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REFER TO:

21 May 2019

Ms Maddison Evans  
Committee Clerk  
Standing Committee on Environment and Public Affairs  
Legislative Council  
Parliament House  
PERTH WA 6000

By email ([env@parliament.wa.gov.au](mailto:env@parliament.wa.gov.au))

Dear Ms Evans,

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

I refer to a letter dated 15 April 2019 from Hon Matthew Swinbourn MLC, Chair of the Standing Committee on Environment and Public Affairs seeking a written submission on the Inquiry into mandatory registration of children and young people on the Sex Offenders Register.

Please find attached a submission prepared by Ms Sarah Dewsbury and Mrs Claire Rossi, Solicitors from the Youth Law Team of our Criminal Law Division.

Should the Committee deem it necessary for Ms Dewsbury and Mrs Rossi to appear in a Committee hearing at a later date, they are both willing to appear.

Should you wish to discuss any aspect of this correspondence further, you may contact Mrs Kelly Niclair, Acting Division Director of the Criminal Law Division

Yours sincerely,

Graham Hill  
DIRECTOR OF LEGAL AID



## SUBMISSION TO THE STANDING COMMITTEE ON ENVIRONMENT AND PUBLIC AFFAIRS

### ***Inquiry into children and young people on the sex offenders' register – is mandatory sentencing appropriate?***

#### **a) The current criteria for registration on the sex offenders register.**

The relevant legislation is the *Community Protection (Offender Reporting) Act 2004* (WA) ("the Act").

Section 6 of the Act provides that a reportable offender is a person sentenced for a reportable offence. "[R]eportable offences" are defined in section 9 of the Act as classes of offences listed in Schedules 1, 2 and 3 of the Act.

Schedules 1 (Class 1 offences) and 2 (Class 2 offences) delineate offences specifically committed against a child.

Schedule 3 (Class 3 offences) refers to specific, serious offences where the person against whom the offence is committed is not a child.

The Act is primarily aimed at monitoring "*paedophiles and other serious sex offenders*" (Mrs. M H Roberts, Minister for Police and Emergency Services, Second Reading Speech, Legislative Assembly, Wednesday 22 September 2004).

A "young reportable offender" means a reportable offender who is a child (section 3).

A "child" is defined in section 3 as a person who is under 18 years of age.

The definition of sentence under section 3 includes:

- (c) an exercise of power under the *Young Offenders Act 1994* section 66, 67, 69 or 70;
- (d) a custody order made under the Criminal law (Mentally Impaired Accused) Act 1996 Part 4;
- (e) a special order made under the *Young Offenders' Act 1994* section 126;
- (f) anything prescribed by the regulations to be a sentence for the purposes of this definition.

A 'finding of guilt' is defined in section 4 of the Act. The effect of this definition, combined with the meaning ascribed to 'sentence' in section 3 of the Act, is that any young person dealt with for a reportable offence is required to register.

This may include a Juvenile Justice Team (JJT) referral for an offence of indecent dealing against a child under section 320(4) or section 321(4) *Criminal Code*, where a plea is taken, or where there is a finding of guilt within the meaning of section 4 of the Act. It should be noted that the *Community Protection (Offender Reporting) Regulations 2004* (WA) ("the Regulations") do not refer to the JJT.

The Act and the Regulations are silent as to whether a referral to the JJT is a 'sentence'. The word 'includes' leaves it open, but it appears significant that the Act specifically includes other *Young Offenders Act* sentencing options at the lower end of the scale, without including a referral to the JJT.

An indecent assault under section 323 *Criminal Code* only attracts registration on the Child Protection Offender Register (CPOR - the "Register") under the Act 'if the person against whom the offence is committed is a child' (Schedule 2 – Class 2 offences). If an adult or child commits an offence of indecent assault against an adult, it does not attract registration.

These sections have been included to highlight the fact that, as the offences under Schedule 2 must be committed against a child to attract registration, it is more likely that children will be affected by the legislation because children generally offend against other children. The degree of criminality may be far less than a situation in which an adult is offending against a child.

The current situation means that, whilst a child may not have a conviction recorded for a reportable offence, the fact of a 'finding of guilt' under the Act means that a child is subject to registration under the Act without having a criminal record. This has been the subject of judicial comment in court when the facts of an offence are clearly not serious enough to warrant a conviction being recorded.

#### **b) The advantages and disadvantages of mandatory registration:**

##### Advantages

In our view, there are no advantages for a child to be subject to mandatory registration.

##### Disadvantages

- (i) In our view, there are no therapeutic benefits. Mandatory registration operates contrary to therapeutic intervention, as a young person on the register is less likely to discuss their situation and emotional state. They are labelled by some as 'paedophiles'. This can lead to public vilification amongst children where child victims or their families disclose details of an offender's status to their peers or on social media, despite the protections in section 35 *Children's Court of Western Australia 1988* (WA).
- (ii) In our experience, children experience anxiety, depression and suicidal thoughts as a result of being labelled as 'paedophiles' by virtue of their registration; long after their sentences have been discharged. One of our clients (aged 14 years, with no conviction recorded), became suicidal and left school because of information being spread about his reportable status for an offence of low-level indecent dealing.
- (iii) Once the mandatory reporting requirements have been satisfied the offender:
  - a. will remain a 'person of interest' on the register if they are assessed as still presenting some risk; or

- b. if the assessed risk is above a certain level, the Sex Offender Management Squad (SOMS) will apply for the period of reporting to be extended.

When the file is 'closed' by SOMS there is still no mechanism to be removed from the Register.

- (iv) The length of mandatory reporting for a child is half the length of an adult and can be from four years to seven and a half years. (section 47(2) of the Act). This can follow a child beyond the age of eighteen years. Clients have informed us that once they turn eighteen, and are still reportable offenders, SOMS, which administers the CPOR, increases the level of scrutiny to which they are subjected. This appears to be irrespective of:
    - a. the length of time since the original offence was committed;
    - b. the age of the child offender at the time when the offence was committed; and/or
    - c. the nature and level of seriousness of the original offence;
    - d. whether or not the current behaviour warrants extra scrutiny.
  - (v) Numerous young people are sentenced for reportable offences where the factual circumstances are at the lowest end of the scale of seriousness for the type of offences for which the sentence is imposed. For example, a 'dacking' (pulling down another child's shorts or pants) or a boy poking the breast of a same age girl at school in front of class mates. These children were given short Youth Community Based Orders to learn appropriate behaviour with counselling and to reflect the low level of factual seriousness. The orders did not result in convictions being recorded. The only reason that these children are subject to the provision of the Act is that these offences were committed against children.
  - (vi) Mandatory registration does not take into account a child's personal developmental circumstances, level of maturity or, in many cases, level of intellectual or psychological impairment.
  - (vii) CPOR registration may prevent a person on the register from travelling to other countries.
  - (viii) CPOR registration may prevent participation in sporting or social activities with other young people. For example, a young person may be able to play on a sporting team with children of his own age but not attend a sporting carnival where there are younger children present or go to a toilet unaccompanied without an adult. A child over the age of ten, who has to be accompanied by an adult supervisor whenever he/she goes to the toilet, immediately attracts negative attention and suspicion of sexual offending.
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- (ix) CPOR registration may affect accommodation where there are younger children in a family.
  - (x) CPOR registration can affect blended families in which adults with children wish to become partners but cannot share accommodation due to a child's CPOR status.
  - (xi) CPOR registration places an onerous burden on the parents or carers of the registered child to meet their reporting obligations and this may have an impact on family life, such as having to seek permission to travel and scrutiny of where they want to live.

- (xii) CPOR registration may affect employment and career opportunities, even when an offence was committed when the child was very young, and there was no suggestion of future risk of offending or that the child would develop sexual deviance.
- (xiii) CPOR impacts adversely on young offenders in remote regions, or young offenders who are homeless, or who suffer from an intellectual disability or a mental illness. Once young offenders are subject to CPOR, they are obliged to comply with strict reporting obligations, and a failure to do so will result in further charges being laid for failing to comply with the CPOR reporting conditions.

Reporting obligations are imposed in addition to any sentence imposed for the offence and will run for years after the sentence has been discharged. This impacts on young or homeless children, who generally do not have the maturity, intellectual capacity or the basic supports to cope and comply with the reporting requirements for such an extended period of time. Charges for failing to comply with the conditions of CPOR registration, may breach the court orders which constitute the original sentence for the offending behaviour. The new CPOR related charges, and the added risk of being breached for re-offending, propel children back into the justice system.

- (xiv) In the Law Reform Commission of Western Australia *Community Protection (Offender Reporting) Act 2004* Discussion Paper (February 2011) at page 54 it was noted that 'breaching offences appear to be disproportionately higher in regional areas and among Aboriginal reportable offenders.'

Young Indigenous offenders in the regions are particularly disadvantaged. They are frequently uncertain or confused about their continuing obligations to report and confuse the CPOR reporting obligations with conditions imposed on a court sentencing order.

Young offenders with a limited and basic understanding of the justice system may not have the capacity to distinguish between reporting obligations to different agencies, and this renders them particularly vulnerable to breaching their CPOR reporting obligations. This is especially so when English may be a second or third language and the young person frequently moves address, has no permanent or fixed address or has a frequent change of carer or responsible adult.

In regional Australia young Indigenous children may find it very difficult to comply with reporting obligations when they are engaging in cultural activities, or other family commitments over which they have no control.

In regional Australia young Indigenous children may find it very difficult to comply with reporting obligations as they may not have access to the internet or may not have phones with access to mobile networks in their communities.

**(c) Circumstances that may not warrant mandatory registration.**

We do not believe that any child should be subject to mandatory registration and that the following circumstances should not warrant mandatory registration:

- (i) very young juvenile offenders under the age of 14, which is the age at which criminal capacity is presumed.;
- (ii) children who have an intellectual disability or a mental illness;

- (iii) sexting where there is a consensual exchange of photos or videos and there is no element of malicious coercion or use of the material for criminal gain;
- (iv) underage consensual sexual activity.

It is very common for young people to have consensual underage sex. If the law were taken to its logical conclusion, all these young people would have to go on the CPOR.

Offences such as being in a sexual relationship with a child under sixteen (s321A Code) and sexual penetration of a child under sixteen (s321 Code) are offences, which, whilst on the face of it appear very serious, may not necessarily reflect a degree of criminality which would require a conviction to be recorded. The behaviour, although technically contrary to law, has not 'damaged' either party and can be properly dealt with by appropriate interventions and education. They are still, however, reportable offences.

We have observed a notable gender bias in the application of the law. Irrespective of the relative ages of the young people, we observe the law is enforced against males, and not against females, where one of the young people in a sexual relationship is under the age of 16.

By way of example, a young person had a relationship with a girl who was fifteen years old at the start of their relationship but had subsequently turned sixteen years old. There was an eighteen-month age gap between them. The parents of both young people knew about the sexual nature of their relationship. The offence of persistently engaging in sexual conduct with a child under sixteen (s321(A) Code) came to attention of SOMS because the young male had previously been convicted after trial for other offences which put him on the CPOR. He was at the time of the relevant court proceedings living with the girl and her family. She was pregnant, and they intended to marry. He did not receive a conviction for the latter offending but was none the less required to be 're-registered' and comply with onerous conditions for having a sexual relationship with a female whom he intended to marry and with whom he intended to have children.

In one instance, a young person's 'offence' only came to light because the girl's parents did not approve of the sexual activity. In other instances, rumours may be circulated about girls who are sexually active, and it is more the effect of the gossip rather than the effect of the sexual activity which is damaging and upsetting to the girl.

- (v) Offences where there is a mistake of law which does not afford a defence to a criminal charge but is mitigating. For example, young people in remote regions or who have an intellectual disability may not have a good understanding about the age of consent and that it is illegal to engage in consensual sexual activity with a child under 16.

An age difference of three years does not necessarily reflect the relative maturity of the parties. In some instances, the older person may be the less mature of the two.

**(d) The approach employed by other jurisdictions.**

Offender registration is not uniform across all jurisdictions of Australia. A child may be subject to mandatory registration in Western Australia for an offence that would not attract mandatory registration in another State.

In the Law Reform Commission of Western Australia *Community Protection (Offender Reporting) Act 2004* Discussion Paper (February 2011) at page 35 it was noted that: 'In the Commission's view this makes the Western Australian scheme the strictest of all Australian sex offender registration schemes'.

Judicial officers in Western Australia have no discretion as to whether a child is subject to CPOR registration for reportable offences, but judicial officers in some other Australian States do.

In some States there are minimum sentencing thresholds before there is registration but in Western Australia the sentence is immaterial, and a child is subject to registration once a finding of guilt is recorded on the record, in relation to a reportable offence. Given that CPOR information is shared with other States and countries with similar registers, this lack of a uniform national approach to juvenile sex offender registration is patently unfair.

Victoria, the Northern Territory, South Australia and Tasmania all allow judicial discretion as to whether to make an order that a juvenile offender is reportable:

**Victoria**

*Sex Offenders Registration Act 2004* (Vic) - Sections 11(2) and 11(2A):

- (2) If a court finds a person guilty of an offence committed as a child (including a Class 1, Class 2, Class 3 or Class 4 offence), it may order that the person comply with the reporting obligations of this Act.
- (2A) On an application by a police officer, a court may order that a person who is found guilty by a court of a foreign jurisdiction of an offence committed as a child (including a Class 1, Class 2, Class 3 or Class 4 offence) comply with the reporting obligations of this Act.

**Northern Territory**

*Community Protection (Offender Reporting) Act 2005* (NT) - Section 6:

Section 6: Order requiring registration of offender

- (1) The court is to make an order directing that –
  - (a) the Registrar cause the name of a person whom the court sentences for a reportable offence to be placed on the Register; and
  - (b) the person comply with the reporting obligations under this Act – unless the court is satisfied that the person does not pose a risk of committing a reportable offence in the future.

**South Australia**

*Child Sex Offenders Registration Act 2006* (SA) - Section 9:

**9—Child sex offender registration order**

- (1) A court may—
  - (a) on sentencing a person for an offence that is not a class 1 or class 2 offence; or

- (b) on sentencing a person for a class 1 or class 2 offence committed while the person was a child; or
- (c) on sentencing a person for a single class 2 offence where the sentence imposed does not include a term of imprisonment and is not a supervised sentence; or
- (d) on making a restraining order against a person under section 99AA of the *Summary Procedure Act 1921*, order that the person comply with the reporting obligations of this Act....
- (3) The court may only make an order under this section if, after taking into account any matter that it considers appropriate, it is satisfied that the person poses a risk to the safety and well-being of any child or children.
- (4) For the purposes of subsection (3), it is not necessary that the court be able to identify a risk to a particular child or particular children.
- (5) The court may only make an order under this section on the application of -
  - (a) in the case of an order to be made by a court that is dealing with a person for an offence—the prosecution; or
  - (b) in any other case—a police officer.

## **Tasmania**

In Tasmania, 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. *Community Protection (Offender Reporting) Act 2005 (Tas)* - Section 6:

### **6. Order requiring registration of offender**

- (1) The court is to make an order directing that –
  - (a) the Registrar cause the name of a person whom the court sentences for a reportable offence to be placed on the Register; and
  - (b) the person complies with the reporting obligations under this Act – unless the court is satisfied that the person does not pose a risk of committing a reportable offence in the future.
- (2) The court is to make the order at the time the person is sentenced for the reportable offence.
- (3) For the purposes of subsection (1), it is not necessary that the court be able to identify a risk of offending against a particular person or particular persons or a particular class of persons.

### **(e) Other relevant matters.**

#### Comments from the bench

In *Riggall v The State of Western Australia* [2008] WASCA 69, Justice Wheeler considered an appeal against sentence, in which the appellant sought a release without penalty order and a spent conviction order.

The appellant, who was a 22-year-old man, had pleaded guilty to two counts of indecent dealing with a child over the age of thirteen and under the age of sixteen, and two counts of sexual penetration of a child over the age of thirteen and under the age of sixteen. The pleas of guilty were entered on the basis that, although the appellant had an honest and reasonable mistake about the victim's age, it did not afford him a defence, as the actual age difference between them was more than three years.



Justice Wheeler at pages 13 and 14 of her decision outlined the reforms to the *Criminal Code* dealing specifically with offences against children, which were introduced in 1989 and 1992. She quoted at length from a speech in Parliament by the then Attorney General which dealt with the issue raised in Parliament at that time about sexual acts by juveniles which could theoretically be prosecuted but which are not. These comments make it clear that it was believed at that time that:

...the clear intention and target is not sexual activity as such but sexual activity involving some element of abuse. The whole point of this legislation is to protect children and not to prosecute them. In this context there is no reason to doubt that the prosecuting authorities and the courts will continue to act on that basis. (citing Parliamentary Debates (Legislative Council) 14 May 1992 page 2361)

Her Honour held that the appellant's offences were "technical", and she ordered that he be released without penalty and made a spent conviction order. Her Honour went on to consider the impact of the Act upon the appellant:

While the adverse effects of child abuse as revealed so often in this court, make it clear that children require firm protection from those who would abuse them, I would be inclined to doubt that Parliament, in enacting the provisions discussed above, considered the question of whether it was appropriate that they apply in exceptional cases such as the present. It may be appropriate that there be some consideration of whether some reform would be desirable, in order to deal with rare cases of this kind. However, that is not a matter for this court.

In a sentencing matter in 2017 (name withheld) Judge Davis, sitting as President in the Children's Court at Perth, made comments about the effect of CPOR registration for a young offender who was 13 years of age at the date of sentencing and who had a diagnosis of autism. Judge Davis said:

Is this family – and I say that "family" because X (name withheld) is not old enough to do the reporting, he will have to be taken by his parents – is this family going to be having to take X to the police station every two weeks, or month, or whatever is deemed appropriate? Is this the story? (page 7 of the court transcript)

... I don't understand why children are subjected to this. Why it's not at the discretion of a judicial officer, who knows the facts of the case, and can make a decision as to whether it's appropriate that a child be subject to those restrictions, frankly. (page 8 of the court transcript)

... Now, in terms of the Community Protection (Offender Reporting) Act, it's really, in my view, inappropriate that a child be subject to the provisions, but that is the rule, and there's no discretion. (page 22 of the court transcript)

In a sentencing matter in 2016 (name withheld) Judge Davis, sitting as President in the Perth Children's Court, made comments about the effect of CPOR registration for a young offender. Judge Davis said:

I do not understand why children are required to be on this register... there's no judicial discretion in relation to the registration of offenders where the circumstances of offending can vary so widely from what can be considered minor, low-level offending through to the more serious offending which would justify the registration of an offender. (page 12 of the court transcript)

Position of the Office of the Director of Public Prosecutions  
for Western Australia

The Office of the Director of Public Prosecutions for Western Australia (ODPP) has informed Legal Aid and reiterated in court, that the fact of a child being placed on the CPOR is not a matter which will be considered in any way as part of the discretion to prosecute, or to amend, or to withdraw a charge.

Recommendations

Legal Aid Western Australia recommends that there should be no automatic registration on the CPOR for children.

If the State wishes to make an application for a child to be registered as a reportable offender, Legal Aid is of the view that there should be an application by the State to the President of the Children's Court.

In that application, Legal Aid is of the view that the State should be required to produce cogent expert evidence in support of its application, such as psychiatric or psychological assessments, to prove that the young person poses a high and real risk of serious reoffending.

Legal Aid suggests that consideration of an order for registration as a reportable offender may include factors such as:

- Age and maturity of the child.
- Circumstances of the offence.
- The educational level of the child.
- Mental health considerations.
- Intellectual capacity or disability.
- Whether the child has been personally subject to sexual abuse.
- Whether the child is prepared to engage in counselling.

Prepared by: Sarah Dewsbury and Claire Rossi  
Youth Law Team  
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16 May 2019.