.[28] On the other hand, the Commission is not convinced that this provision should apply to a reportable offender whose reporting period has ended because, unlike in the above situations, there has not been a determination by a court that the offender no longer poses a risk to the lives or sexual safety of one or more persons, or persons generally.

RECOMMENDATION 11

Removal from the register

That the *Community Protection (Offender Reporting) Act 2004* (WA) be amended to provide that if a court makes an order that a reportable offender is no longer a reportable offender (in accordance with Recommendations 7 to 10 of this Report) the Commissioner of Police is to cause that person's name and personal details to be removed from the Community Protection Offender Register (established under s 80 of the *Community Protection (Offender Reporting) Act 2004* (WA)) and the Australian National Child Offender Register.

26. VLRC, *Sex Offenders Registration*, Information Paper (2011) 14.
27. Victorian Privacy Commissioner, Submission No 10 (July 2011) 11.
28. In its submission the Department of Corrective Services stated that if a court is given the power to determine reportable offender status then it may be appropriate for the court to have the function of 'deregistration': Department of Corrective Services, Submission No 14 (30 May 2011).

Chapter Four

Determining Reporting Obligations

Contents

The initial determination of reporting obligations

In Chapter Three of this Report the Commission makes a number of recommendations that incorporate a degree of judicial decision-making into the determination of reportable offender status. Classification as a reportable offender means, firstly, that the offender is included on the sex offender register and, secondly, that the offender is required to comply with the reporting obligations under the *Community Protection (Offender Reporting) Act 2004* (WA) ('the CPOR Act'). Currently, the content of those reporting obligations is set by the legislation with one exception: the police determine how often reportable offenders are required to report to police (over and above the ongoing legislative requirement to report annually and to notify police of any changes to personal details and any travel plans). The Commission refers to this requirement as 'periodic reporting obligations'.[1]

Although a small number of submissions discussed a preference for the content of reporting obligations to be set by the court at the outset,[2] the Commission has decided that the initial determination of reporting obligations—including the frequency of periodic reporting—should continue to be prescribed by legislation and by police. This decision has been made on the basis that the question to be answered by a court when determining reportable offender status is whether the offender poses a risk to the lives or sexual safety of one or more persons, or persons generally. To answer this question the court is not required to determine the degree of risk posed by the offender (ie, very high, high, moderate, etc). The outcome of such an assessment is clearly relevant to how often a reportable offender should be required to report to police. The Commission has also taken into account resourcing implications (both financial and human) and is of the view that to require a court to decide the precise content of reporting obligations would place an unnecessary burden on the courts and associated parties because the court would be required to consider the *level* of risk posed by the offender in *every* case where a person is found guilty of a reportable offence. In contrast, under the Commission's recommendations a court will only be required to consider whether an offender poses a risk to the lives or sexual safety of one or more persons or persons generally if the offender is a juvenile or, in the case of an adult, if the offender has first satisfied the court that there are exceptional circumstances.

Having determined that police (as distinct to a sentencing court) should remain responsible for setting the initial periodic reporting obligations, this chapter examines the manner in which police undertake this task and whether any reform is required to ensure that the process is fair and accountable. Finally, this chapter considers the existing power of the Commissioner of Police to suspend reporting obligations for certain juvenile reportable offenders and, specifically, whether that power should be expanded.

1. For a detailed discussion of the content of reporting obligations, see LRCWA, *Community Protection (Offender Reporting) Act 2004*, Discussion Paper (February 2011) 44–49.
2. Dr Katie Seidler, Submission No 2 (11 April 2011); Mental Health Law Centre, Submission No 4 (29 April 2011); Legal Aid WA, Submission No 11 (24 May 2011). It is noted that in a submission to the Victorian Law Reform Commission for its review of sex offender registration laws, Professor Terry Thomas submitted that reporting obligations should continue to be set automatically for simplicity and because it is preferable to have discretion at the point when a decision is made in relation to registration: Professor Terry Thomas, *Sex Offenders Registration Information Paper*, Submission to the Victorian Law Reform Commission (July 2011).

Review of periodic reporting obligations

Setting Periodic Reporting Obligations

As explained in Chapter One of this Report, pursuant to s 28(1) of the *Community Protection (Offender Reporting) Act 2004* (WA) ('the CPOR Act') all reportable offenders are required to report their details to police at least once a year. However, s 28(3) empowers the police to issue a notice requiring a reportable offender to report at any time.[1] In contrast, the legislation in other Australian jurisdictions stipulates periodic reporting on an annual basis only.

In Western Australia, following a risk assessment and depending on the outcome, reportable offenders are usually required to report either weekly, monthly, three-monthly, six-monthly or annually. However, the Commission was told by lawyers that some reportable offenders had in the past been required to report twice a week and some expressed concern about the difficulty of complying with weekly reporting.[2] The Western Australia Police advised that if there are additional or specific concerns about an offender's risk he or she may be required to report more often than the periods stipulated above but the maximum frequency would never be more often than weekly. As at 9 September 2011, the Western Australia Police advised that four reportable offenders were required to report more often than once a month, with one of these offenders reporting on a weekly basis.[3]

Risk assessment by police

As stated above, the Western Australia Police conduct a risk assessment to determine how frequently each reportable offender should be required to report. An actuarial risk assessment tool, Risk Matrix 2000 (RM2000) is currently used for adult reportable offenders; however, the risk classification can be adjusted based on the subjective views of the police. An actuarial tool is not used for juvenile reportable offenders (instead, the assessment of risk is based solely on a subjective assessment by police).

1. See Chapter One, 'Reporting Obligations'.
2. LRCWA, *Community Protection (Offender Reporting) Act 2004*, Discussion Paper (February 2011) 117.
3. Western Australia Police, Submission 18A (9 September 2011) 2.

In its Discussion Paper the Commission noted the limitations of the RM2000 including that it may not be reliable for specific groups (eg, adolescent offenders, female offenders and Indigenous offenders).[4] In more general terms, it has been observed that actuarial risk assessment tools are considered to be more reliable in predicting risk of reoffending than clinical judgments,[5] but they are not immune from criticism and they are 'not infallible'.[6] Depending on whether the risk categories are over-inclusive or under-inclusive there will be false positives or false negatives.[7]

> While the costs to the community of a false negative error are high, the seriousness of false positives from both an individual liberty as well as resource allocation and ethical standpoint, also cannot be ignored.[8]

Further, it has been stated that actuarial tools examine static factors only and do not take into account dynamic factors.[9] In *Director of Public Prosecutions (WA) v Free*[10] the Supreme Court considered an application under the *Dangerous Sexual Offenders Act 2006* (WA). Two different psychological reports were considered and each referred to a risk assessment score using the STATIC-99 (an actuarial risk assessment tool). However, each presented different results (one report assessed the offender as a medium- to high-risk while the other found the offender was a high-risk). McKechnie J stated that:

> This application highlights the limitations of STATIC-99. The STATIC-99 score is coded and immutable. The respondent will remain at a statistical

4. LRCWA, *Community Protection (Offender Reporting) Act 2004*, Discussion Paper (February 2011) 48.
5. Four primary methods employed to assess risk of sexual recidivism have been identified in the literature: clinical judgment, actuarial risk assessment tools, structured professional judgement and clinically adjusted actuarial assessment): See Blasko B et al, 'Are Actuarial Risk Data Used to Make Determinations of Sex Offender Risk Classification? An examination of sex offenders selected for enhanced registration and notification' (2011) 55 *International Journal of Offender Therapy and Comparative Criminology* 676, 679; Wood M & Ogloff J, 'Victoria's *Serious Sex Offenders Monitoring Act 2005*: Implications for the Accuracy of Sex Offender Risk Assessment' (2006) 13 *Psychiatry, Psychology and the Law* 182, 187
6. Wood & Ogloff, ibid 189.
7. Ibid 189–90.
8. Ibid 190.
9. Ibid 191.
10. [2010] WASC 255.

> high risk of offending under STATIC-99, no matter what interventions occur and how much he changes his lifestyle, because it takes no account of dynamic factors.[11]

In the context of actuarial risk assessments conducted by police, any positive changes made by the offender (eg, participation in rehabilitation programs) will not change the assessment outcome. However, as noted above, the police do alter risk classification based on their own subjective views. Nevertheless, the subjective views of police about risk assessment are not the same as expert opinions of clinical psychologists and/or psychiatrists.

Finally, 'no actuarial and adjusted-actuarial risk tools have been validated in Australia, which (among other important differences) is more ethnically diverse than many other developed nations, and research suggests that accuracy of actuarial procedures may vary according to ethnicity of the study sample'.[12] In *Director of Public Prosecutions for Western Australia v Williams*,[13] again in the context of an application under the *Dangerous Sexual Offenders Act*, McKechnie J commented that criticisms of the STATIC-99 have some validity because research suggests that the test is less accurate with ethnic groups (having been developed for white Canadians).[14]

All bar one Australian jurisdiction uses an actuarial risk assessment tool for the purpose of managing and monitoring registered sex offenders.[15] The RM2000 is used by Western Australia and the Northern Territory. New South Wales and Victoria appear to employ a specific sex offender register tool (and the Australian Capital Territory adopts the New South Wales tool). Queensland uses the Sex Offender Risk Assessment Tool (SORAT) and South Australia uses STATIC-99. Dr Katie Seidler, a clinical psychologist from New South Wales, stated in her submission that:

> [The RM2000] is not widely used in clinical circles, where the assessment of risk occurs routinely. For example, according to the Paper, the RM2000 predicts that high risk offenders reoffend at between 85 and 91%. This is far in excess of the rates predicted by the STATIC-99, which is the most widely used measure for risk prediction within the clinical field.[16]

While the value of actuarial risk assessment tools are acknowledged, the Commission has some concern that the frequency in which reportable offenders are required to report to police is largely based on these assessments without any avenue for review. Further, the process for setting periodic reporting lacks accountability and transparency – it is important that reportable offenders have a mechanism to question the frequency in which they are required to report to police (over and above their ongoing obligation to ensure that their personal details held by police are updated and accurate). As Dr Katie Seidler argued, the process whereby police determine how frequently a reportable offender is required to 'check-in' with police is open to abuse and there needs to be 'checks and balances in place to minimise the potential abuse of power'.[17] This is especially relevant for vulnerable and disadvantaged reportable offenders who may experience additional difficulties with compliance.

Review of the Frequency of Periodic Reporting Obligations

The need for a review process

In its Discussion Paper the Commission proposed that the CPOR Act be amended to provide that juvenile and adult reportable offenders can seek a review of the frequency of their periodic reporting obligations imposed under s 28(3) of the Act.[18] The Commission did not have a firm view about whether this review should be undertaken by police or by a court so submissions were sought to garner views about who should undertake the review.

The Commission received overwhelming support for the provision of a right to review the frequency of periodic reporting.[19] Only the Western Australia Police objected to the proposal. It was stated that while

11. Ibid [45]. See also *DPP (WA) v GTR* [2008] WASCA 187, [68] (Steytler P & Buss JA) where it was commented that the two psychiatrists who had given evidence 'appear, in their reports, to have placed some reliance upon the STATIC99 risk prediction tool in suggesting that offending at a young age gives rise to an enhanced risk of reoffending. However, each recognised, in the course of oral evidence, that there are significant shortcomings in that test. That is primarily because the test relies upon unchangeable historical factors. It is consequently susceptible to error in cases in which opportunities for rehabilitation have been availed of'.
12. Wood M & Ogloff J, 'Victoria's *Serious Sex Offenders Monitoring Act 2005*: Implications for the Accuracy of Sex Offender Risk Assessment' (2006) 13 *Psychiatry, Psychology and the Law* 182, 193.
13. [2007] WASC 95.
14. Ibid [36].
15. Ministerial Council for Police and Emergency Management, *National Approach to Child Protection Offender Registration – Report from National Working Party* (2009) 10.
16. Dr Katie Seidler, Submission No 2 (11 April 2011).
17. Ibid.
18. LRCWA, *Community Protection (Offender Reporting) Act 2004*, Discussion Paper (February 2011) Proposals 3 & 14.
19. Paul Beatts, Submission No 1 (10 March 2011); Dr Katie Seidler, Submission No 2 (11 April 2011); Mental Health Law Centre, Submission No 4 (29 April 2011); Reverend Peter Humphris, Submission No 5 (4 May 2011); Chief Magistrate Steven Heath, Submission No 8 (24 May 2011); Aboriginal

> reportable offenders may dislike reporting to police, WA Police do not consider that the current reporting regime places an onerous or time-consuming obligation on them. The current reporting obligations range from as little as once a year to 12 times per year. By placing a legislative review procedure into the Act, a significant impost would be felt on WA Police resources and staff. WA Police would need to exert considerable time on such a review in order to weigh risk, operational issues and other considerations before coming to a decision. Further WA Police would be concerned as to what responsibility such a review regime would place on this agency should the offender commit another sexual offence. WA Police would also be concerned about the impost on the court system by putting in place a judicial review process.[20]

In response to the comment that reporting obligations are not onerous, the Commission notes that periodic reporting is only one aspect of the reporting regime. Reportable offenders are also required to notify police of any changes to their personal details (and the list of personal details in the legislation is extensive) as well as any travel plans (both within and outside of the state). The additional obligation to 'check-in' with police on a regular basis must be viewed in this context.

It was also explained by the Western Australia Police that they currently have a review procedure in place and this review is conducted on a regular basis, and decisions about reporting frequency are made 'at a senior level' and reviewed internally. The Commission disagrees with the justification for opposing a right of review; any perceived accountability for sexual reoffending would have to be greater under the current regime because police are solely responsible for setting the frequency of periodic reporting. Further, as they state, police undertake regular reviews so issues such as weighing risk and operational considerations must already be taken into account in conducting these reviews. The Commission remains convinced that a right of review is necessary and appropriate.

A two-stage review process

In seeking submissions about the most appropriate forum for such a review, the Commission asked whether the 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). It was also queried whether there should be a limit on the number of times or frequency in which a reportable offender is entitled to seek a review of his or her periodic reporting obligations. [21]

There were mixed responses from respondents. Some favoured a review by police.[22] The Department of Corrective Services stated that the review should be conducted by a senior police officer or internal police review panel because such a process would be quicker and easier, and police have special expertise in assessing reporting frequency.[23] The Department of Indigenous Affairs supported a review by police because it would be more accessible for offenders in remote areas.[24]

The majority of respondents submitted that the review should be undertaken by a court[25] with half of these submissions advocating for a two-stage review process.[26] Chief Magistrate Heath submitted that there should be a right of review to a police officer with a subsequent right of appeal from that decision to the court which originally determined reportable offender status.[27] Similarly, the Aboriginal Legal Service of Western Australia submitted that there should be:

> a two tiered review process, whereby an offender can firstly seek a review to a senior police officer. If still unsatisfied, an offender can then seek a review to a Magistrates Court. This Court review ought be on a hearing de novo basis.[28]

The Aboriginal Legal Service expressed the view that the Magistrates Court would be the most appropriate court jurisdiction because it is 'more accessible to remote and

Legal Service of Western Australia, Submission No 10 (May 2011); Legal Aid WA, Submission No 11 (24 May 2011); Department of Corrective Services, Submission No 14 (30 May 2011); Chief Justice Wayne Martin, Submission No 15 (1 June 2011); Department for Child Protection, Submission No 19 (17 June 2011); Department of the Attorney General, Submission No 20 (20 June 2011); Law Society of Western Australia, Submission No 21 (21 June 2011); Department of Indigenous Affairs, Submission No 22 (5 July 2011).

20. Western Australia Police, Submission No 18 (30 May 2011).
21. LRCWA, *Community Protection (Offender Reporting) Act 2004*, Discussion Paper (February 2011) Questions C & G.
22. Department of Corrective Services, Submission No 14 (30 May 2011); Department for Child Protection, Submission No 19 (17 June 2011); Department of Indigenous Affairs, Submission No 22 (5 July 2011).
23. Department of Corrective Services, Submission No 14 (30 May 2011).
24. Department of Indigenous Affairs, Submission No 22 (5 July 2011).
25. Mental Health Law Centre, Submission No 4 (29 April); Chief Magistrate Steven Heath, Submission No 8 (24 May 2011); Aboriginal Legal Service of Western Australia, Submission No 10 (May 2011); Legal Aid WA, Submission No 11 (24 May 2011); Law Society of Western Australia, Submission No 21 (21 June 2011); Department of the Attorney General, Submission No 20 (20 June 2011).
26. Chief Magistrate Steven Heath, Submission No 8 (24 May 2011); Aboriginal Legal Service of Western Australia, Submission No 10 (May 2011); Department of the Attorney General, Submission No 20 (20 June 2011).
27. Chief Magistrate Steven Heath, Submission No 8 (24 May 2011).
28. Aboriginal Legal Service of Western Australia, Submission No 10 (May 2011).

regional offenders' and magistrates are likely to be more familiar with local conditions in these areas.[29]

The Department of the Attorney General submitted that a 'robust process' is required and suggested that for day-to-day short-term changes an offender should be able to apply to the Local District Manager (police) and this should be reviewed by a senior police officer from the Sex Offenders Management Squad. However, in the case of longer-term changes the review should be conducted by a court (or a review panel established by the Commissioner of Police).[30]

The Commission is persuaded by these submissions that a two-stage process is the ideal solution. A reportable offender should first seek a review to a senior police officer of the rank of sergeant or above and then if he or she remains aggrieved, a review to a magistrate (Magistrates Court or Children's Court) should be available. This will provide the quickest and most accessible form of court review. The Commission recognises that a provision of a right of review of periodic reporting frequency will create additional work for judicial officers and police. It was for this reason that the Commission sought submissions about whether there should be a limit on the number of times or frequency in which a reportable offender is entitled to seek a review.

Most respondents indicated that a reportable offender should have the right to apply for a review of reporting frequency once a year but with the proviso that an application could be brought more often if circumstances had significantly changed or there were exceptional reasons. The Mental Health Law Centre submitted that if the right to apply for a review of periodic reporting frequency is restricted this 'should be modified by a right to make an application for leave in certain circumstances, such as changed medications or recovery from illness or changed facts'.[31] The Department for Child Protection suggested that any limit on the right to apply for a review should take into account the potential for circumstances to change.[32] The Department of the Attorney General also stated that a reportable offender should be able to seek a review if there has been a significant change in his or her circumstances.[33] Finally, the Law Society submitted that there should be a right to apply annually unless there are exceptional reasons.[34]

There were two submissions promoting an even more liberal approach. The Department of Corrective Services stated that a review should be available every time a new decision is made in regard to reporting frequency; however, the department did not support a court-based review.[35] The Aboriginal Legal Service stated that because the 'life circumstances of [offenders] (and in particular Aboriginal offenders) may change quickly, significantly, and often for reasons beyond their control, there ought be no limit on the number of reviews that can be sought'.[36] In contrast, Chief Magistrate Heath submitted that the right of review should be limited to once in an annual period 'but with power for the reviewing Judge to set a longer period in order to prevent continual requests without merit'.[37]

The provision of a right to apply to a court for a review of the frequency of periodic reporting requires a balance to be struck between resourcing and operational issues on the one hand and the rights of the offender on the other hand. If the right of review is unrestricted, most reportable offenders would be likely to apply regularly and continuously during the lifespan of their reporting obligations. The Commission envisaged that reportable offenders would have a right to apply for a review in relatively rare circumstances; it was not intended that every slightly dissatisfied reportable offender would be able to lodge an application with a court whenever they chose. The purpose is to prevent injustice in those exceptional cases where police have set overbearing and unnecessary periodic reporting requirements. For that reason the Commission is of the view that the best option is a two-stage review process whereby reportable offenders are entitled to seek a review of reporting frequency to a senior police officer once a year, or whenever the frequency of their periodic reporting is increased or their circumstances significantly change. Following that it is recommended that if a reportable offender is aggrieved by the decision of police in relation to the frequency of periodic reporting he or she can apply to a court, but may do so only once in any 12-month period. The first 12-month period should run from the commencement of reporting obligations (as determined under s 24 of the

29. Ibid.
30. Department of the Attorney General, Submission No 20 (20 June 2011).
31. Mental Health Law Centre, Submission No 4 (29 April). It is noted that Legal Aid advocated for an annual court review as well as the right to apply to a court for a review every time periodic reporting frequency is increased: Legal Aid WA, Submission No 11 (24 May 2011). This is inconsistent with their submission that an increase in reporting frequency should only be made by a court. If a court has determined that it is appropriate to increase reporting frequency there is no need for a court review.
32. Department for Child Protection, Submission No 19 (17 June 2011).
33. Department of the Attorney General, Submission No 20 (20 June 2011).
34. Law Society of Western Australia, Submission No 21 (21 June 2011).
35. Department of Corrective Services, Submission No 14 (30 May 2011).
36. Aboriginal Legal Service of Western Australia, Submission No 10 (May 2011).
37. Chief Magistrate Steven Heath, Submission No 8 (24 May 2011).

CPOR Act) and end on the date on which the offender is required to comply with the first annual reporting date (under s 28(2) of the CPOR Act). Each 12-month period should thereafter begin and end with the annual reporting date.

Furthermore, the onus should be on the reportable offender to satisfy the court that the frequency of periodic reporting should be reduced. It is therefore recommended that the applicant must satisfy the court that a reduction in the frequency of periodic reporting will not result in an increased risk to the lives or sexual safety of one or more persons, or persons generally. This will assist in discouraging groundless applications and ensure that the objective of community protection is not undermined.

RECOMMENDATION 12

Review of frequency of periodic reporting obligations

1. That the *Community Protection (Offender Reporting) Act 2004* (WA) be amended to provide that a reportable offender may apply for a review of his or her periodic reporting frequency (as determined by the Commissioner of Police under s 28(3) of the *Community Protection (Offender Reporting) Act 2004* (WA)) and that the application may be made to a senior police officer (of the rank of sergeant or above)
   (a) once in every 12-month period; and/or
   (b) within 21 days after the frequency of the periodic reporting has been increased; and/or
   (c) if there has been a significant change in the offender's personal circumstances.
2. That if a reportable offender is aggrieved by the decision of the reviewing senior police officer the reportable offender may apply for a review of his or her reporting frequency to a magistrate in the Magistrates Court or the Children's Court and the magistrate may reduce the frequency of the reportable offender's periodic reporting if satisfied that such a reduction would not increase the risk to the lives or sexual safety of one or more persons, or persons generally.
3. That, in determining the review under 2 above, the magistrate may take into account any matter the court considers relevant and may have access to and take into account any material (including any evidence, document or record, statement or deposition, exhibit, pre-sentence report, victim impact statement and mediation report) that was available to the court which determined that the offender was a reportable offender under the *Community Protection (Offender Reporting) Act 2004* (WA) or the court which sentenced the offender for the reportable offence.
4. That a review under 2 above may only be made once in each 12-month period.
5. That the first 12-month period for the purpose of 1 (a) and 2 above is to be calculated from the commencement of the reportable offender's reporting obligations (as determined under s 24 of the *Community Protection (Offender Reporting) Act 2004* (WA)) and each subsequent 12-month period is to commence on the date on which the offender is required to report in accordance with s 28(2) of the *Community Protection (Offender Reporting) Act 2004* (WA).
6. That the decision of the magistrate under 2 above is final.

Suspension of reporting obligations

Once an offender is deemed to be a reportable offender under the *Community Protection (Offender Reporting) Act 2004* (WA) ('the CPOR Act') he or she remains subject to reporting obligations until the expiration of the applicable reporting period barring two limited exceptions. The first is that reportable offenders who are subject to lifetime reporting may apply, after at least 15 years has expired, to the District Court for an order suspending their reporting obligations.[1] The second is that the Commissioner of Police may suspend the reporting obligations of specified juvenile reportable offenders.[2] This latter power is contingent upon the juvenile reportable offender being found guilty of a prescribed offence and sentenced to a prescribed sentence.[3] If these preconditions are met, the Commissioner of Police 'must consider whether or not to approve the suspension of the reportable offender's reporting obligations' but may only approve suspension 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'.[4] The Commission also notes that the government has recently introduced a proposed amendment to s 62 of the CPOR Act to enable the Commissioner of Police to reinstate reporting obligations; if the Commissioner of Police is no longer satisfied that the offender does not pose the relevant risk and has given the offender written notice of that decision, the prior suspension of the offender's reporting obligations ceases to have effect.[5]

1. *Community Protection (Offender Reporting) Act 2004* (WA) s 52.
2. *Community Protection (Offender Reporting) Act 2004* (WA) s 61.
3. Prescribed sentences do not include a sentence of detention: *Community Protection (Offender Reporting) Regulations 2004* (WA) reg 18. Regulation 17 lists the offences that are prescribed for the purpose of s 61 of the CPOR Act. This list was expanded in July 2011 to include additional child pornography related offences including ss 218–220 of the *Criminal Code* (WA). The Commission notes that if Recommendation 2 of this Report is implemented (ie, there are new offences added to the list of prescribed offences for the purpose of the statutory exception for juveniles) the list of prescribed offences in Regulation 17 should include all of the offences prescribed for Regulation 8 of the *Community Protection (Offender Reporting) Regulations* (WA) (as it currently does).
4. *Community Protection (Offender Reporting) Act 2004* (WA) s 61(2).
5. Community Protection (Offender Reporting) Amendment Bill 2011 (WA) cl 20.

Extending the Commissioner's Power

In general terms, and without reciting the list of prescribed sentences and prescribed offences in full, the power of the Commissioner of Police to suspend reporting obligations applies to less-serious offending. For example, sexual offences committed against a child under the age of 13 years are excluded from the ambit of the provision, as are custodial sentences. As noted in its Discussion Paper, the Commissioner's power to suspend was inserted to accommodate underage consensual sexual activity and counteract the harshness of mandatory sex offender registration for juveniles.[6] However, the Commission found that the current power is insufficient and that there are juvenile offenders falling outside its scope who would be appropriate candidates for suspension. In fact, the Western Australia Police informed the Commission during consultations that if the power was extended to cover all juvenile reportable offenders (ie, irrespective of the offence committed or the sentence imposed) they would expect a much higher number of approvals to be granted.[7] The Commission determined that the existing power of the Commissioner of Police should be extended to provide another tool to enable the scheme to operate fairly and appropriately for juvenile offenders.

Specifically, it was proposed that s 61(1) of the CPOR Act be amended to provide that:

> [I]f 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.[8]

It was further proposed that the section 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.[9]

Two respondents did not agree with the use of the word 'must' in the first part of the Commission's proposal.

6. LRCWA, *Community Protection (Offender Reporting) Act 2004*, Discussion Paper (February 2011) 55–56.
7. Ibid 56 & 125.
8. LRCWA, *Community Protection (Offender Reporting) Act 2004*, Discussion Paper (February 2011) Proposal 5.
9. Ibid.

The Office of the Director of Public Prosecutions submitted that the current provision is adequate and did not support a compulsory requirement for the Commissioner of Police to consider whether to suspend a juvenile reportable offender's reporting obligations.[10] The Western Australia Police stated that they opposed any reform that would place a mandatory obligation upon the Commissioner of Police.[11] The Commission is somewhat surprised by these responses because the current s 61(1) of the CPOR Act provides that:

> If —
>
> (a) a person is a reportable offender only in respect of an offence prescribed by the regulations that was committed by the person when a child; and
>
> (b) the offence results in the person being subject to a sentence prescribed by the regulations,
>
> the Commissioner *must* consider whether or not to approve the suspension of the reportable offender's reporting obligations.

The only proposed amendment to s 61(1) of the CPOR Act was the removal of the provision for prescribed offences and prescribed sentences so that the power to suspend (and the requirement to consider whether to suspend) would apply to all juvenile reportable offenders.

The majority of submissions supported the extended application of the Commissioner's power so that it is available to all juvenile reportable offenders.[12] In addition, some respondents supported a power for the Commissioner of Police to remove an offender from the register.[13] However, there were also some respondents who emphasised that if a court is empowered to determine reportable offender status, it would not be appropriate for the Commissioner of Police to be given the authority to remove a person's name from the register. For example, the Department of Corrective Services supported an extended function for the Commissioner of Police in relation to the suspension of reporting obligations but stressed that if the determination of a reportable offender status is a judicial function, 'deregistration' should also be determined by a court.[14] Likewise, the Department of the Attorney General supported the proposal in principle but submitted that the Commissioner of Police should not be given the power to remove a person from the register if the court has discretion to determine reportable offender status at the outset.[15] It was also noted that if mandatory registration is retained then the Commissioner of Police should have power to remove offenders from the register.

A different view was expressed by the Aboriginal Legal Service who argued that in addition to the Commissioner of Police's power there should be a right to apply to a magistrate for a suspension of reporting obligations and for removal from the register (if the Commissioner of Police has refused to exercise the power in favour of the reportable offender).[16] The Department for Child Protection submitted that a court should decide if reporting obligations are to be suspended and whether an offender should be removed from the register.[17] The Western Australia Police objected to the inclusion of a power to remove a person from the register because of the 'importance this register has in terms of police intelligence and community safety'.[18]

The Commission has concluded that the Commissioner of Police should not have an independent power to remove a reportable offender from the register.[19] In reaching this view, the Commission has weighed the competing opinions and considered the totality of the recommendations in this Report. The Commission agrees with the view that whether an offender should be 'deregistered' is most appropriately considered by a court because the court has the power to determine reportable offender status (either initially or after a period of time as part of the recommended review process in Chapter Three).

The final matter in this chapter concerns the extension of the Commissioner of Police's power to suspend reporting obligations to adult offenders. While this issue was not raised by the Commission in its Discussion Paper the Department of the Attorney General suggested

10. Office of the Director of Public Prosecutions, Submission No 17 (2 June 2011).
11. Western Australia Police, Submission No 18 (30 May 2011).
12. Aboriginal Legal Service of Western Australia, Submission No 10 (May 2011); Legal Aid WA, Submission No 11 (24 May 2011); Department of Corrective Services, Submission No 14 (30 May 2011); Law Society of Western Australia, Submission No 21 (21 June 2011); Department of Indigenous Affairs, Submission No 22 (5 July 2011). One respondent suggested that the power currently exercisable by the Commissioner of Police to suspend reporting obligations should be extended to other professional persons: Reverend Peter Humphris, Submission No 5 (4 May 2011).
13. Legal Aid WA, Submission No 11 (24 May 2011); Law Society of Western Australia, Submission No 21 (21 June 2011); Department of Indigenous Affairs, Submission No 22 (5 July 2011).
14. Department of Corrective Services, Submission No 14 (30 May 2011).
15. Department of the Attorney General, Submission No 20 (20 June 2011).
16. Aboriginal Legal Service of Western Australia, Submission No 10 (May 2011).
17. Department for Child Protection, Submission No 19 (17 June 2011).
18. Western Australia Police, Submission No 18 (30 May 2011).
19. Although it is noted that under Recommendation 11, the Commissioner of Police may be required to remove a person from the register as a result of an order by a court that the person is no longer a reportable offender under the CPOR Act.

that it may be appropriate, in certain circumstances, for the Commissioner of Police to have the power to suspend the reporting obligations of adult reportable offenders, especially those who are mentally impaired or intellectually disabled. Specifically, the department submitted that under the Commission's Proposal 15 (now Recommendation 3) the court should be able to order that the Commissioner of Police must consider (on an annual basis) whether or not to approve the suspension of reporting obligations for an offender who has been found to pose a risk but who nevertheless committed an offence in exceptional circumstances.[20]

The Commission sees considerable merit in enabling the Commissioner of Police to suspend the reporting obligations of all reportable offenders. If a mentally impaired or intellectually disabled reportable offender is being appropriately supervised and cared for by others and is stable, the police may decide that reporting is unnecessary. Another example would be a very elderly offender who is extremely unlikely to commit any further offences. It may also prove to be a useful management tool, especially if the proposed amendment to allow the Commissioner of Police to reinstate reporting obligations is passed. For instance, the police may be satisfied that as a consequence of an offender engaging in treatment programs and commencing employment the risk of reoffending is minimal and the possibility that reporting obligations may be reinstated in the future may serve as an incentive for the offender to stay focussed on his or her rehabilitation. The Commission, therefore, recommends that s 61(1) of the CPOR Act be amended to enable the Commissioner of Police to consider whether an adult reportable offender's reporting obligations should be suspended. Bearing in mind the differences between juvenile and adult offenders, the Commission sees no reason for stipulating this as a requirement for adults; instead it is intended as an enabling provision.

RECOMMENDATION 13

Power of the Commissioner of Police to suspend reporting obligations

That s 61(1) of the *Community Protection (Offender Reporting) Act 2004* (WA) be amended to provide:

61. Commissioner may approve suspension of reporting obligations

(1) If —

(a) a person is a reportable offender only in respect of an offence that was committed by the person when a child, the Commissioner must consider whether or not to approve the suspension of the reportable offender's reporting obligations.

(b) a person is a reportable offender in respect of an offence that was committed by the person when an adult, the Commissioner may consider whether or not to approve the suspension of the reportable offender's reporting obligations.

20. Department of the Attorney General, Submission No 20 (20 June 2011).

Chapter Five

A More Effective Scheme

Contents

Introduction

In earlier chapters of this Report the Commission made various recommendations aimed at importing a degree of flexibility or discretion into the sex offender scheme established by the *Community Protection (Offender Reporting) Act 2004* (WA) ('the CPOR Act'). These recommendations are primarily designed to alleviate the unfairness or injustice that emanates from the rigid application of the provisions of the CPOR Act. In the course of considering the impact of the mandatory registration provisions (as required by its terms of reference) the Commission has considered ancillary matters stemming from its discussions with people consulted and from submissions received in response to the proposals in the Discussion Paper. These issues are examined in this final chapter because they are related to the consideration of the impact of the provisions of the CPOR Act upon juvenile offenders and upon adult offenders who have committed a reportable offence in exceptional circumstances.

Improving notification of reporting obligations

During this reference it became clear that reportable offenders may be significantly disadvantaged if they are not fully cognisant of the nature of their reporting obligations and the consequences of non-compliance. Non-compliance may result in breach proceedings and, ultimately, the imposition of penalties including imprisonment. These sanctions should clearly apply to reportable offenders who deliberately avoid their reporting requirements; however, they may also apply to those who inadvertently fail to report or who experience practical difficulties in complying with the obligations under the *Community Protection (Offender Reporting) Act 2004* (WA) ('the CPOR Act'). Hence, it is important to ensure that reportable offenders are properly and appropriately informed of their obligations under the Act and are provided with relevant support so mistakes or problems of this nature are avoided. Vulnerable offenders such as children and offenders with special needs require particular attention in this regard.

Appropriate Notification Procedures for Juvenile Reportable Offenders

Section 67 of the CPOR Act stipulates that reportable offenders must be given written notification of their reporting obligations and the consequences of non-compliance as soon as practicable after being sentenced or released from custody. The 'Notification of Reporting Obligations' form refers to the requirement to report to police within seven days of being sentenced or released from custody and explains that failure to report is a criminal offence with a maximum penalty of up to two years' imprisonment.[1] The form also includes details of the personal information that must be reported to police as well as the types of identification that should be presented (eg, drivers licence, passport) and other requirements. An information pamphlet is handed to the reportable offender along with the notification form.

During consultations for this reference the Commission was informed that reportable offenders have misunderstood their obligations and rights under the CPOR Act. In particular, some lawyers and police advised the Commission that some reportable offenders held the belief that they were not entitled to move freely from one location to another; they were required to reside close to a particular town in order to comply with their reporting obligations; or they could not change employment without permission. Irrespective of whether these types of misconceptions arise due to a lack of understanding on the part of the offender or from misinformation by authorities the Commission saw merit in reviewing the notification procedures under the CPOR Act. It proposed that the Western Australia Police review its processes for advising juvenile reportable offenders of their obligations and rights under the CPOR Act, and that the brochure provided to juvenile reportable offenders be revised to ensure that the information is provided in a child-friendly, accessible format.[2]

The Commission received complete support for this proposal[3] with many respondents emphasising the need for the information provided to take into account different cultural backgrounds and other issues such as intellectual disability. For example, the Aboriginal Legal Service suggested that audiovisual presentation of information, such as by DVD, may be useful and that information should be provided in Aboriginal languages in regional and remote areas.[4] Likewise, the Department of Indigenous Affairs stressed the importance of ensuring that Aboriginal juvenile reportable offenders properly understand their reporting obligations and rights under the CPOR Act.[5] The Department of Corrective Services (which is responsible for notifying juvenile detainees) stated that notification processes 'should not only take into account the offender's age but also

1. It is proposed to increase this penalty to five years' imprisonment: Community Protection (Offender Reporting) Bill 2011 (WA) cl 21.
2. LRCWA, *Community Protection (Offender Reporting) Act 2004*, Discussion Paper (February 2011) Proposal 4.
3. Aboriginal Legal Service of Western Australia, Submission No 10 (May 2011); Legal Aid WA, Submission No 11 (30 May 2011); Commissioner for Children and Young People, Submission No 12 (31 May 2011); Department of Corrective Services, Submission No 14 (30 May 2011); Equal Opportunity Commission, Submission No 16 (1 June 2011); Department for Child Protection, Submission No 19 (17 June 2011); Department of the Attorney General, Submission No 20 (20 June 2011); Law Society of Western Australia, Submission No 21 (21 June 2011); Department of Indigenous Affairs, Submission No 22 (5 July 2011).
4. Aboriginal Legal Service of Western Australia, Submission No 10 (May 2011).
5. Department of Indigenous Affairs, Submission No 22 (5 July 2011).

cultural background and intellectual disability' and that it is 'preferable for an adult to be present during notification'.[6] The Department of the Attorney General usefully submitted that the information provided to juvenile reportable offenders should also be available on the Western Australia Police website.[7]

In its submission the Western Australia Police stated that all juvenile reportable offenders are informed of their reporting obligations in the presence of a parent or guardian. Certainly, the provisions of the CPOR Act enable a reportable offender who is a child to be accompanied by a parent or guardian when he or she reports to police and the accompanying parent or guardian may report the relevant details on behalf of the offender. However, there is nothing in the legislation that requires the presence of a parent or guardian *at the time* a juvenile reportable offender is provided with the 'Notification of Reporting Obligations' form under s 67 of the Act. Thus, if a juvenile reportable offender leaves detention or court without properly understanding his or her requirements, the potential for breach is very real. Measures employed by the police when the reportable offender first reports (ie, within the initial seven-day period) are obviously important to ensuring that the reportable offender understands his or her ongoing obligations; however, it is equally important that there is the provision of appropriate information at the time a person is first informed of his or her reportable offender status and initial requirements.

The Western Australia Police also advised that they are currently compiling an easy-to-understand brochure for all reportable offenders.[8] The Commission requested a copy of any draft brochure, but the Western Australia Police responded that it was not yet available.[9]

It is also important to note that if the recommendations in this Report are implemented, juvenile reportable offenders will gain specific additional rights under the CPOR Act (eg, the right to apply for a review of reportable status, a retrospective right of review for existing juvenile reportable offenders, and the right to apply to police and the courts for a review of periodic reporting frequency). Such rights will be ineffectual in practice if juvenile reportable offenders are not aware of their ability to exercise these rights. Thus, appropriate notification procedures are necessary to ensure a proper understanding of obligations as well as an awareness of rights.

6. Department of Corrective Services, Submission No 14 (30 May 2011).
7. Department of the Attorney General, Submission No 20 (20 June 2011). This has been incorporated into the Commission's final recommendation below.
8. Western Australia Police, Submission No 18 (30 May 2011).
9. Western Australia Police, Submission No 18A (9 September 2011). It was noted that the plan for a revised brochure was expected at the time that the Community Protection (Offender Reporting) Amendment Bill 2011 was introduced (this Bill was introduced on 30 November 2011).

RECOMMENDATION 14

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 properly understand both their obligations and their 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.
3. That information about the obligations and rights of reportable offenders under the *Community Protection (Offender Reporting) Act 2004* (WA) be available on the Western Australia Police website.

Appropriate support for juvenile offenders and offenders with special needs

All reportable offenders are entitled to make a report to police in the company of a support person.[10] As noted above, a reportable offender who is a child may be accompanied by a parent or guardian at the time he or she reports to police and the parent or guardian can make the report on behalf of the offender. This provision also applies to reportable offenders who have a disability that makes it impossible or impracticable for them to make a report on their own.[11] Further, s 36 provides that a person authorised to receive the report *may* permit an interpreter to be present when the offender is making a report.

In its Discussion Paper the Commission observed that various factors (such as language and cultural barriers or intellectual disability or other mental health issues)

10. *Community Protection (Offender Reporting) Act 2004* (WA) s 36(1).
11. *Community Protection (Offender Reporting) Act 2004* (WA) s 35(4).

may prevent a proper understanding of reporting obligations. In 2003 the Australasian Police Ministers' Council national working party recommended that special provisions should apply for vulnerable offenders including that police should be able to notify a support person of the offender's reporting obligations and the consequences of non-compliance.[12] Section 114(2)(e) of the CPOR Act provides that regulations may be made in this regard but to date no such regulations have been made. Special provisions do exist in other jurisdictions. For example, in the Northern Territory the police must take reasonable measures to ensure that a reportable offender who is a child or who has a special need understands his or her obligations and such special measures may include an audio or video explanation, a translation or provision of an interpreter or the provision of assistance from a person with special experience.[13] The Commission formed the view that the provision of special measures should be mandated in legislation and proposed that regulations be made under s 114 of the CPOR Act for the provision of special measures including 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.[14]

Once again the Commission received full support for this proposal from respondents,[15] including the Western Australia Police who acknowledged that support and assistance could be incorporated into s 67 of the CPOR Act; that is, at the time an offender is first given notice of his or her reporting obligations.[16] The Department for Child Protection suggested that special measures could also include an audio or video explanation of reporting obligations.[17]

In addition, Chief Judge Peter Martino submitted that it would be preferable for one agency 'to have the obligation of informing offenders of their reporting obligations and of making appropriate arrangements for those with special needs' instead of the current arrangements where different agencies are responsible for notification depending upon whether the offender is sentenced to a custodial or non-custodial sentence or depending upon the court jurisdiction in which the offender was sentenced.[18] He also suggested that the Commissioner of Police should have this responsibility in all cases.

In its Issues Paper (prepared for the statutory review of the CPOR Act) the Western Australia Police explained that it was experiencing problems in relation to the notification processes. Under s 68 of the Act, a sentencing court is required to provide details of the sentence imposed on a reportable offender to the Commissioner of Police. Because those details are forwarded after the sentencing proceedings are complete, the police have found that if an offender's whereabouts are unknown they use significant resources locating the offender and serving the offender with the notice. Court staff are responsible for notifying offenders who have been sentenced in person to a non-custodial sentence in the District Court but the Commissioner of Police is responsible for notifying all other offenders.[19] The problem discussed above arises in those cases where the police, as distinct from court staff, have responsibility for notifying the offender.

While the Commission understands the Chief Judge's view that it would be preferable for one agency to have responsibility for notification, if this responsibility falls to the Commissioner of Police the resourcing impact on the police may be compounded. Furthermore, there would be an additional resourcing impact on police if they were also required to notify offenders in custody. Ideally, the most appropriate time for notification for offenders sentenced to a non-custodial disposition is immediately after the sentencing has finished; however, this may place an additional administrative burden on court staff. Given the potential consequences for different agencies the Commission does not consider that it is appropriate to make a recommendation; however, it is suggested that relevant agencies consult with a view to resolving these issues. From the Commission's perspective the key issue is to ensure proper and effective notification and,

12. LRCWA, *Community Protection (Offender Reporting) Act 2004*, Discussion Paper (February 2011) 151.
13. *Child Protection (Offender Reporting and Registration) Regulation 2004* (NT) reg 15.
14. LRCWA, *Community Protection (Offender Reporting) Act 2004*, Discussion Paper (February 2011) Proposal 12.
15. Mental Health Law Centre, Submission No 4 (6 May 2011); Chief Judge Peter Martino, District Court of Western Australia, Submission No 6 (24 May 2011); Chief Magistrate Steven Heath, Magistrates Court of Western Australia, Submission No 8 (24 May 2011); Aboriginal Legal Service of Western Australia, Submission No 10 (May 2011); Legal Aid WA, Submission No 11 (24 May 2011); Commissioner for Children and Young People, Submission No 12 (31 May 2011); Department of Corrective Services, Submission No 14 (30 May 2011); Equal Opportunity Commission, Submission No 16 (1 June 2011); Western Australia Police, Submission No 18 (30 May 2011); Department for Child Protection, Submission No 19 (17 June 2011); Department of the Attorney General, Submission No 20 (20 June 2011); Law Society of Western Australia, Submission No 21 (21 June 2011); Department of Indigenous Affairs, Submission No 22 (5 July 2011).
16. Western Australia Police, Submission No 18 (30 May 2011).
17. Department for Child Protection, Submission No 19 (17 June 2011).
18. Chief Judge Peter Martino, District Court of Western Australia, Submission No 6 (24 May 2011).
19. *Community Protection (Offender Reporting) Regulations 2004* (WA) reg 19.

therefore, it makes a recommendation in terms of its original proposal.

RECOMMENDATION 15

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, where relevant, the provision of a qualified interpreter; a written translation of the formal notice of reporting obligations; oral, audio or video explanations 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.

Awareness Raising

Proper notification and improved understanding of the nature of reporting obligations and the consequences of non-compliance under the CPOR Act is necessary to ensure that reportable offenders are not unfairly penalised for breaching their obligations. However, it is arguably just as important to ensure that members of the community—in particular, young people—are appropriately educated about relevant sexual offence laws and the potential for violation of these laws to result in sex offender registration. This is especially relevant in remote Indigenous communities where it is apparent from the Commission's consultations and research[20] that a clear understanding of age of consent laws may be lacking and, more generally, for young people throughout Western Australia in relation to behaviours such as sexting.

While it is appreciated that there are educational strategies employed by schools and community organisations to educate young people about appropriate behaviours and legal boundaries, the Commission strongly encourages the Western Australian government to monitor the effectiveness of available educational strategies to ensure that all young people across the state are properly informed, in an age- and culturally-appropriate manner, about the legal consequences of unlawful sexual behaviour with their peers and of behaviours such as sexting.

RECOMMENDATION 16

Education strategies and awareness raising initiatives

That the Western Australia government monitor on a regular basis the effectiveness of education strategies employed by government agencies in delivering age- and culturally-appropriate information about the legal consequences of unlawful sexual behaviour, in particular the potential for the imposition of registration and reporting obligations under the *Community Protection (Offender Reporting) Act 2004* (WA).

20. Specifically, the Department of Indigenous Affairs submitted that community awareness raising initiatives, especially for young Aboriginal people in relation to sexual offending laws and the consequences of such laws (including registration under the CPOR Act) are required: Department of Indigenous Affairs, Submission No 22 (5 July 2011).

Reporting on behalf of reportable offenders

A recurrent theme during the Commission's consultations was the difficulty experienced by some reportable offenders in complying with reporting obligations, especially those who are subject to 'overlapping' requirements to report to different government agencies. For example, some reportable offenders are required to report to police under the provisions of the *Community Protection (Offender Reporting) Act 2004* (WA) ('the CPOR Act') and, at the same time, report to police as a requirement of bail or report to a community corrections officer or a youth justice officer as part of a community-based sentence. It was emphasised that for many offenders, especially juvenile offenders, these simultaneous requirements can be confusing and onerous. Consequently, the Commission considered whether there was any scope for a representative of a government agency to report on behalf of an offender where that agency is closely involved with the offender. For example, if a juvenile reportable offender is under the care of the Department for Child Protection and the department arranges for the young person to move into new accommodation, it would be reasonable for the relevant officer to notify police of the person's new address. Similarly, if a youth justice officer who is supervising a young person on a community-based sentence directs and assists the young person to attend a residential drug treatment program the temporary accommodation change could be reported to the police via the youth justice officer.

The Commission proposed, for both adults and juveniles, that if a government agency is involved with a reportable offender to the extent that the agency is empowered to make decisions that impact on the status of the offenders personal details (as defined under s 3 of the CPOR Act) a representative of that agency *may* notify the police of any change to the offender's personal details as required by the provisions of the CPOR Act. This proposal was intended to operate as an enabling provision rather than as a direction so that a representative of a government agency could, if aware of the offender's reportable status, assist where appropriate. It was not envisaged that the agency representative would be under any obligation to lodge a report on behalf of the offender. In order to provide a tangible benefit it was proposed by the Commission that a reportable offender should not be prosecuted for a failure to comply with s 29 of the CPOR Act if a representative of a government agency had provided the police with the required information within the stipulated timeframe.[1] The reasoning being that if the police were provided with the relevant information within the required time the objective of obtaining up-to-date and accurate information would have been met and any prosecution for failure on the part of the offender to report would be unnecessary. It was envisaged that this proposal would be of particular benefit to disadvantaged and vulnerable reportable offenders. The Commission also sought submissions about whether the proposal to enable representatives from government agencies to report on behalf of reportable offenders should apply to specified and limited government agencies and, if so, to which government agencies should it apply.[2]

Submissions received in response to these two proposals were, overall, supportive.[3] The Aboriginal Legal Service submitted that any 'measure that aids an offender to comply with reporting requirements is worthwhile'.[4] The Department of the Attorney General agreed that agencies should be 'empowered to notify police of any change to the offender's personal details as required under s 29 of the Act, where the agency is involved with the juvenile offender to the extent that the agency is empowered to make decisions as defined under s 3 of the Act'.[5] It was further commented that guidelines for staff would be useful in this regard. The Department also confirmed that the wording of any amendment to the CPOR Act should include the use of the word 'may' in contrast to 'must' or 'shall' because agency staff may

1. LRCWA, *Community Protection (Offender Reporting) Act 2004*, Discussion Paper (February 2011) Proposals 2 & 13.
2. Ibid Questions B & F.
3. Mental Health Law Centre, Submission No 4 (29 April 2011); Reverend Peter Humphris, Submission No 5 (4 May 2011); Aboriginal Legal Service of Western Australia, Submission No 10 (May 2011); Legal Aid WA, Submission No 11 (24 May 2011); Commissioner for Children and Young People, Submission No 12 (31 May 2011); Department of Corrective Services, Submission No 14 (30 May 2011); Department for Child Protection, Submission No 19 (17 June 2011); Department of the Attorney General, Submission No 20 (20 June 2011); Law Society of Western Australia, Submission No 21 (21 June 2011); Department of Indigenous Affairs, Submission No 22 (5 July 2011).
4. Aboriginal Legal Service of Western Australia, Submission No 10 (May 2011).
5. Department of the Attorney General, Submission No 20 (20 June 2011).

not be aware of the offender's reporting obligations or 'reportable offender' status'. [6]

However, the Western Australia Police opposed the proposal arguing that it would 'present considerable problems in situations where WA Police intend to consider prosecution for a breach of s 29 of the Act. For example, it would pose difficulties when determining who was to be held responsible should police not be advised of changes under that section.'[7] Further it was stated that agencies 'are encouraged to advise WA Police if they are aware of certain changes in a reportable offender's details such as address or other pertinent information although this is not a substitute for the reportable offender making the same report personally'.[8] As explained above, the Commission's proposal was not intended to relieve a reportable offender of the general responsibility to comply with reporting obligations; it was designed to provide an alternative means of obtaining up-to-date and accurate personal information and where such information is provided the need to prosecute offenders who are experiencing difficulty in complying with the reporting obligations would be reduced. Under the Commission's proposal, if a reportable offender failed to report a change in his or her personal details and no agency had assisted by reporting on their behalf, the offender would remain liable to prosecution.

In response to the question about which agencies should be included in the proposal, the Commission received a number of submissions identifying particular agencies that may be in a position to lodge a report on behalf of a reportable offender. Agencies mentioned included the Department of Corrective Services, the Department for Child Protection, the Department of Health (including Mental Health) and the Disability Services Commission.[9] A number of respondents did not consider that the agencies should be specified in legislation but rather that the proposal should apply broadly to any government agency.[10] Others simply listed agencies that it considered should come within the scope of the proposal.[11] The Department for Corrective Services stated in its submission that the agencies should be limited and it referred only to the Department for Child Protection and the Department for Corrective Services where the offender is subject to community supervision as well as the Public Trustee and the Public Advocate. It was contended that confusion may arise if more than one agency is held responsible for reporting on behalf of a reportable offender.[12]

Some respondents referred to the Office of the Public Advocate. The Department of the Attorney General explained that the Public Advocate is neither a government department nor is it a body corporate or unincorporated body but is a natural person appointed by the Governor and, therefore, any recommendation should not be limited to government agencies.[13] Currently, public authority is defined in s 3 of the CPOR Act as:

> (a) a department of the Public Service;
>
> (b) a local government or regional local government; or
>
> (c) any other body, whether incorporated or not, that is established or continued for a public purpose under a written law and that, under the authority of the written law, performs a statutory function on behalf of the State.

The Public Advocate does not appear to fit within this definition; however, it seems that this will soon be rectified. Clause 4 of the Community Protection (Offender Reporting) Amendment Bill 2011 (WA), which was introduced on 30 November 2011, proposes to amend the definition in s 3(c) above to read:

> [A] body, whether incorporated or not, or the holder of an office, being a body or office that is established or continued for a public purpose under a written law and that, under the authority of the written law, performs a statutory function on behalf of the State.

Accordingly, this definition will cover office holders such as the Public Advocate and the Commission has decided to use the term 'public authority' for this reason.

The Commission confirms its proposal as a recommendation because it is satisfied that the recommendation will not place an undue burden on public authorities but will enable relevant staff to lodge a report on behalf of a reportable offender in circumstances where that staff member has authorised, directed or facilitated a change in the offender's personal

6. Ibid.
7. Also, the Commission notes that pursuant to s 35(5) of the CPOR Act there is already provision for a parent, guardian, carer or nominated person to make a report on behalf of a reportable offender who has a disability that makes it impossible or impracticable for him or her to make the report.
8. Western Australia Police, Submission No 18 (30 May 2011).
9. Department of the Attorney General, Submission No 20 (20 June 2011).
10. Aboriginal Legal Service of Western Australia, Submission No 10 (May 2011); Department of the Attorney General, Submission No 20 (20 June 2011).
11. Legal Aid WA, Submission No 11 (24 May 2011); Department of Corrective Services, Submission No 14 (30 May 2011); Department for Child Protection, Submission No 19 (17 June 2011).
12. Department of Corrective Services, Submission No 14 (30 May 2011).
13. Department of the Attorney General, Submission No 20 (20 June 2011). See also Mental Health Law Centre, Submission No 4 (29 April 2011).

details. This will be particularly useful for vulnerable offenders such as juveniles, mentally impaired offenders or intellectually disabled offenders.

However, the Commission does acknowledge that there may be some difficulty for police in determining whether to prosecute an offender for failing to comply with his or her reporting obligations as a result of this recommendation. What should happen, for example, if an offender's youth justice officer advises the offender that he or she will notify the police of the offender's temporary living arrangements at a residential drug treatment program but that officer fails to fulfil this undertaking? In such a case it is arguable that the offender should not be liable to prosecution even though the police have not received the required information from either the offender or the youth justice officer. While the Commission does not consider that it is appropriate for the youth justice officer to be held responsible, there should be a defence available for the offender in such circumstances. The second part of the recommendation below prevents the police from prosecuting the offender if the relevant and required information is received in time but it does not provide any protection to the offender if the required notification does not take place. Accordingly, the Commission has added to its recommendation to provide for an appropriate defence in these circumstances.

RECOMMENDATION 17

Reporting on behalf of a reportable offender

1. That the *Community Protection (Offender Reporting) Act 2004* (WA) be amended to provide that if a public authority[14] is involved with a reportable offender to the extent that the authority is empowered to make decisions that impact on the status of the reportable offender's personal details (as defined under s 3 of the *Community Protection (Offender Reporting) Act 2004* (WA)), a representative of that public authority (if the representative is aware that the offender is a reportable offender) *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 reportable offender is not to be prosecuted for a failure to comply with s 29 of the *Community Protection (Offender Reporting) Act 2004* (WA) if a representative of a public authority has provided the police with the required information within the stipulated timeframe.
3. That s 63 of the *Community Protection (Offender Reporting) Act 2004* (WA) be amended to provide that it is a defence to proceedings for an offence of failing to comply with a reporting obligation if it is established that the offender reasonably believed that a representative of a public authority had made a report on his or her behalf in accordance with 1 above.

14. As defined in Clause 4 of the Community Protection (Offender Reporting) Amendment Bill 2011 (WA).

A therapeutic approach for juveniles

As explained earlier in this Report, for juvenile offenders the justice system places a particular emphasis on the objective of rehabilitation. However, the registration and reporting obligations under the *Community Protection (Offender Reporting) Act 2004* (WA) ('the CPOR Act') do not include any therapeutic options.[1] A juvenile child sex offender can only be required to undergo counselling or treatment as part of the sentence imposed for the offence and, even so, only if such treatment is available. During its consultations and research conducted prior to the Discussion Paper the Commission was frequently reminded of the necessity for appropriate treatment for juvenile child sex offenders. It was also highlighted that the provision of psychological counselling is particularly difficult in regional and remote areas of the state. Many people consulted expressed the view that a more treatment-oriented approach should be incorporated into the Western Australian sex offender registration scheme for juveniles.[2] In this regard the Commission noted that in Victoria a therapeutic treatment order may be made in relation to juveniles under the age of 15 years who exhibit sexually abusive behaviours and if the order is successfully completed any pending criminal charges may be dismissed.[3]

As a consequence of the issues raised, submissions were sought about whether an alternative therapeutic order should be available to the Children's Court for juvenile offenders who are considered to pose a risk to the lives or sexual safety of any member of the community and, if so, what should be the requirements of the order and the consequences for successful (or non-successful) completion of the order.[4]

In response, the Commission received a number of submissions in favour of an alternative therapeutic approach.[5] Dr Katie Seidler, who had previously informed the Commission that sex offender registration schemes would be more effective if they focused on therapeutic intervention, submitted that 'the registration and reporting process should form part of a large multidisciplinary approach to managing offenders' risk in the community'.[6] The Commissioner for Children

1. However, it is noted that the Community Protection (Offender Reporting) Amendment Bill 2011 (WA) (which was introduced into Parliament on 30 November 2011) significantly amends the provisions of the CPOR Act covering prohibition orders. These orders may be made in relation to a person who is already a reportable offender upon an application by the Commissioner of Police. The Bill proposes to rename these orders 'protection orders' because the new provisions will not only prohibit a reportable offender from engaging in particular behaviour but may also require the offender to comply with specific conditions. Under the proposed amendments a court may order—as part of a protection order—that the reportable offender 'comply with the orders of the Commissioner [of Police] as to undergoing an assessment by a medical practitioner, a psychiatrist, a psychologist or a social worker, or more than one of them and, if necessary appropriate treatment (proposed s 94A)'. During the second reading speech it was stated in regard to these proposed provisions that: 'The bill incorporates this rehabilitative element to support an offender's treatment in the community. When an offender is willing to undergo treatment, provisions have been included in the bill to enable the court to order that this occur. The bill ensures that no treatment can occur without the consent of both the person administering the treatment and the reportable offender. In the event the reportable offender breaches the treatment order, the offender will not be subject to a penalty, but, instead, this will give rise to the commissioner seeking that the prohibition order be varied': Western Australia, *Parliamentary Debates,* Legislative Assembly, 30 November 2011, 10164–10165 (Hon RF Johnson, Minister for Police).
2. LRCWA, *Community Protection (Offender Reporting) Act 2004*, Discussion Paper (February 2011) 137–138. The Mental Health Law Centre submitted that an alternative therapeutic approach should be extended to mentally impaired child sex offenders, in particular, to those who are unable to comply with the reporting obligations under the CPOR Act: Mental Health Law Centre, Submission No 4 (29 April 2011).
3. It has been observed that the 'aim of therapeutic treatment order provisions within the legislation is to ensure early intervention for young people who exhibit sexually abusive behaviours to help prevent the potential for ongoing and more serious offences': Victorian Department of Human Services, *Adolescents with Sexually Abusive Behaviours and Their Families: Best interest case practice model*, Specialist Practice Resources (2010) 14.
4. LRCWA, *Community Protection (Offender Reporting) Act 2004*, Discussion Paper (February 2011) Question E. The Commission also questioned whether a therapeutic order should be limited to juveniles under a certain age or whether it should be available to all juvenile offenders who have been found guilty of a Class 1 or Class 2 offence.
5. Dr Katie Seidler, Submission No 2 (11 April 2011); Reverend Peter Humphris, Submission No 5 (4 May 2011); Aboriginal Legal Service of Western Australia, Submission No 10 (May 2011); Legal Aid WA, Submission No 11 (30 May 2011); Law Society of Western Australia, Submission No 21 (21 June 2011); Department of Indigenous Affairs, Submission No 22 (5 July 2011); Commissioner for Children and Young People, Submission No 12 (31 May 2011); Department for Child Protection, Submission No 19 (17 June 2011).
6. Dr Katie Seidler, Submission No 2 (11 April 2011).

and Young People emphasised the importance of a rehabilitative approach for juveniles and the need for intervention at the earliest possible time in order to reduce the likelihood of reoffending.[7] In addition the Commissioner stated that 'while it is beyond the scope of the legislation to provide these services it is within its remit to provide a legislative framework that facilitates access to such services where appropriate'.[8]

The Aboriginal Legal Service strongly supported the Victorian model for therapeutic treatment orders submitting that any pending criminal charges should be dismissed if the order is successfully completed,[9] and that the therapeutic order should be available to any juvenile irrespective of age and irrespective of whether the offender pleaded guilty or was found guilty after a trial.[10] Likewise, Legal Aid submitted that 'it would be very beneficial to offenders and the community if the Children's Court had available to it an alternative therapeutic order' which could be imposed where a reporting order under the CPOR Act would otherwise be appropriate. It was further suggested that such an order should be available to all juveniles but at the very least to those under the age of 16 and for juveniles of any age with 'an intellectual disability, mental disability or relevant developmental delay'. Legal Aid put forward that the therapeutic order should include sexual education; psychological assessment and counselling; family counselling in appropriate circumstances (if the offending behaviour occurred amongst siblings); and other sex offender treatment courses. Again, it was contended that if a juvenile successfully complied with the order they should not be subject to registration or reporting obligations. For those juveniles who fail to comply, the matter should be returned to court to consider whether the order should be extended or the offender should be made subject to a juvenile offender reporting order.[11] Legal Aid's response was adopted with full support by the Law Society.[12]

The Department of Indigenous Affairs also stated that it strongly supports the option of a therapeutic order as an alternative to a juvenile offender reporting order and that:

> It is acknowledged that such an approach may involve an investment of resources to provide these services in remote and regional locations. A whole of government and community focussed approach is important in addressing this issue. There needs to be close collaboration between agencies responsible for the legal and justice applications and those with a social services agenda, such as health, communities and child protection. It is anticipated that the economic and social benefits that can be achieved through the rehabilitation of young offenders will outweigh the initial costs needed to provide these services in all areas of the State.[13]

The Department for Child Protection expressed its in-principle support for a therapeutic order but also noted that funding would be required to provide services across the state.[14]

In contrast, the Department of Corrective Services did not support a therapeutic order as an alternative to registration and reporting because it is

> not possible to ensure equal access to therapy for all sexual offenders, and introduction of a therapeutic order as an alternative to registration would introduce an additional systemic bias that would probably prejudice Aboriginal offenders due to lack of access to programs in remote areas.[15]

Instead, it was suggested that an offender may be able to participate in therapeutic programs as part of the sentence and successful completion may be relied upon in the future when seeking a review of registration status or a suspension of reporting obligations. The Department of the Attorney General and the Office of the Director of Public Prosecutions similarly submitted that programs should be made available through the sentencing process and should not operate as an alternative to registration.[16]

7. In a similar vein, the Equal Opportunity Commission pointed out the importance of Australia's obligations under Article 14(4) of the Convention on the Rights of the Child which emphasises the importance of rehabilitation for juveniles: Equal Opportunity Commission, Submission No 16 (1 June 2011).
8. Commissioner for Children and Young People, Submission No 12 (31 May 2011).
9. But that unsuccessful completion of the order should not aggravate the sentence imposed for the offence.
10. Aboriginal Legal Service of Western Australia, Submission No 10 (May 2011).
11. Legal Aid WA, Submission No 11 (30 May 2011).
12. Law Society of Western Australia, Submission No 21 (21 June 2011).
13. Department of Indigenous Affairs, Submission No 22 (5 July 2011).
14. Department for Child Protection, Submission No 19 (17 June 2011). The Department of the Attorney General also commented that more resources would be required to provide services to support the introduction of a therapeutic order: Department of the Attorney General, Submission No 20 (20 June 2011).
15. Department of Corrective Services, Submission No 14 (30 May 2011).
16. Department of the Attorney General, Submission No 20 (20 June 2011); Office of the Director of Public Prosecutions, Submission No 17 (2 June 2011).

The Western Australia Police explained that the viability of therapeutic orders is being considered as part of its statutory review of the CPOR Act.[17] In its Issues Paper, the Western Australia Police observed that:

> Studies indicate that if sexual offending is not effectively prevented and treated at the age of onset then it is likely that young people engaging in such behaviour will go on to be high risk adult sexual offenders.[18]

It was also recognised that recidivism levels are reduced if 'young people and their families are provided with specialist counselling to encourage positive and non-abusive behaviours'.[19] Most significantly, it was stated that Western Australia is one of three Australian jurisdictions that lack effective treatment programs for young sexual offenders, especially those in regional and remote parts of the state.[20] The Western Australia Police sought submissions about the viability of court-ordered treatment for young sexual offenders and whether such an option could be built-in to the CPOR Act. At the time of writing this Report the outcome of the statutory review had not been made public.

Despite the significant support for an alternative therapeutic treatment order the Commission is reluctant to make a recommendation for legislative reform to enable the Children's Court to impose an order instead of registration and reporting obligations under the CPOR Act. In the absence of a commitment from government to fund the provision of appropriate treatment services for juvenile child sex offenders across the entire state such a recommendation may result (as suggested by the Department of Corrective Services) in inequity and the overrepresentation of Aboriginal juvenile offenders and juveniles from remote areas on the register. Having said that, there is ample support for the provision of more effective and accessible treatment services for juvenile child sex offenders in this state. Accordingly the Commission recommends that the government provide sufficient resources to enable this to occur and to further investigate the option of an alternative therapeutic treatment order to enable juvenile child sex offenders to be diverted into treatment prior to the determination of reportable offender status.

17. Western Australia Police, Submission No 18 (30 May 2011).
18. Western Australia Police, *Statutory Review: Community Protection (Offender Reporting) Act 2004*, Issues Paper (June 2011) 32.
19. Ibid.
20. Ibid.

RECOMMENDATION 18

Therapeutic treatment orders

1. That the Western Australian government provide sufficient resources across the state to enable juvenile child sex offenders to participate in appropriate therapeutic treatment.
2. That the Western Australian government investigate the viability of providing the Children's Court with the option of a therapeutic treatment order for juvenile child sex offenders under the *Community Protection (Offender Reporting) Act 2004* (WA) as an alternative to a juvenile offender reporting order in appropriate cases.

Prosecutorial Policies For Juvenile Child Sex Offenders

A significant number of the recommendations in this Report are designed to address the unfairness of mandatory sex offender registration for juveniles who are dealt with by the criminal justice system for unlawful sexual behaviour in circumstances where such a punitive response is unwarranted. Sex offender registration is a side-effect of prosecution (and conviction) and cannot arise until a decision has been made by the police to charge, and by the state to prosecute, the person. Bearing in mind some of the case examples referred to in the Discussion Paper and this Report it is important to take into consideration that the prosecution of juveniles under child sexual offences laws may not always be necessary or desirable in the first place.

In general terms, prosecutorial polices enable discretion to be exercised by the police and the Office of the Director of Public Prosecutions (DPP) where a prosecution is not in the public interest. It is arguable that the prosecution of juveniles who have engaged in 'consensual underage sexual activity' is not always in the public interest. Uniquely, Victoria has a specific prosecutorial policy covering child sexual offences committed by juveniles. 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;
- 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.[21]

Although people consulted by the Commission raised concerns about juveniles being charged for consensual sexual activity and as a result of behaviours such as sexting, the Commission did not have any direct evidence to demonstrate that the police and the DPP were unfairly or inappropriately charging young people for such behaviour. The Commission was informed by the DPP that prosecutions are usually only continued against juveniles if there is evidence of abuse, coercion, age disparity or lack of consent. However, given the case examples examined and the anecdotal accounts heard by the Commission, submissions were sought about whether the DPP *Statement of Prosecution Policy and Guidelines 2005* should be amended to include specific criteria to be considered when determining if a juvenile should be prosecuted for a child sexual offence and whether the decision to charge a juvenile with a child sexual offence should be overseen by a senior police officer.[22]

Five respondents made submissions in favour of specific guidelines for the prosecution of child sexual offences committed by juveniles.[23] The Aboriginal Legal Service favoured the Victorian model and Legal Aid provided some detail of the factors which could be included in the guidelines.[24] On the other hand, the Department of Corrective Services submitted that there should be separate guidelines for the prosecution of child sexual offences but that these guidelines should not be specific to juvenile offenders. Only the DPP opposed specific guidelines and argued that the current general guidelines for the prosecution of juveniles are appropriate.[25]

The Commission has concluded that specific guidelines modelled on the Victorian provision would be an appropriate inclusion in the DPP *Statement of Prosecution Policy and Guidelines 2005*. While current prosecutorial practice may reflect the tenor of such guidelines, the formal inclusion of guidelines will ensure that such practices continue in the future and will also provide a benchmark for defence counsel to make representations to the DPP in appropriate cases.

RECOMMENDATION 19

Prosecutorial policy

That the Office of the Director of Public Prosecutions amend its *Statement of Prosecution Policy and Guidelines 2005* to include a specific policy relating to the prosecution of juveniles for child sexual offences and that this policy be modelled on the Victoria Office of Public Prosecutions, *Prosecution Policies and Guidelines 2008—2010* Policy 2.9.2.

The Commission also posed the question whether the decision to charge a juvenile with a child sexual offence should be overseen by a senior police officer.[26] The Western Australia Police responded by advising that the decision to charge a juvenile with a child sexual offence is currently overseen by a senior police officer and this refers to the rank of sergeant or above. It was also noted that 'in most regional areas, the Local District Manager for reportable offenders is a Sergeant who works autonomously within the District'.[27] The

21. Victoria Office of Public Prosecutions, *Prosecution Polices and Guidelines* (2008–2010).
22. LRCWA, *Community Protection (Offender Reporting) Act 2004*, Discussion Paper (February 2011) Question A.
23. Aboriginal Legal Service of Western Australia, Submission No 10 (May 2011); Legal Aid WA, Submission No 11 (30 May 2011); Department for Child Protection, Submission No 19 (17 June 2011); Law Society of Western Australia, Submission No 21 (21 June 2011); Department of Indigenous Affairs, Submission No 22 (5 July 2011).
24. For example, whether the children involved were siblings and the impact of prosecution on the family; whether the juvenile offender has any intellectual disability, mental illness or developmental delays; and whether the juvenile offender is under the age of 14 years and has been exposed to pornographic material: Legal Aid WA, Submission No 11 (30 May 2011).
25. Office of the Director of Public Prosecutions, Submission No 17 (2 June 2011).
26. LRCWA, *Community Protection (Offender Reporting) Act 2004*, Discussion Paper (February 2011) Question A.
27. Western Australia Police, Submission No 18 (30 May 2011); Western Australia Police, Submission No 18A (9 September 2011).

majority of respondents agreed that the decision to charge a juvenile with a child sexual offence should be overseen by a senior police officer.[28] The Department of the Attorney General submitted that the decision should be overseen by both a senior police officer and, wherever possible, a person from a specialised unit should also be consulted.[29] However, as the Department of Corrective Services observed, this may be difficult in practice. Police in regional and remote locations may not have easy access to specialised officers (such as those from the Sex Offenders Management Squad) and, therefore, the Commission recommends that the decision to charge a juvenile with a child sexual offence must be overseen by a senior police officer (being the rank of sergeant or above).

RECOMMENDATION 20

Decision to charge

That the decision to charge a juvenile with a child sexual offence be overseen or made by a senior police officer of the rank of sergeant or above.

28. Aboriginal Legal Service of Western Australia, Submission No 10 (May 2011); Legal Aid WA, Submission No 11 (30 May 2011); Department for Child Protection, Submission No 19 (17 June 2011); Department of the Attorney General, Submission No 20 (20 June 2011); Law Society of Western Australia, Submission No 21 (21 June 2011).
29. Department of the Attorney General, Submission No 20 (20 June 2011).

Appendices

Contents

Appendix A: List of recommendations

RECOMMENDATION 1 _____ page 49

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 (a juvenile offender reporting order).
   (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 sentence is imposed 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 of the date the sentence is imposed.
3. That a new section be inserted into the *Community Protection (Offender Reporting) Act 2004* (WA) to provide that:
   (a) The offender and the prosecution may seek a review of a decision of a magistrate of the Children's Court of Western Australia to make or not to make a juvenile offender reporting order under s 40 of the *Children's Court of Western Australia Act 1988* (WA).
   (b) The offender may appeal against a decision of a magistrate of the Children's Court of Western Australia to make a juvenile offender reporting order in accordance with s 7 of the *Criminal Appeals Act 2004* (WA).
   (c) The prosecution may appeal against a decision of a magistrate of the Children's Court of Western Australia to not make a juvenile offender reporting order in accordance with s 7 of the *Criminal Appeals Act 2004* (WA).
   (d) The offender may appeal against a decision of a judge of the Children's Court of Western Australia to make a juvenile offender reporting order in accordance with s 23 of the *Criminal Appeals Act 2004* (WA).
   (e) The prosecution may appeal against a decision of a judge of the Children's Court of Western Australia to not make a juvenile offender reporting order in accordance with s 24 of the *Criminal Appeals Act 2004* (WA).
4. That s 9(d) of the *Community Protection (Offender Reporting) Act 2004* (WA) be amended to provide that a reportable offence includes an offence that results in the making of a juvenile offender reporting order (under 2 above).

RECOMMENDATION 2 _____ page 51

Limited statutory exception for juveniles

1. That regulation 8 of the *Community Protection (Offender Reporting) Regulations 2004* (WA) be amended to include ss 217 of the *Criminal Code* (WA) and ss 273.5, 273.6, 471.16, 471.17, 471.19 and 471.20 of the *Criminal Code* (Cth).
2. That the Western Australia Police continue to monitor on a regular basis any changes to the list of Class 2 offences to ensure that any newly prescribed Class 2 offences that involve child pornography are included in Regulation 8 in appropriate circumstances so that a juvenile offender convicted of a single child pornography offence continues to be excluded from the definition of a reportable offender under s 6(4) of the *Community Protection (Offender Reporting) Act 2004* (WA).

RECOMMENDATION 3 _____ pages 53–54

Adult exemption orders

1. That the *Community Protection (Offender Reporting) Act 2004* (WA) provide that:
   (a) 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, on its own motion or upon an application by the offender, consider whether it is appropriate to make an order that the offender is not a reportable offender (an adult exemption order).
   (b) The court can only consider whether it is appropriate to make an adult exemption order if it is satisfied that there are exceptional circumstances.
2. That the *Community Protection (Offender Reporting) Act 2004* (WA) provide 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 *Community Protection (Offender Reporting) Act 2004* (WA) provide that:
   (a) The court can only make an adult exemption 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.
   (b) For the purposes of deciding if the offender poses a risk to the lives or sexual safety of one or more persons, or persons generally, 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.
   (c) An application by the offender for an adult exemption order must be made before the sentence is imposed.
   (d) The court may adjourn the sentencing proceedings if necessary to enable relevant information to be presented to the court.
   (e) If the court determines that it is necessary to adjourn the proceedings for the purpose of determining if an adult exemption 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 adult exemption order either at the time the sentence is imposed for the offence or at the time the proceedings are heard after being adjourned (pursuant to (d) above).

4. That the *Community Protection (Offender Reporting) Act 2004* (WA) provide that:

   (a) The offender may appeal against a decision of a magistrate not to make an adult exemption order in accordance with s 7 of the *Criminal Appeals Act 2004* (WA).

   (b) The prosecution may appeal against a decision of a magistrate to make an adult exemption order in accordance with s 7 of the *Criminal Appeals Act 2004* (WA).

   (c) The offender may appeal against a decision of a judge of a superior court not to make an adult exemption order in accordance with s 23 of the *Criminal Appeals Act 2004* (WA).

   (d) The prosecution may appeal against a decision of a judge of a superior court to make an adult exemption order in accordance with s 24 of the *Criminal Appeals Act 2004* (WA).

RECOMMENDATION 4 _____ page 56

Sex offender registration is not a mitigating factor

That s 8 of the *Sentencing Act 1995* (WA) be amended to provide that the fact that an offender is or may be a reportable offender and subject to reporting obligations under the *Community Protection (Offender Reporting) Act 2004* (WA) is not a mitigating factor.

RECOMMENDATION 5 _____ page 56

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 or that are relevant to the making of an adult exemption 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.

RECOMMENDATION 6 _____ page 60

Matters to be taken into account by the court when determining if a juvenile offender reporting order or an adult exemption order should be made

1. That a new section be inserted into the *Community Protection (Offender Reporting) Act 2004* (WA) to provide that when a court is deciding if a juvenile offender reporting order or an adult exemption order should be made in relation to an offence the court may take into account the following –

   (a) any evidence given during proceedings for the offence;

   (b) any document or record (including any 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; and

   (h) any other matter the court considers relevant.

RECOMMENDATION 7 _____ page 64

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 Recommendation 1 above) may apply to the President of the Children's Court or to the District Court for a review of his or her reportable offender status at any time after he or she has attained the age of 18 years so long as he or she has been subject to the reporting obligations under this Act for at least 24 months or if he or she has complied with the reporting obligations for at least half of the applicable 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 only 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 in determining the application the court may take into account the following –
   (a) any evidence given during proceedings for the offence;
   (b) any document or record (including any 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;
   (3) 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; and
   (h) any other matter the court considers relevant.
5. The offender may appeal against the decision in accordance with s 23 of the *Criminal Appeals Act 2004* (WA).
6. The prosecution may appeal against the decision in accordance with s 24 of the *Criminal Appeals Act 2004* (WA).

RECOMMENDATION 8 _____ pages 64–65

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 reportable offender 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 only order that the offender is no longer a reportable offender 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 and at the time the offender was sentenced there were exceptional circumstances.
4. That in determining the application the court may take into account the following –
   (a) any evidence given during proceedings for the offence;
   (b) any document or record (including any 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; and

(h) any other matter the court considers relevant.

5. The offender may appeal against the decision in accordance with s 23 of the *Criminal Appeals Act 2004* (WA).

6. The prosecution may appeal against the decision in accordance with s 24 of the *Criminal Appeals Act 2004* (WA).

RECOMMENDATION 9 _____page 66

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 reportable offender 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 offender reporting order (as set out in Recommendation 1).

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 the reporting obligations under the *Community Protection (Offender Reporting) Act 2004* (WA) and is no longer a reportable offender 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 in determining the application the court may take into account the following –

   (a) any evidence given during proceedings for the offence;

   (b) any document or record (including any 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; and

   (h) any other matter the court considers relevant.

6. The offender may appeal against the decision in accordance with s 23 of the *Criminal Appeals Act 2004* (WA).

7. The prosecution may appeal against the decision in accordance with s 24 of the *Criminal Appeals Act 2004* (WA).

8. That if the court hearing the application determines that the applicant should remain subject to the juvenile offender reporting order and the reporting obligations under the *Community Protection (Offender Reporting) Act 2004* (WA) the applicant remains entitled to apply for a review in accordance with Recommendation 8.

RECOMMENDATION 10 _____ page 67

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 reportable offender 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 under this section can only be made once.
4. That upon an application the court may order that the offender is no longer a reportable offender and is no longer subject to reporting obligations under the *Community Protection (Offender Reporting) Act 2004* (WA) 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 in determining the application the court may take into account the following –
   (a) any evidence given during proceedings for the offence;
   (b) any document or record (including any 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; and
   (h) any other matter the court considers relevant.
6. The offender may appeal against the decision in accordance with s 23 of the *Criminal Appeals Act 2004* (WA).
7. The prosecution may appeal against the decision in accordance with s 24 of the *Criminal Appeals Act 2004* (WA).
8. That if the court determines that the applicant should remain a reportable offender and subject to reporting obligations under the *Community Protection (Offender Reporting) Act 2004* (WA) the applicant remains entitled to apply for a review in accordance with Recommendation 9.

RECOMMENDATION 11 _____ page 68

Removal from the register

That the *Community Protection (Offender Reporting) Act 2004* (WA) be amended to provide that if a court makes an order that a reportable offender is no longer a reportable offender (in accordance with Recommendations 7 to 10 of this Report) the Commissioner of Police is to cause that person's name and personal details to be removed from the Community Protection Offender Register (established under s 80 of the *Community Protection (Offender Reporting) Act 2004* (WA)) and the Australian National Child Offender Register.

RECOMMENDATION 12 _____ page 76

Review of frequency of periodic reporting obligations

1. That the *Community Protection (Offender Reporting) Act 2004* (WA) be amended to provide that a reportable offender may apply for a review of his or her periodic reporting frequency (as determined by the Commissioner of Police under s 28(3) of the *Community Protection (Offender Reporting) Act 2004* (WA)) and that the application may be made to a senior police officer (of the rank of sergeant or above)
   (a) once in every 12-month period; and/or
   (b) within 21 days after the frequency of the periodic reporting has been increased; and/or
   (c) if there has been a significant change in the offender's personal circumstances.
2. That if a reportable offender is aggrieved by the decision of the reviewing senior police officer the reportable offender may apply for a review of his or her reporting frequency to a magistrate in the Magistrates Court or the Children's Court and the magistrate may reduce the frequency of the reportable offender's periodic reporting if satisfied that such a reduction would not increase the risk to the lives or sexual safety of one or more persons, or persons generally.
3. That, in determining the review under 2 above, the magistrate may take into account any matter the court considers relevant and may have access to and take into account any material (including any evidence, document or record, statement or deposition, exhibit, pre-sentence report, victim impact statement and mediation report) that was available to the court which determined that the offender was a reportable offender under the *Community Protection (Offender Reporting) Act 2004* (WA) or the court which sentenced the offender for the reportable offence.
4. That a review under 2 above may only be made once in each 12-month period.
5. That the first 12-month period for the purpose of 1 (a) and 2 above is to be calculated from the commencement of the reportable offender's reporting obligations (as determined under s 24 of the *Community Protection (Offender Reporting) Act 2004* (WA)) and each subsequent 12-month period is to commence on the date on which the offender is required to report in accordance with s 28(2) of the *Community Protection (Offender Reporting) Act 2004* (WA).
6. That the decision of the magistrate under 2 above is final.

RECOMMENDATION 13 _____ page 79

Power of the Commissioner of Police to suspend reporting obligations

That s 61(1) of the *Community Protection (Offender Reporting) Act 2004* (WA) be amended to provide:

61. Commissioner may approve suspension of reporting obligations
   (1) If —
      (a) a person is a reportable offender only in respect of an offence that was committed by the person when a child, the Commissioner must consider whether or not to approve the suspension of the reportable offender's reporting obligations.
      (b) a person is a reportable offender in respect of an offence that was committed by the person when an adult, the Commissioner may consider whether or not to approve the suspension of the reportable offender's reporting obligations.

RECOMMENDATION 14 _____ page 85

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 properly understand both their obligations and their 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.
3. That information about the obligations and rights of reportable offenders under the *Community Protection (Offender Reporting) Act 2004* (WA) be available on the Western Australia Police website.

RECOMMENDATION 15 _____ page 87

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, where relevant, the provision of a qualified interpreter; a written translation of the formal notice of reporting obligations; oral, audio or video explanations 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.

RECOMMENDATION 16 _____ page 87

Education strategies and awareness raising initiatives

That the Western Australia government monitor on a regular basis the effectiveness of education strategies employed by government agencies in delivering age- and culturally-appropriate information about the legal consequences of unlawful sexual behaviour, in particular the potential for the imposition of registration and reporting obligations under the *Community Protection (Offender Reporting) Act 2004* (WA).

RECOMMENDATION 17 _____ page 90

Reporting on behalf of a reportable offender

1. That the *Community Protection (Offender Reporting) Act 2004* (WA) be amended to provide that if a public authority is involved with a reportable offender to the extent that the authority is empowered to make decisions that impact on the status of the reportable offender's personal details (as defined under s 3 of the *Community Protection (Offender Reporting) Act 2004*), a representative of that public authority (if the representative is aware that the offender is a reportable offender) *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 reportable offender is not to be prosecuted for a failure to comply with s 29 of the *Community Protection (Offender Reporting) Act 2004* if a representative of a public authority has provided the police with the required information within the stipulated timeframe.
3. That s 63 of the *Community Protection (Offender Reporting) Act 2004* (WA) be amended to provide that it is a defence to proceedings for an offence of failing to comply with a reporting obligation if it is established that the offender reasonably believed that a representative of a public authority had made a report on his or her behalf in accordance with 1 above.

RECOMMENDATION 18 _____ page 93

Therapeutic treatment orders

1. That the Western Australian government provide sufficient resources across the state to enable juvenile child sex offenders to participate in appropriate therapeutic treatment.
2. That the Western Australian government investigate the viability of providing the Children's Court with the option of a therapeutic treatment order for juvenile child sex offenders under the *Community Protection (Offender Reporting) Act 2004* (WA) as an alternative to a juvenile offender reporting order in appropriate cases.

RECOMMENDATION 19 _____ page 94

Prosecutorial policy

That the Office of the Director of Public Prosecutions amend its *Statement of Prosecution Policy and Guidelines 2005* to include a specific policy relating to the prosecution of juveniles for child sexual offences and that this policy be modelled on the Victoria Office of Public Prosecutions, *Prosecution Policies and Guidelines 2008—2010* Policy 2.9.2.

RECOMMENDATION 20 _____ page 95

Decision to charge

That the decision to charge a juvenile with a child sexual offence be overseen or made by a senior police officer of the rank of sergeant or above.

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

Appendix C: List of submissions

Aboriginal Legal Service of Western Australia (Inc)
Chief Judge Peter Martino
Chief Justice Wayne Martin
Chief Magistrate Steven Heath
Commissioner for Children and Young People
Department for Child Protection
Department of Corrective Services
Department of Indigenous Affairs
Department of the Attorney General
Dr Katie Seidler
Equal Opportunity Commission
Judge Denis Reynolds
Law Council of Australia
Law Society of Western Australia
Legal Aid WA
Lesley Power, SBS Corporation
Magistrate Steve Wilson
Mental Health Law Centre (WA)
Office of the Director of Public Prosecutions
Paul Beatts
Reverend Peter Humphris
Western Australia Police