



Law Council
OF AUSTRALIA

Policy Statement on Registration and Reporting Obligations for Child Sex Offenders

Background

In every State and Territory of Australia, legislation has been enacted which requires people who have been found guilty of certain offences against children to be entered on a register of offenders. Registered persons must keep police informed, for a specified or indefinite period, about their place of residence, place of employment, interstate or overseas travel plans, the motor vehicle they drive and other matters relating to their contact or likely contact with children.

The legislation is based on the premise that knowledge of the whereabouts and activities of convicted sex-offenders:

- better enables police to prevent child sex abuse,
- assists in the investigation and prosecution of child sex offences committed by recidivist offenders,
- provides a deterrent to re-offending; and
- affords child abuse victims and their families an increased sense of security.

The legislation in each State and Territory is based on national model legislation which was formally agreed to by the Australasian Police Ministers' Council on 30 June 2004. However, differences remain between the legislative regimes of each jurisdiction.

CrimTrac maintains the Australian National Child Offender Register, which allows police from all jurisdictions to share information about registered persons and which enables alerts to be generated when registered persons notify that they are planning to travel interstate or overseas.

The Law Council does not object in principle to the maintenance of child protection registers of the type described.

However, acknowledging that inclusion on the register brings with it onerous reporting obligations; ongoing police monitoring of, and involvement in, one's activities; and the risk of adverse community attention, the Law Council is of the view that only offenders who pose a demonstrated risk to children should be required to register.

The experience of legal practitioners in recent years suggests that the registers do not always operate in this targeted manner.

People are automatically required to register upon a finding of guilt for a wide variety of offences. There are myriad factual scenarios which may lead to a successful prosecution for a qualifying offence, not of all which are indicative of a propensity for sexual predation. This is particularly the case where the qualifying offence involves:

- consensual sexual activity between young people;
- an isolated act of violence committed by one young person against another young person;
- kidnapping where there is no sexual motive (for example where a car is stolen and a child is in the back); or
- the possession, production or distribution (again, potentially by young people themselves) of material which falls within the outer reaches of the broad definition of child pornography.

Inclusion on the register, and the reporting obligations it entails, has the potential to extend a person's contact with police and the criminal justice system well beyond the expiry of any sentence they receive. Likewise, it casts the constant spectre of negative exposure and unwarranted discrimination over a person's future employment opportunities and engagement in the community. The consequences, particularly for first time and one-off offenders, can be unduly punitive.

For that reason, the Law Council's National Criminal Law Liaison Committee has formulated the following statement of principles, which the Committee submits ought to govern the operation of the register in each State and Territory. At present, there is no state and territory legislative regime which complies with all of the principles.

The Law Council notes that this Statement does not address in detail a range of particular concerns relevant to the inclusion of certain individuals on child sex offender registers, such as concerns relating to individuals experiencing mental illness or the inclusion of juveniles on the register. This Statement is intended to provide broad guidance as to the key principles that ought to be governing the operation of the register in each State or Territory.

Statement of Principles

➤ **Inclusion on a child offender register should not be arbitrary or automatic**

Inclusion on a register of child offenders should be at the discretion of, and by order of, the sentencing court, upon application by the prosecution.

Inclusion on a register of child offenders should not be automatic upon a finding of guilt for certain prescribed offences.

It will never be possible to definitively list the offences which appropriately qualify an offender for inclusion on a child offender register. A tendency to ensure that the list of qualifying offences is sufficiently comprehensive will inevitably result in the inclusion of some offences which, although potentially serious in nature, may also capture conduct which is at worst imprudent. Likewise offences may be included which, although they involve a child victim, are not sexually motivated or indicative of any broader propensity to target or harm children.

Inclusion on a register of child offenders should certainly never be automatic, where:

- there is a finding of guilt in a relation to a prescribed offence but the person is discharged or conditionally discharged without a conviction being recorded; or
- a conviction is recorded in relation to a prescribed offence but a custodial or supervisory sentence is not imposed.

However, it must be noted that a provision which exempts offenders from automatic inclusion on the register, where they are discharged without conviction or given a non-custodial sentence, should not be regarded as a substitute for judicial discretion. Such a provision is not an adequate safeguard against the inappropriate and unnecessary inclusion of certain offenders on a child offender register.

Whether a sentencing judge opts to discharge an offender without recording a conviction or opts to impose a non-custodial or supervisory sentence will depend on a wide variety of factors, which may or may not be relevant to whether the offender should be included on a child offender register. For example, such factors may include the offender's prior convictions for entirely unrelated crimes, such as drink driving or offences of dishonesty.

➤ **An offender should be required to register only where the sentencing court is satisfied that he or she poses a risk to the lives or sexual safety of one or more children, or of children generally**

If, upon a finding of guilt, the prosecution makes an application as part of the sentencing process that a person be required to register on a child offender register, the sentencing judge should so order where he or she is satisfied that the offender poses a risk to the lives or sexual safety of one or more children, or of children generally.

The onus should be on the prosecution to establish the existence of such a risk, based on the evidence presented and accepted during the preceding trial and any other material which is otherwise admitted and accepted in the course of the sentencing.

The offender should have the opportunity to respond to any such application.

To allay concerns that such a process may, through inadvertence, allow certain high risk offenders to escape inclusion on the register, it may be appropriate to make special provision for certain prescribed offences.

For example, in relation to certain serious sexual offences against children, a conviction for which will, in and of itself, almost certainly demonstrate the existence of the requisite risk, the relevant legislation may provide:

- that an application for inclusion on the register is deemed to have been made by the prosecution upon conviction and must be considered by the sentencing court; and
- that the sentencing court must order that the defendant be required to register unless satisfied that the offender *does not pose a risk* to the lives or sexual safety of one or more children, or of children generally.

➤ **There should be a right of appeal against a sentencing court's order that a person be required to register**

In order to exercise this right, the person required to register must have access to legal assistance for the purpose of pursuing the appeal, if the person is unable to afford his or her own legal representation.

Legal aid commissions should be adequately funded to provide legal assistance for these matters and commissions' guidelines amended to reflect this commitment.

➤ **Following a specified period of time, a person should be able to apply to have his or her name removed from the register**

The legislation governing the establishment and administration of child offender registers should provide that after the lapse of a specified period of time, a person on the register should be permitted to apply to a Court or Tribunal to have his or her name removed from the register.

This type of mechanism would ensure that persons placed on the register as children or young adults have an opportunity to have their name removed from the register as they mature and rehabilitate. Criteria should be provided in the legislation setting out the types of considerations a Court or Tribunal should take into account when determining an application for removal from the register.

➤ **The legislation governing the establishment and administration of child offender registers should clearly set out who may have access to information on the register and for what purposes.**

The information contained on child offender registers is of a highly personal nature and is collected and maintained for a very specific purpose. There is significant potential for the information on the register to be misused and, if broadly or improperly disclosed, to result in unwarranted discrimination and even persecution.

For that reason, the persons to whom, and the circumstances in which, information on the register may be disclosed should not be left to the discretion of the Police

Commissioner or police generally, even where there is a requirement that the discretion must be exercised in accordance with established protocols.

Offenders who are required to register and report should be able to know in advance the uses that may be made of the information provided and the persons or agencies to whom it may be disclosed.

- **Registered persons should be informed if information about them is disclosed to a person or agency, other than a law enforcement agency or officer**

Offenders on the register have the greatest interest in ensuring that their personal information is not improperly or unlawfully disclosed.

While police may investigate and take action in response to deliberately unlawful and unauthorised disclosures, there may be other circumstances where police mistakenly regard a disclosure as necessary and authorised by the legislation.

For this reason, a registered offender should automatically be notified if information about him or her is disclosed to a person or agency, other than a law enforcement agency or officer.

This would create the opportunity for offenders to challenge the legality of any disclosure (albeit after the fact), create the opportunity for meaningful court supervision of the disclosure provisions and encourage strict compliance with the legislation.

- **Registered persons should only be required and requested to provide police with information in accordance with the legislation.**

The legislation should list all the information which registered persons are required to report to police and keep updated.

The reporting process should not be used by police as an opportunity to obtain information from registered persons that they are not statutorily obliged to provide.

If the registration and reporting process is used as an opportunity to obtain information from registered persons, beyond that required to be provided by law, there is a risk that people will provide that information without understanding that they are not compelled to do so or because they feel pressured or intimidated by the circumstances. This risk can not be alleviated with a simple warning.

- **Registered persons must be able to provide information to police, in accordance with their reporting obligations, and police must verify that information, in a manner which does not in and of itself jeopardise the privacy of registered persons.**

Procedures should be in place which allow registered persons to fulfil their reporting obligations and which require police, when they seek to verify that information, to do so in a manner which does not require registered persons to declare their status before members of the public or which does not alert neighbours, employers or others to the fact that a person is on the register.

➤ **Unlawful disclosure of information on the child offender register should constitute an offence**

Disclosure of information on a child offender register by police is necessary for a range of legitimate purposes, for example disclosing information to housing authorities to allow a person on the register to be fast-tracked for new accommodation where allocated accommodation is unsuitable.

However, as the disclosure of information about a person on a child offender register has the potential to have a significant impact on an individual's life, including adversely affecting opportunities for employment and rehabilitation, it is also necessary to protect against and deter the unlawful use or disclosure of information on the register.

For this reason the legislation governing the establishment and administration of child offender registers should make it an offence for a person with access to the register to disclose that information for any purpose other than those situations authorised by law.

Many jurisdictions already make unlawful disclosure of information on a child offender register an offence, although the range of disclosures permitted under the respective legislation differs. Similar offences are in place with respect to the disclosure of spent convictions.

➤ **Unlawful disclosure offence provisions should be accompanied by a complaints based mechanism administered by an independent body such as the Privacy Commissioner.**

The inclusion of a complaint-based mechanism complements the principles described above with respect to informing persons on the register of any disclosures of their personal information. It has the advantage of empowering the person whose identity or other information has been disclosed to initiate a complaint and/or seek remedial action, rather than having to rely on the matter being pursued by the Crown.

Further, a complaint based mechanism ensures a higher degree of confidentiality than a prosecution based process, protecting against further public disclosure of the information that has been alleged to have been unlawfully disclosed. A similar mechanism exists in relation to spent convictions under section 55ZW of the *Crimes Act 1914* (Cth) enforced and administered by the Privacy Commissioner.