



THE LAW SOCIETY
OF NEW SOUTH WALES

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CPOR Act review
Ministry for Police and Emergency Services
GPO Box 5434
SYDNEY NSW 2001

By email: cporareview@mpes.nsw.gov.au

Dear ¹

Child Protection (Offenders Registration) Act 2000

I write to you on behalf of the Criminal Law, Juvenile Justice and Indigenous Issues Committees ("the Committees") of the Law Society of New South Wales ("NSW"), in relation to the review of the *Child Protection (Offenders Registration) Act 2000*.

I thank you for the invitation to make a submission and now attach the Committees' submission for your consideration.

Yours sincerely

John Dobson
President

Submission by Criminal Law, Juvenile Justice and Indigenous Issues Committees

Review of the *Child Protection (Offenders Registration) Act 2000*

Discussion Paper

July 2013

**Ministry for Police & Emergency Services
NSW Government**

The Criminal Law Committee ("CLC"), Juvenile Justice Committee ("JJC") and Indigenous Issues Committee ("IIC") (referred together as "the Committees") of the Law Society of NSW recognise that the *Child Protection (Offenders Registration) Act 2000*, ("the Act") represents a balancing of two competing and equally important considerations. Namely, on the one hand the need to protect children from sexual and other forms of harm and on the other, the civil liberties of offenders who have served the punishment imposed upon them as a result of a criminal conviction.

The Committees submit that it is well established in our society that the welfare of children is of paramount importance. Such is the premium placed on the protection of children that it is considered legitimate to, from time to time, curtail the individual freedoms and civil liberties which are otherwise enjoyed by members of our community in favour of the need to protect children from harm, particularly sexual harm.

Also of importance are the legitimate interests of those offenders who are affected by the Act. The scheme of the Act represents a departure from the basic principle of criminal justice that once an offender has served the penalty imposed on him or her for their offence they are entitled to the same rights and liberties as any other member of the community. Although the Child Protection Register is not publicly available, registration under the Act nonetheless has the capacity to engender a feeling in the mind of the offender that they have been stigmatised as a "paedophile". This can have serious consequences for that person's self-esteem and prospects of rehabilitation, particularly in the case of young offenders. Such registration also exposes the registrable person to the risk of criminal sanctions for failing to comply with their reporting obligations.

The Committees note that having regard to the fact that the Act has been in operation for well over a decade, its continued legitimacy depends, in part, on an ability to demonstrate through empirical data its effectiveness in protecting children from offenders. The Committees are concerned that to date, there does not appear to have been any statistical analysis carried out to determine whether the scheme embodied in the Act has had any effect on rates of reoffending by registrable persons.

While this is an issue that may be outside the scope of this review, the IIC submits that there is a need for consistency across the States and Territories in relation to the requirements of the various child protection registers.

The Committees set out below their responses to the questions in the Discussion Paper, adopting the numbering used in the Discussion Paper.

4. Discussion

4.1 Purpose

Is the purpose of the Act clear? Should the objects of the Act be specified?

The Committees are of the view that it is important that the purpose of the Act be stated clearly and explicitly in the Act. A statement of the objects of the Act is important because it assists the courts in resolving any ambiguity that may arise in the interpretation of its provisions and provides guidance in the exercise of any discretion which the Act gives to a court or tribunal. In particular, the objects of the Act should refer to the need to balance the competing considerations referred to above.

4.2 Part 1 – Preliminary

As there are a number of specific meanings referred to in the definitions as well as occurring in other sections of the Act (such as 'child protection registration order'), do the definitions provide the intended clarity?

Is it necessary to have definitions and descriptions occurring elsewhere in the Act?

The Act is comparatively short and has relatively few defined terms. Such defined terms as exist within the Act, are defined as clearly and concisely as their subject matter allows. There does not appear to be any need for additional clarity in the definitions; however, the IIC suggests that as the Act is fairly extensive, it may be useful to provide definitions in each section.

Registrable offences

Are the current Class 1 and Class 2 offences appropriate?

The IIC is of the view that Class 1 and Class 2 offences are appropriate. The IIC's view is informed by the imperative of minimising as much as possible the risk of harm to children.

Should there be any additions to or deletions from Class 1 or Class 2 registrable offences?

As noted above, the IIC prefers the approach of minimising the risk to children, and placing the burden on the offender to show that they are not a risk to children. This is a complex issue and while the best interests of children is of paramount importance, there can be a divergence of views in relation to striking the correct balance when considering the competing rights of different children.

The CLC and JJC have concerns about the current list of Class 1 and Class 2 offences as they relate to young offenders who do not pose an ongoing risk to the welfare of children. The view of the CLC and JJC is that there is a need to expand the circumstances in which a particular offence is excluded from the definition of a registrable offence to ensure that offenders who should not be subject to the Act are not caught by it.

The CLC and JJC are very concerned about the offence of sexual intercourse with a child because this offence includes situations in which two teenagers, at least one of whom is under the age of 16, engage in consensual sexual intercourse. In addition,

this section also captures sexual experimentation – such as digital penetration, oral sex and digital manipulation where the fingers of the offender go past the outer lips of the vagina¹ - which is common amongst young people. While it is not suggested that such conduct should be decriminalised, equally, sexual experimentation between two young persons is not suggestive of any proclivity towards paedophilia and it is therefore inappropriate that such offenders be caught by the operation of the Act. The CLC and JJC recommend that consideration be given to excluding from the definition of a registrable offence, sexual intercourse with a child which is attended by the following circumstances:

- (i) Where the intercourse is consensual AND
- (ii) Where the offender is under the age of 20 AND
- (iii) Where the difference in age between the offender and the victim is 3 years or less.

The effect of this proposal would be that offenders whose behaviour is more akin to sexual experimentation (or inappropriate), but not paedophilic would not be tarred by the brush of registration under the Act. The CLC and JJC note that the courts' power to make a Child Protection Registration Order could still be utilised in appropriate cases.

The CLC and JJC further note that similar considerations apply to offences involving acts of indecency committed upon a child by another child.

In relation to the offence of possess/disseminate/produce child abuse material, the Committees are concerned that young persons who participate in the practice of 'sexting' will become registrable persons. In the view of the CLC and JJC, while undesirable, participating in 'sexting' amongst young people is not normally an indication of any underlying proclivity which would pose a risk to children. The CLC and JJC suggest that consideration be given to excluding from the definition of registrable offence offences contrary to s 91H of the *Crimes Act 1900* (NSW) where the offender is under the age of 20 and the victim appears to be or is no more than 3 years younger than the offender and the image was taken with the consent of the person depicted in it. The CLC and JJC note that even if this exclusion applied, the sentencing Court retains a discretion to make a Child Protection Registration Order on a case by case basis.

In making these recommendations, the CLC and JJC are cognisant that if adopted, it would increase the complexity of the scheme. However, it is the view of the CLC and JJC that additional complexity may be necessary for greater fairness in the scheme.

4.3 Part 2 – Offenders to whom the Act applies

Is the description, in section 3A of the Act, of a registrable person clear about its meaning?

Yes. The Committees have no concerns about the clarity of the meaning in s 3A.

Does the term 'registrable person' best describe the persons covered under the Act?

Yes. It is the Committees' view that the term has the advantage of being value neutral and at the same time descriptive.

¹ See *R v Preval* [1984] 3 NSWLR 647

Is the approach to young registrable persons under the Act appropriate?

Again, this is a complex issue and while the best interests of children is of paramount importance, there can be divergent views in relation to striking the correct balance when considering the competing rights of a range of children.

The IIC is of the view that young offenders should be registered under the Act. The IIC submits that there are so many Aboriginal and Torres Strait Islander children in care that an approach that minimises risk should be preferred.

On the other hand, the view of the CLC and JJC is that it is trite to state that young persons (here being a reference to persons under the age of 18) are often sexually immature and still learning about their own sexual identity and the boundaries of acceptable sexual behaviour. The CLC and JJC submit that many sexual offences committed by children are committed in this phase of sexual immaturity. For this reason, a scheme whereby a child is effectively presumed to be a risk to the sexual welfare of other children, merely by commission of a sexual offence, is particularly inappropriate.

The CLC and JJC have had the advantage of reading, in draft, the submission of the Shopfront Youth Legal Centre. The CLC and JJC support its recommendations for reform, in particular the recommendation that young offenders be excluded from automatic registration under the Act, and that they only become registrable if a court makes a specific order for registration. The CLC and JJC also note that the sentencing Court retains the discretion to make a Child Protection Registration Order on a case by case basis.

4.4 Part 2A – Child Protection Registration Orders

Does the scope in which the CPRO may be made (e.g. for persons found guilty in a foreign jurisdiction, in cases where bail is granted etc) remain appropriate and are the timeframes for applying for such orders workable?

Yes, however with one exception. The view of the CLC and JJC is that the scheme for the making of a CPRO is largely unproblematic and the timeframes are realistic. The JJC and CLC are concerned with s 3F(3). The effect of this section is that a person convicted of a child sexual offence in a foreign country may need to be subject to the reporting obligations under the Act for far longer after the commission of the relevant offence than a person who commits an equivalent offence under NSW law. There does not appear to be any rational justification for this differential treatment. The CLC and JJC recommend that this provision is amended so that the date of conviction is deemed to be the date of the conviction when entered in the original jurisdiction.

Are there other specific orders that would be beneficial?

No.

4.5 Reporting obligations

Division 1 – Notices to be given

Is the current system of written notification under section 4 of the Act working?

No. The CLC and JJC submit that anecdotal experience suggests that courts which convict an offender of a registrable offence often do not provide that offender with the

required notice. This may be a matter that can be addressed through a change to the Justice Link software which the courts use to ensure that the staff processing the court's adjudication are prompted to provide the necessary notice in appropriate cases.

Are the timeframes for the giving of notices appropriate and workable?

Yes, subject to the comments made above in 4.5.

Are those required to give the notice the appropriate authority?

Yes.

Are the circumstances in which notices must be given appropriate?

Yes.

Have any problems been experienced with notifications to supervising authorities? If so, how can they be rectified?

The Committees are unable to comment on this question.

Division 2 – Initial report

Is the level of information required for initial reports and the timeframe appropriate?

The Committees are of the view that the level of information required in initial reports (while extensive and onerous), appears to be appropriate. As to the timeframe, having regard to the fact that offenders are not always notified of their reporting obligations by the court sentencing them, the Committees are of the view that there is a real risk that an offender could commit the offence of failing to comply with reporting obligations without even knowing that he/she was under such an obligation. The Committees recommend that the timeframe should be seven days from the date on which the offender receives notice of the obligation to report.

Division 3 – Ongoing reporting obligations

Do the current timeframes need streamlining or simplifying?

Yes. It is the Committees' view that presently, the multiplicity of different timeframes for reporting different changes to circumstances may be confusing to some offenders, particularly to offenders whose intellectual capacity is limited. The Committees suggest that all changes should be required to be reported within seven days of their occurrence. Further, the methods of reporting should be relaxed to make it easier and simpler for registrable persons to comply with their obligations. The Committees are of the view that there is no reason changes should not be able to be reported through a secure internet site.

Are the ongoing reporting obligations appropriate?

Yes. The Committees submit that the Act can only achieve its objectives if the information on the register is accurate and current.

Are there other situations or other types of personal information that should be reported?

No. The Committees submit that the existing reporting obligations are comprehensive and extensive.

Forensic patient reporting obligations

What legislative changes could be made to better clarify the Act's obligations as they relate to forensic patients?

The Committees have no comment on this issue.

Division 4 – Provisions applying to all reporting obligations

Are the powers and responsibilities of the Police appropriate?

The CLC and JJC are concerned that the powers in s 12F of the Act are too intrusive and far-reaching. The CLC and JJC note that the power of a police officer to require a registrable person to submit to the taking of photographs is (save for the requirement to expose a person's private parts) entirely arbitrary. The view of the CLC and JJC is that there is no restriction as to the circumstances in which, or the reasons for which, such a power is to be exercised. As such, the power is particularly susceptible to abuse.

The CLC and JJC also note that where it is necessary to obtain a photograph of a person for genuine investigative purposes, such a power already exists in the *Crimes (Forensic Procedures) Act 2000* which has appropriate restrictions and safeguards built into it. It is the view of the CLC and JJC that there is no compelling reason why police need such wide and unfettered additional powers with respect to registrable persons.

Is there sufficient scope in the reporting process to ensure that registrable persons are not restricted by practical considerations such as remote locations from reporting as required?

As stated above, it is the Committees' view that consideration should be given to allowing registrable persons to comply with reporting obligations (at least so far as they concern reporting changed circumstances) via the internet. The Committees note there is sufficient technology (including fingerprint scanners attached to many contemporary computers) to be able to devise a system which will ensure the identity of the person making the report. Consultation is recommended with Indigenous agencies, organisations and departments to discuss the most appropriate way forward where remote locations inhibit a registrable person complying with the Act.

Division 5 – Modified reporting procedures for protected witnesses

Are the current modified reporting processes for protected witnesses appropriate?

The Committees have no comment on this issue.

Division 6 – Reporting period

Are the reporting periods appropriate?

Subject to the comments below regarding the suspension of reporting requirements, and previous comments regarding young offenders, the Committees submit that the reporting periods are appropriate.

Are the different requirements for young people appropriate?

The Committees refer to their earlier comments above regarding the Act's approach to young people.

Should the obligations of corresponding registrable persons occur in a separate Division in the Act or does it make better sense that their requirements occur at each relevant Division?

The view of the CLC and the JJC is that the present placement of the reporting obligation of corresponding registrable persons does not necessarily require amendment. The IIC submits that it would assist the navigation of the Act if the requirements occurred at each relevant Division.

Division 7 – Suspension and extension of reporting obligations

Are the circumstances in which a person can have their reporting obligations suspended appropriate?

Is 15 years sufficient time to have passed for an application to be exempt from compliance with reporting obligations to be lodged with the ADT?

Should the ADT retain this power?

The CLC and JJC are of the view that it is appropriate for reporting obligations to be suspended in the circumstances described in subsection 15(1) of the Act. The IIC notes that in relation to subsection 15(1)(b), if the registrable person is outside of NSW, the responsible agency in NSW should be required to report to their counterpart agencies in the other states.

The CLC and JJC note however, such a suspension does not justify a subsequent extension of those obligations by the period of the suspension as is provided by subsections 15(1) and (2). The CLC and JJC submit that it must be borne firmly in mind that the need for reporting is said to be for the protection of children. The Act is not intended to be a punitive measure. Accordingly, any extension of reporting obligations can only be justified on the basis that the registrable person continues to pose a risk to children.

It is very difficult to see how the suspension of the requirement for reporting leads to the conclusion that the registrable person will continue to be a risk to children for a longer period than would have been the case had the obligations not been suspended. The view of the CLC and JJC is that this provision has a distinct punitive flavour. It is very difficult to avoid the impression that its aim is to ensure that every registrable person suffers the burden of reporting obligations for the minimum period prescribed in the legislation. As such, the section contradicts the underlying premise of the Act. The CLC and JJC submit that subsections 15(2) and (3) should be repealed.

The CLC and JJC note a related issue here, being the power in s 16 of the Act for the ADT to exempt a person from compliance with reporting obligations. The CLC and JJC recommend that the power be expanded in the following ways:

1. By removing the 15 year waiting period before an application for exemption can be made;
2. That all registrable persons have the right to apply for such an exemption, not just those subject to lifetime reporting obligations;
3. That the application be determined by the court which sentenced the offender for the relevant offence, either at the time of sentence or at a later date; and
4. That there be a limit of one application every 5 years unless the applicant can establish a change in circumstances justifying more frequent applications in order to prevent frivolous applications.

The CLC and JJC submit that if it is accepted that the imposition of reporting obligations on registrable persons derives its justification from the need to protect children, then it follows that once a person ceases to represent such a risk, their continued status as a registrable person also ceases to be justified. Accordingly, there is no reason for imposing an artificial and arbitrary period of time before a registrable person ought to be able to apply an exemption from reporting obligations.

Additionally, the CLC and JJC are of the view that, having regard to the importance of these issues to both to the community and to the applicant, such applications ought to be determined by a court, not a tribunal. Courts have vast experience in dealing with child sexual offenders and are therefore better placed than the ADT to determine such applications.

Division 8 - Offences

Are these all the offences that should apply? Are the penalties appropriate?

The Committees are of the view that the offences created by the act as well as the maximum penalties available for them are appropriate. However, the Committees are concerned with s 8 of the Act, which provides that a failure to give a registrable person notice of their obligations as required by Division 1 of Part 3 does not relieve them from their reporting obligations.

The Committees' view is that it is unfair to render a person liable for not complying with obligations which that person does not know they have. While a 'reasonable excuse' for not reporting is a defence, the presence of s 8 means that, as a matter of statutory construction, lack of notice is unlikely to be available as such an excuse. Accordingly, it is recommended that s 8 should be repealed.

Consequences of not complying with annual reporting obligations

Should the length of a registrable person's reporting period be increased if he or she fails to comply with their reporting obligations for a period of time? If so, how should this occur? Are the current arrangements appropriate?

The Committees submit that failure to report should be dealt by the laying of appropriate charges relating to that failure. The CLC and JJC note that police have

expressed a concern that the penalties imposed for failure to report are not an adequate deterrent. With respect to the examples of failure to report cited by police as an illustration of their concerns it is observed that of the several thousands of people on the register in 2010, only four have failed to comply with their reporting obligations, and of those, two ultimately received a custodial sentence for their failures.

Division 9 – Child Protection Register

Is Police the most appropriate agency to maintain the Register?

The CLC and JJC submit that it is the function of police to investigate any suspected child sexual offences and it is the police which have the resources and expertise to adequately monitor any offenders who are considered to pose a high risk to children.

While this point is outside the immediate scope of this review, the IIC submits that there should be a national Child Protection Register that is maintained by one specialised agency (perhaps the Federal Police). The national agency should have the power to share information with other agencies, and should be guided in this respect by an Advisory Council. The IIC further submits that any agency that carries out private placements of children should have access to the information on the Register.

Should any other information be included in the Register? If so, what information?

It is the Committees' view that the register should also include details of the registrable person's address and any children residing with that person so that agencies such as the Department of Family and Community Services are in a position to determine whether any children are at risk of harm from the registrable person and, if so, take appropriate action to protect those children.

Should any information no longer be required for inclusion in the Register? If so, what information?

The Committees submit that subsections 19(2)(g) and (h) should be repealed as they are far too broad and risk the disclosure to other agencies of personal information about a registrable person which is not relevant for child protection purposes. These sections should be replaced with a provision that the Register should include any information the Commissioner considers relevant to the protection for children and appropriate for inclusion in the Register.

Should any other agencies be able to collect and use personal information about a registrable person, and disclose this information to another scheduled agency? If so, which agencies?

The IIC submits that the Aboriginal Medical Service should be included on the list of scheduled agencies.

4.6 Part 3A – Change of name

Are the circumstances in which the Commissioner approves a change of name appropriate?

Yes.

Are there any other issues to be considered in relation to name changes?

The IIC submits that the maximum penalty for unauthorised changes of name by or on behalf of a registrable person is too low (a maximum of 5 penalty units) and should instead be consistent with the penalties for failing to comply with reporting obligations or of furnishing false or misleading information.

4.7 Miscellaneous

Disclosure of information – section 21D and 21E

Should any changes be made to Schedule one of the Act?

The IIC submits that the Aboriginal Medical Service should be included on the list of scheduled agencies.

Do the provisions under Sections 21D and 21E remain appropriate?

The Committees are concerned about the breadth of the Commissioner's power to disclose information about a registrable person to any other person provided for in s 21E(d). The Committees suggest that this sub-section is repealed. Where there is a concern about the safety of a child or children, it is the Committees' view that it should be dealt with by DOCS rather than by an arbitrary release of information by the Commissioner of Police.