The Law Society of Western Australia
The voice of the legal profession in Western Australia

Submission to the Inquiry into mandatory registration of children and young people on the Sex Offenders Register

To

STANDING COMMITTEE ON ENVIRONMENT AND PUBLIC AFFAIRS

Law Society Contact

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Table of Contents

Mandatory registration on the Sex Offenders Register

The Law Society holds the view that the registration of an offender, especially a young offender, as a reportable offender should be a matter of judicial discretion.

The stated aims of the *Community Protection (Offender Reporting) Act 2004* ("the Act") are

- To reduce the likelihood of re-offending;
- To facilitate the investigation and prosecution of future offences that they may commit;
- To enable publication of information, in relation to non-compliance with obligations or re-offending; and
- To enable Courts to make orders prohibiting certain offenders from engaging in certain conduct.

All of the purposes of the Act are predicated on the possibility of an offender re-offending.

The subjection of an offender to reporting requirements under the Act is not intended to be an additional or supplementary punishment for an offender. An offender's punishment is to be determined by the Court in accordance with ordinary sentencing principles.

The Law Society submits that where the particular circumstances of an offence or an offender mean that the aims of the Act will not be served by the act, because the risk of re-offending is already sufficiently low, the offender should not become a reportable offender. The present regime of mandatory reporting in all cases means that some offenders will become reportable offenders despite the fact that the purposes of the Act will not be served by that requirement.

In keeping with this approach, the Law Society proposes that an offender should become a reportable offender where:

- Where the Court imposes a sentence of imprisonment to be immediately served; or
- Where the Court finds that there is an appreciable risk of reoffending, which will generally be the case where the offender has previously committed such an offence.

The law recognises that not all offenders (whether sexual offenders or offenders generally) will go on to become repeat offenders. Some offences are aberrations by persons leading otherwise law-abiding lives. To this end, the *Sentencing Act 1995*, the *Spent Convictions Act 1988* and the *Young Offenders Act 1994* provide mechanisms whereby a person who has committed an offence is relieved of some of the consequences of a conviction for that offence. The Act is not consistent with those principles, in that it imposes obligations on an offender as a result of a conviction (or, in the case of a juvenile, a finding or admission of guilt where no conviction is recorded) despite the successful rehabilitation of an offender.

Young Offenders Act

Section 54 of the *Young Offenders Act* provides that, where a Court deals with a young person for an offence that is not a Schedule I or Schedule II offence, the Court is not to record a conviction unless it imposes a sentence of Detention[1] or finds that there are circumstances which warrant the recording of a conviction.

[1] "Detention" in this sense includes an Intensive Youth Supervision Order with Detention, also known as a "Conditional Release Order".

Many offences to which the Act relates are not Schedule I or Schedule II offences, notably indecent dealing with and sexual penetration of children aged 13 to 16. The reason for this is that the law recognises that sexual contact between consenting children takes place, usually without the elements of abuse present in sexual offences committed by adults against children of that age.

Such a sexual offence committed by a child can be referred to a Juvenile Justice Team and be dealt with outside the criminal law. Where this is done by the police instead of charging the offender(s), the obligations under the Act are not triggered. When this is done by a Court, the obligations are triggered, even when the Prosecution concede that this is the appropriate disposition. It is not acceptable that a child can become a reportable offender because the charging police officer does not appreciate or fails to properly exercise their discretion.

The law also recognises that teenagers who have sex with teenagers do so because their sexual interests are in people of a similar age to themselves, thus, when they become adults, their sexual interests will be in adults. Children who engage in sexual activity with children of a similar age to themselves are not more likely to become sexual offenders as adults than other members of the population.

The Law Society suggests that the criteria used by the Children's Court to determine whether an offence requires a sentence of detention or, when it decides not to impose detention, whether or not to record a conviction, are suitable criteria for the determination of whether an offender becomes a reportable offender.

There would, therefore, be no need for a "discretionary" exclusion of an offender from the Act – if the Court determines that Detention is appropriate, or a Conviction is appropriate, then and only then should the reporting obligation arise.

Section 189

Section 189 of the *Young Offenders Act* provides that a conviction, other than a conviction for homicide, is not be to regarded as a conviction for any purpose after the expiry of two years after the conclusion of the sentence. This is to recognise that children sometimes commit serious offences in their youth and are successfully rehabilitated into law-abiding adults. Their past offences should not be a millstone around their necks for the whole of their lives, except in the cases of the most serious offences.

Section 47 of the Act sets the reporting period for a young reportable offender to one half of the period that would apply to an adult offender under section 46, to a maximum of 7.5 years. This means that a child convicted of a single Class 2 offence will be a reportable offender for 4 years, and all other young offenders are reportable offenders for 7.5 years. This is significantly longer than the period in which a conviction can be regarded under section 189 of the *Young Offenders Act*, and is inconsistent with the rehabilitative purposes of the *Young Offenders Act.*

The Law Society acknowledges that there may be circumstances where an offender who has been subject to a reporting obligation should continue to be a reportable offender after the expiry of the period in s. 189 – the obvious example being a reportable offender who has breached their reporting obligations or has committed other serious offences, but has not committed a new sexual offence (in which case they would be a reportable offender as a result of the new offence).

To achieve an appropriate balance between the conflicting legislative aims, the Law Society suggests that a mechanism should exist where a juvenile offender can be relieved of their reporting obligations after the expiry of the period in which the previous conviction can be treated as a previous conviction. This may be an administrative process (similar to the issuing of a declaration that convictions have been spent under the *Spent Convictions Act*) or a judicial process (such as

the granting of an Extraordinary Licence or removal of a long-term or permanent disqualification under the *Road Traffic Act*). If it is a judicial process, the power should be vested in the Court who imposed the sentence. If it is an administrative process, the exercise of the power should be reviewable by a Court.

In any case, the criteria for the removal of the reporting obligation should reflect the aims of the Act. Where the offender has not re-offended and has not breached a reporting obligation, generally the reporting obligation should be removed. Discretion to remove the reporting obligation should exist where the offender has only committed minor offences, or has not committed offences for a long time. An offender who persistently re-offends or persistently breaches reporting obligations should not have their reporting obligation removed.

Adult Offenders

It is well established that the ordinary sentencing disposition for adult offenders committing sexual offences against a child or possession of Child Exploitation Material is a term of imprisonment to be immediately served.

Courts in relatively rare cases may impose a sentence other than immediate imprisonment. Usually, this will be a sentence of imprisonment which is suspended. In even rarer cases the Court will impose a sentence other than imprisonment, and may grant a Spent Conviction Order.

The circumstances which may justify a Court imposing a suspended imprisonment order are varied. Some examples include:

- Where the offending is particularly minor;
- Where the offender is particularly young (18-19) and the victim close to the age where the conduct would not have been an offence;
- Where the offender was mistaken as to the age of the victim, but this does not afford a defence due to the operation of s.205;
- Where the conduct was entirely consensual, and/or initiated by the victim;
- Where there is no element of predation, abuse of power or exploitation; and
- Where the victim and the offender were in and remain in a committed relationship;

Despite some or all of these elements, the Courts have imposed sentences of immediate imprisonment in cases of consensual sexual activity with a child or cases where mistake as to age or identity of the victim, where the offender has a history of offending or where there is an appreciable risk of re-offending: *BGE v The State of Western Australia*[2]

In reaching a decision to suspend a sentence of imprisonment, the Court is likely to have found that the risk of re-offending is low. This will usually be established by psychological evidence. There may be cases where the Court considers that some supervision or intervention is required to ensure that the risk of re-offending is minimised, in which case the Court would impose a Conditional Suspended Imprisonment Order. In such a case, the risk of re-offending is managed by the conditions attached to that order, directed at addressing the offender's criminogenic needs.

There is a single example, *Riggall v The State of Western Australia*[3], of the Court of Appeal imposing a Spent Conviction Order for an adult committing sexual offences against a child. In that case, the sentencing judge in the District Court imposed a Community Based Order, finding that the offender had been deceived by the victim into believing he was much older than he was. The

[2] [2013] WASCA 136.
[3] [2008] WASCA 69.

Court of Appeal found that the sentence of Community Based Order was excessive, and made a Spent Conviction Order.

As it is a prerequisite to the making of a Spent Conviction Order that the Court is satisfied that the offender will not commit a similar offence in the future, it is submitted that where the Court grants a spent conviction, there is no purpose of the act which would need to apply. By requiring such offenders to comply with a reporting obligation, the Act interferes with the future liberty of the offender there the relevant purpose of the Act

Spent Conviction Orders in cases of sexual offending are exceptionally rare. This is because most sexual offences result in sentences of imprisonment to be immediately served. Where a Court considers, as an exception to the ordinary course, the sentence of imprisonment should be suspended, the Court will have no power to make a Spent Conviction Order, as the Court has imposed a sentence which precludes the making of a Spent Conviction Order.

Rather than being an occasion to enliven a discretion to make an order that an offender not be a Reportable Offender, the circumstances which would result in a Court making a Spent Conviction Order are such that, where such a discretion exists, it would almost always, if not always, be exercised.

The Law Society submits that where a Court determines that a sentence other than a sentence of immediate imprisonment is appropriate, the Court should then consider whether there is a need for the offender to be a reportable offender. Given the necessarily serious nature of the offence where a Court has imposed a suspended imprisonment order, generally the Court would find that such an offender should be a reportable offender, but there will be exceptions.

Alternatively, the Court should be given the discretion to order that an offender who receives a community-based disposition be a reportable offender for a shorter period of time, but not less than the duration of that sanction. For example, if a Court sentences an offender to imprisonment suspended for 12 months, the Court would not be able to reduce the reporting period to less than twelve months.

Intellectually Disabled and Cognitively Impaired Offenders

The Act makes no allowance for those offenders who suffer from an intellectual disability or cognitive difficulties, with the result that the reporting obligation is an added burden to those offenders least able to understand the requirements of such an obligation.

Generally, persons suffering from a significant intellectual disability or cognitive difficulty will already be receiving some support from other agencies or services.

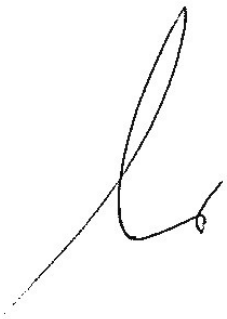
Such offenders do not in any way fit the profile of the stereotypical child sex offender who is the target of the Act.

The WALRC Discussion Paper proposes that in the case of adult offenders with special needs, an agent be able to report on behalf of the offender. This transfers the burden of the reporting obligation from the offender to the agent, who would be either a carer for the offender or a delegate of the agency responsible for the offender's support in the community.

Where a reporting obligation may be discharged by an agent, the legislation and regulations must be carefully framed so that an offender is not criminally responsible for the failure of the agent to fully discharge the reporting obligation.

While such an arrangement would relieve the offender of the burden of the reporting obligation, it fails to recognise that because of the level of support and supervision provided to the offender, either supplied by or partly funded by a government agency, the purposes of the Act are not served by the offender being subjected to any reporting obligation, either personally or by agent. This is because the offender is already closely monitored in the community.

One simple solution is to amend the legislation so that any person subject to a Guardianship Order under the *Guardianship and Administration Act 1990* is relieved, during the currency of that order, of any reporting obligation. This would use an existing, established criterion for the assessment of the degree of impairment of an offender. It also avoids the need for the Court, at the time of imposing sentence, or at any time, to separately assess the competence of the offender. It ensures consistency, and avoids the possibility of two different decisions being made on the assessment of the offender's capacity.



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