

The NSW Child Protection Register

Ongoing consequences of child sex offences and offences relating to non-compliance

Two Acts in NSW have established a Child Protection Register and create orders which control the conduct of people on the Register who allegedly continue to pose a danger to children. These are -

Child Protection (Offenders Registration) Act 2000

Child Protection (Offenders Prohibition Orders) Act 2004

In brief, the first act provides that registrable persons must register with police and provide information. The second act allows a Local Court to make orders restricting the conduct of registrable persons.

Neither of these Acts allow for public access to the information about sex offenders, which is the premise of Megan's Law in parts of the USA. Megan Kanka was a seven year old girl who was raped and killed by a twice convicted sex offender who had moved in next door.

While there are calls for public access to the register these have been resisted. Fred Nile has had private members bills before Parliament which would allow access to the register – Nicole's Law. There are unofficial child sex offender registers available online, but legislation across Australia follows the UK model where offender details are not published.

The theory behind the Child Protection Register is that child sex offenders are by nature recidivist offenders and that recording the details of known child sex offenders will assist in the prevention and detection of child sex offences. Research into the effectiveness of sex offender registration suggests that these laws do not reflect what is known about child sex offending and are ineffective in reducing offending.¹

Overview of the Legislation

The former NSW government was very proud of the fact that NSW was the first state to introduce a child sex offender register. The aims of the register are to –

- Increase and improve the accuracy of child sex offender intelligence held by police;

¹ Vess, Langskaill, Day, Powell and Graffam "A Comparative Analysis of Australian Sex Offender Legislation for Sex Offender Registries" Australian & New Zealand Journal of Criminology 44(3) 404-424 at 422.

- Assist in the investigation and prosecution of child sex offences committed by recidivist offenders;
- Provide a deterrent to re-offending;
- Assist in the monitoring and management of child sex offenders in the community; and
- Provide child abuse victims and their families with an increase sense of security.²

When the legislation was introduced in NSW in 2000, the Ombudsman was required to review its operation. This review was completed in May 2005 and tabled in Parliament in November 2007. The Ombudsman concluded that the Act had been largely successful in implementing its aims.³

During the course of the Ombudsman's review the Act was amended and the *Child Protection (Offenders Prohibition Orders) Act 2004* was enacted which allows orders to be made by the Local Court restricting the behaviour of persons registered under the Act.

Further amendments in 2009 have enacted a further type of order "Contact Prohibition Orders" where a Local Court may restrict a registrable person's contact with their victim or co-accused.

Sex offender registers now exist across Australia and there is a national database which allows police to share information.

Who goes on the Child Protection Register?

The *Child Protection (Offenders Registration) Act 2000* provides for two classes of offences.

Class 1 offences include the murder of a child and sexual intercourse with a child.⁴

Class 2 offences include acts of indecency, possession of child pornography, kidnapping of a child, filming a child for indecent purposes, and grooming offences.⁵

These definitions extend to –

- Any like offence committed in another jurisdiction

² Second Reading Speech Legislative Assembly 1 June 2000.

³ NSW Ombudsman *Review of the Child Protection Register - Report under s25(1) of the Child Protection (Offenders Registration) Act 2000* May 2005.

⁴ s3 *Child Protection (Offenders Registration) Act 2000*

⁵ s3 *Child Protection (Offenders Registration) Act 2000*

- Any offence in which there is an intention to commit a like offence with a child
- Attempting such an offence, conspiring or inciting the commission of such an offence.
- Any like offence committed prior to the commencement of this legislation.

A child is defined as a person under the age of 18.⁶

A person who is sentenced for a class 1 or 2 offence is required to comply with the requirement to register. A sentence includes detention under the *Mental Health Act 1990* and an undertaking under the *Pre-trial Diversion of Offenders Act 1985*.⁷

The only exemptions are –

- Where the matter is dismissed under section 10 of the *Crimes (Sentencing Procedure) Act 1999* or section 33 (1) (a) of the *Children (Criminal Proceedings) Act 1987*⁸ or
- Where a **child** is convicted of a single offence involving an act of indecency, possession of child pornography or filming for sexual gratitude.⁹

Persons convicted prior to the commencement of the Act are required to register if at 21 October 2001 they were an *existing controlled person*. This generally means a person serving a term of imprisonment (including home detention and periodic detention), a community service order or a person subject to strict supervision at the time of the commencement of the legislation.¹⁰

When a court sentences a person for an offence which is not a Class 1 or 2 offence it can still make an order that the person comply with the reporting obligations if the court is satisfied that the offender poses a risk to the lives or sexual safety of children.¹¹

Reporting Obligations

Initially a person was required to provide the following information –

- All their names

⁶ s3 *Child Protection (Offenders Registration) Act 2000*

⁷ s3A(1) *Child Protection (Offenders Registration) Act 2000*

⁸ s3A(2)(a) *Child Protection (Offenders Registration) Act 2000*

⁹ s3A(2)(c) *Child Protection (Offenders Registration) Act 2000*

¹⁰ s3 *Child Protection (Offenders Registration) Act 2000*

¹¹ s3D *Child Protection (Offenders Registration) Act 2000*

- Date of birth
- Principal address
- Their employment details
- Details of their motor vehicle(s)
- Details of their registrable offences.¹²

A registrable person is required to report annually¹³ and report any change in personal circumstances within 14 days of that change.¹⁴

Reporting must take place away from members of the public and the reporting person is entitled to be accompanied by a support person.¹⁵ A child or a person with a disability which makes it difficult for them to report, may nominate a person to report on their behalf.

In 2004 these obligations were extended to provide –

- Names and ages of any children with whom they ordinarily reside or have unsupervised contact
- Details of any club or organisation which has child participation or membership, where they have an affiliation.
- Details of tattoos or other distinguishing marks.
- Dates of interstate absences of over 14 days as well as regular short absences.¹⁶

The 2007 amendment extends these obligations to –

- Telephone services
- Internet service providers
- Type of internet connection (wireless, broadband, ADSL or dial-up)
- Details of email addresses, internet user names, instant messaging user names, chat room user names or any other names or identities used or intended to be

¹² s9 *Child Protection (Offenders Registration) Act 2000*

¹³ s10 *Child Protection (Offenders Registration) Act 2000*

¹⁴ s11 *Child Protection (Offenders Registration) Act 2000*

¹⁵ s12B *Child Protection (Offenders Registration) Act 2000*

¹⁶ ss9, 11A-11F *Child Protection (Offenders Registration) Act 2000*

used.¹⁷

DNA profiles, as well as fingerprints and photographs, are also to be recorded on the Register.

A person on the register must now have the approval of the Commissioner of Police to change his or her name.¹⁸

For how long does a person stay on the Register?

Reporting obligations commence when a person is sentenced or, if sentenced to gaol, when they are released.¹⁹

For a single Class 2 offence a person is required to report for eight years. For a single Class 1 offence or two Class 2 offences the reporting period is 15 years. For a Class 1 & Class 2 offence, or more than two registrable offences, the reporting period is for the remainder of a person's life.²⁰

For young persons these periods are halved and there is a maximum obligation of seven and a half years.²¹

In all cases a person on parole for a registrable offence is required to comply with the register.²²

There is a process where the Administrative Decisions Tribunal can suspend reporting obligations, but this is not available until after a person has reported for 15 years.²³

Working with Children

A person who is a registrable person, is a 'prohibited person' under the *Commissioner for Children & Young People Act NSW*. It is an offence for a prohibited person to undertake or even apply for child-related employment.²⁴

Some offenders may apply for a review of this classification by the Commissioner and including child sex offenders where there is an age gap of less than three years.²⁵

¹⁷ s9 *Child Protection (Offenders Registration) Act 2000*

¹⁸ See Part 3A *Child Protection (Offenders Registration) Act 2000*

¹⁹ s14 *Child Protection (Offenders Registration) Act 2000*

²⁰ s14A *Child Protection (Offenders Registration) Act 2000*

²¹ s14B *Child Protection (Offenders Registration) Act 2000*

²² s14C *Child Protection (Offenders Registration) Act 2000*

²³ s16 *Child Protection (Offenders Registration) Act 2000*

²⁴ s33C *Commissioner of Children & Young People Act 1998*

²⁵ s33G *Commissioner of Children & Young People Act 1998*

However, most registrable persons are not able to make this application.

The system of Working with Children Checks is to be overhauled by legislation which has been passed by the NSW Parliament, but not yet commenced.²⁶ There will be convictions which will still automatically bar a person from a Working with Children Clearance, and offences which trigger an assessment. These offences are much broader than those that trigger registration, and for example, include intentional wounding of a child (a disqualifying offence) and proceedings for offences under the *Prevention of Cruelty to Animals Act 1979* (triggers an assessment).²⁷

Anyone who is refused a clearance will be able to seek a review of this decision in the Administrative Appeals Tribunal, except a person convicted of the murder of a child.

Is the requirement to register extra-curial punishment?

In *KNL (2005) 154 A Crim R 268* the Crown appealed against a dismissal under s10 *Crimes (Sentencing Procedure) Act*. The sentencing judge had taken into account the extra-curial punishment entailed in the requirements to register under the Act in sentencing a 19 year old who pleaded guilty to sexual intercourse with a girl aged 12 (who was believed to be 16). The Crown appeal was allowed.

The CCA (Latham J, Brownie AJA & Buddin J agreeing) said -

49 ... I doubt that, in the circumstances of this case, the requirements as to registration under the *Offenders Registration Act* could be properly characterised as extra-curial punishment entitling the Respondent to any mitigation of penalty. The Respondent was not, at the time of sentence, or likely in the future to be, pursuing an occupation which gave him access to children. Many pieces of legislation require persons to register their details with police or other public authorities, in the interests of public health and safety, for example, legislation relating to the possession of firearms. The cases which have thus far considered the notion of extra-curial punishment have been restricted to physical and/or financial penalties sustained by offenders, or loss of employment in which the offender was engaged or qualified to be engaged, arising out of the commission of the offence. (See generally: **R v Daetz**; **R v Wilson** [2003] NSWCCA 216).

50 I do not mean to suggest that there could never be a case where extra-curial punishment might arise from the requirements of the *Offenders Registration Act*, but this case fell far short of any penal consequence being visited upon the Respondent because of a conviction. Even allowing for some regard to the requirements of registration and the potential restriction on employment, that factor deserved very little weight; **R v Daetz** at par 62.

However in *TMTW [2008] NSWCCA 50* the Court of Criminal Appeal held that in the

²⁶ *Child Protection (Working with Children) Act 2012*

²⁷ See www.newcheck.kids.nsw.gov.au

circumstances of that case the requirement to register was extra-curial punishment. In *TMTW* the offender was not considered to be a risk to children. Simpson J said -

52 It seems to me that the regime that will be imposed upon the applicant for a period of 8 years could properly qualify for the description 'extra-curial punishment'. The real question is whether that ought to operate in such a way as to reduce the sentence that is appropriate to the offending.

53 Bearing in mind that physical reporting is required only once in each year, I do not regard that requirement as such that it ought to be accorded any weight in the sentencing discretion. There may well, however, be a less tangible burden on an offender such as the appellant. He is, for eight years after his release, to be branded a sexual offender, to be known, at least to local police, in that capacity, and will be reminded of his crime, something he would, no doubt, prefer to put out of his mind. I do not regard this as entirely irrelevant.

These decisions were considered by the NSW Sentencing Council in its consideration of penalties for sexual assault offences. The Council formed the view that the fact of registration should not be a mitigating factor in sentencing an offender for the reason that:

it is impossible to quantify in any meaningful way at the time for sentencing the future impact of registration upon a person who becomes registrable.. and in particular, whether that person would have any realistic prospects of working with children that may be lost, or whether the fact of being known to police or of accepting any reporting obligation will come as any hardship.²⁸

Following this recommendation the *Crimes (Sentencing Procedure) Act* was amended to include the following prohibition –

24A Mandatory requirements for supervision of sex offenders and prohibitions against child-related employment to be disregarded in sentencing

- (1) In sentencing an offender, the court must not take into account, as a mitigating factor in sentencing, the fact that the offender:
 - (a) has or may become a registrable person under the *Child Protection (Offenders Registration) Act 2000* as a consequence of the offence, or
 - (b) has or may become the subject of an order under the *Child Protection (Offenders Prohibition Orders) Act 2004* or the *Crimes (Serious Sex Offenders) Act 2006*, or
 - (c) as a consequence of being convicted of the offence, is prohibited under the *Commission for Children and Young People Act 1998* from applying for or attempting to obtain child-related employment or from undertaking or remaining in child-related employment.
- (2) This section has effect despite any Act or rule of law to the contrary.

²⁸ Paragraph 6.62 p160 NSW Sentencing Council Penalties Relating to Sexual Assault Offences in NSW – Volume 1.

So while registration may be extra curial punishment (and it should be noted that the matters to be reported have significantly increased since 2007), it is a factor that a sentencing court must not take into account.

Additional Child Protection Orders

The *Child Protection (Offenders Prohibition Orders) Act 2004* allows the police to apply to the Court for a Child Protection Prohibition Order which has the effect of controlling the behaviour of offenders on the register.

To make such an order, the Local Court must be satisfied that there is reasonable cause to believe, having regard to the nature and pattern of conduct of the person, that the person poses a risk to the lives or sexual safety of children and that the making of the order will reduce that risk.²⁹ If the person is under 18, the court must also be satisfied that all other reasonably appropriate means of managing the conduct of the person have been considered before the order can be made.³⁰ Specific matters are to be considered and include the effect of the order in comparison to the risk and matters such as the person's accommodation, employment needs and integration into the community.

Interim orders can be made in the absence of the affected person if there is an 'immediate risk'.³¹

An order may prohibit–

- Associating with specified persons or kinds of persons.
- Being in specified locations or kinds of locations
- Engaging in specified behaviour
- Being in specified employment.³²

Commonly these orders seek a prohibition on being in the company of young persons, or a restriction on being in places where young people hang out such as shopping malls, libraries and other public spaces. Such orders are extremely restrictive and it can be very difficult to advise clients how to comply with such orders.

These orders may be consented to without the Court making the enquiries specified in the Act.³³ Hearings, including hearings for interim orders, must be held in the

²⁹ s5(1) *Child Protection (Offenders Prohibition Orders) Act 2004*.

³⁰ s5 (2) *Child Protection (Offenders Prohibition Orders) Act 2004*

³¹ s7 *Child Protection (Offenders Prohibition Orders) Act 2004*

³² s8 *Child Protection (Offenders Prohibition Orders) Act 2004*

³³ s10 *Child Protection (Offenders Prohibition Orders) Act 2004*

absence of the public.³⁴ Orders can only be made for a period of five years for an adult and two years for a child.³⁵

Part 2A of the Act provides for Contact Prohibition Orders which may prohibit contact with a victim of a registrable offence or a co-offender.³⁶ These orders can be made for only 12 months if the Local Court is satisfied that there are "sufficient grounds for making the order."³⁷ Exceptional circumstances are required if the order is made precluding contact with a close family member.³⁸

Offences of non-compliance

Section 17 of the *Child Protection (Offender's Registration) Act 2000* provides -

A registrable person must not fail to comply with any of the person's reporting obligations without reasonable excuse.

Section 17(2) provides -

In determining whether a registrable person had a reasonable excuse ... the court ... is to have regard to the following matters:

- (a) the person's age,
- (b) whether the person has a disability that affects the person's ability to understand, or to comply with, those obligations,
- (b1) whether the form of the notification given to the person as to the person's obligations was adequate to inform the person of those obligations, having regard to the person's circumstances,
- (c) any matter prescribed by the regulations,
- (d) any other matter the court considers appropriate.

It is a defence if a person was not notified of their obligations and was not otherwise aware: s17(3).

It is also an offence for any person to furnish information that the person knows to be false or misleading in a material particular: s18.

The maximum penalty for both offences was two years. It has now been increased to 5 years and is a Table 2 Offence (maximum two years in the Local Court).

There is no statute of limitations for offences under this Act.

³⁴ s14
³⁵ s6
³⁶ s16A
³⁷ s16C
³⁸ s16D

It is also an offence to breach a Prohibition Order. Section 13 provides that -

A person who is subject to a prohibition order must not, without reasonable excuse, contravene the prohibition order.

The maximum penalty for this offence is two years and has not been increased.

The offence of contravention of a contact prohibition order has a maximum penalty of 12 months.

The statistics for failure of comply with registration show that in about 25% cases the penalty imposed is a gaol penalty. As at 30 July 2012 there have been 418 cases failure to comply with reporting obligations and 23 cases of contravene prohibition orders (61% of which resulting in a custodial sentence).

The case of *Sivell* [2009] NSWCCA 286 held that the commission of registrable offence whilst subject to and in contravention of a Child Prohibition Order was an aggravating factor.

In the first two years of the operation of the Register the Ombudsman noted that 54 persons were charged with non-compliance. While only 4 percent of the total population of registered persons were charged, 10 of those charged were Aboriginal. Six of those charged were under 18 at the time of the registrable offence but only one was a young person at the time of the failure to comply with reporting obligations. Four persons were known to have a disability or special need, and only one was female.

What is ‘without reasonable excuse’?

The Accused will bear the evidential burden of raising the defence. Once the defence is raised, the Prosecution will bear the onus of proving, beyond reasonable doubt, that the Accused did not have a reasonable excuse. In practice I imagine the defence will have to produce cogent evidence of the reasonable excuse and convince the Magistrate that the failure to comply amounts to a ‘reasonable excuse.’

What amounts to a reasonable excuse will be determined by the individual facts in a matter with consideration to the legislative purpose of the offence: *Taikato v The Queen* (1996) 186 CLR 454. It has been said to be ‘no more and no less than an excuse that would be accepted by a reasonable person: *Taikato* per Dawson J.

For contraventions of contact prohibition orders reasonable excuses will include –

- Contact in compliance with another order of the court
- Where contact is unintentional, and immediately terminated

- Contact while in strict government custody.³⁹

The matters set out in s17(2) of the Registration Act focus on the accused's ability to understand their obligations. I wonder whether there could be reasonable excuses other than "I did not understand my reporting obligations"? For example, is it ever reasonable to forget over a 15 year period to report a change in your mobile service carrier, or an internet username. When moving house, is it a reasonable thing to overlook?

Considerations of the reasonableness of the requirements of the legislation are likely to be irrelevant. It is also unlikely that objections to the requirement to register, reasonable or otherwise, will not fall under reasonable excuse.

The fact that a standard of reasonableness is to be applied will mean that our clients will be judged by standards that apply to more organised and stable lifestyles.

Does it work?

The Child Protection Register is unusual in respect of the fact that it requires police to attempt to prevent crime rather than investigate reported crime. It requires the investment of significant resources to ensure that those required to report do so.

The legislation allows parliamentarians to make grand statements about the protection of children from the evils of child sexual abuse. It focuses on 'stranger danger' rather than the widespread incidence of intra-familial abuse by known offenders. There is a concern that public vilification of offenders may not assist to improve the low rate of disclosure from child victims.

Research in the US and the UK, has shown that Child Sex Offender Registers have been based on community agitation rather than a strong evidence base. There has not been a demonstrated reduction in child sex offences or in recidivism.⁴⁰

More optimistically, the NSW Ombudsman concluded -

The information provided to our review suggested that the Register has significant benefits in enhancing community safety. All stakeholders, including registered persons, were generally positive about the value of the Register. However, the Register is just one aspect of a broad range of child protection measures in place in NSW, and it should not create a false sense of security or be seen as the single solution to protecting children from sex offenders.⁴¹

³⁹ s16G(2)

⁴⁰ Australian Institute of Criminology "Is notification of sex offenders in local communities effective?" 5 June 2007.

⁴¹ Ombudsman's Review at page vi.