

**LAW REFORM COMMISSION OF
WESTERN AUSTRALIA
COMMUNITY PROTECTION
(OFFENDER REPORTING) ACT 2004
DISCUSSION PAPER – PROJECT 101
FEBRUARY 2011**

Prepared for
Law Reform Commission of Western Australia
heather.kay@justice.wa.gov.au

Prepared by
Law Society of Western Australia

Date
21 June 2011

The Law Reform Commission of Western Australia ("LRCWA") has produced a detailed discussion paper on the *Community Protection (Offender Reporting) Act 2004* ("CPA"). The CPA came into operation on 1 February 2005 and introduced a Sex Offender Registration ("SOR") scheme in Western Australia for adults and juveniles.

The SOR scheme set up in the CPA requires mandatory reporting by juveniles and adult offenders when persons are convicted of certain classes of offences as listed in the CPA. The reporting regime and the time limit for the offender's obligations under the CPA is dependent on the relevant class of offence for which the offender is convicted.

The LRCWA's terms of reference received from the State Attorney General in April 2009 was to examine and report upon the application of the CPA in relation to:

- (a) reportable offenders who are children when they commit the relevant reportable offence; and
- (b) reportable offenders who are over the age of 18 years of age when they commit the reportable offence in circumstances which are exceptional (for example persons who committed a reportable offence involving consensual sexual activity with a person, not being under the care, supervision or authority of the offender who the offender honestly and reasonably, but mistakenly, believed to be of or over the age of 16 years at the time the relevant reportable offence was committed).

and to report on the adequacy of and on any desirable changes to the existing law, practices and procedures in relation thereto having due regard to the necessity to preserve the central aims and efficacy of the legislation."

The reference was received from the State Attorney General after concerns were raised that the Western Australian SOR Scheme was unnecessarily capturing juvenile and other low risk and low level offenders.

The LRCWA's discussion paper is comprehensive. The paper examines the impact of the CPA on offenders to determine if mandatory registration remains appropriate or whether a discretionary approach is warranted. It examines in detail the CPA and equivalent legislation in other jurisdictions both in and outside Australia. It cites various case examples that demonstrate serious concerns about the fairness of mandatory registration for juveniles and adult offenders as a result of them being subject to the CPA. The paper advocates that

discretion should be available in certain cases where the courts should decide whether the registration is appropriate.

The LRCWA consulted with over 80 individuals and numerous agencies throughout Western Australia to ensure that its proposals for reform are practical.

The LRCWA discussion paper advances 19 proposals in relation to its terms of reference. Annexed as Appendix A are the proposals and questions asked by the LRCWA. In essence, the proposals, if enacted, will result in a court having discretion to make a sex offender reporting order in relation to juveniles who commit offences covered by the CPA and in exceptional circumstances for adult offenders.

The Law Society of Western Australia has previously established policies on the following issues:

1. Opposing mandatory sentencing.
2. Opposing the fettering of judicial discretion in the criminal law jurisdiction.
3. Supporting the principle that juveniles should be treated separately and differently from adults in the criminal law jurisdiction.

The Society has had regard to these policies in preparing this submission.

The Society supports all nineteen of the LRCWA proposals except Proposals 7(c) and 7(g). We disagree with 7(c) because for a juvenile offender, a 'group of at risk persons' ought at least be identified. We disagree with 7(g) because the prosecution should have to make the application immediately in relation to juvenile offenders.

We also provide the following answers to questions asked in the discussion paper by the LRCWA and listed A-H in Appendix A.

PROPOSAL 1

Exception for juvenile offenders convicted of a single prescribed offence

That regulation 8 of the *Community Protection (Offender Reporting) Regulations 2004 (WA)* be amended to include the newly enacted offences under ss 217–220 of the *Criminal Code (WA)*.

QUESTION A [page 98]

Prosecutorial policies

- (i) Should the Director of Public Prosecutions *Statement of Prosecution Policy and Guidelines 2005* be amended to provide specific criteria to be considered when determining if a juvenile should be prosecuted for a child sexual offence?

ANSWER

Yes. The Society has also had the benefit of considering Legal Aid Western Australia's (LAWA) submission and the Aboriginal Legal Service Western Australia (ALSWA) submission to the LRCWA and we endorse their answers. It is particularly important that specific criteria be included in prosecution policies regarding "boyfriend/girlfriend" cases. The Society also supports a criteria based mechanism for assessment of whether an offender should be placed on a sex offender register

- (ii) Should the decision to charge a juvenile with a child sexual offence be overseen by a senior police officer?

ANSWER

Yes. The decision to charge a juvenile should be overseen by a senior police officer who is guided by a prosecution policy.

PROPOSAL 2 [page 117]

PROPOSAL 2

Reporting on behalf of a juvenile reportable offender

1. That the *Community Protection (Offender Reporting) Act 2004 (WA)* be amended to provide that if a government agency is involved with a juvenile reportable offender to the extent that the agency is empowered to make decisions that impact on the status of the reportable offender's personal details (as defined under s 3 of the Act), a representative of that agency (if that representative is aware that the offender is a reportable offender under the Act) *may* notify police of any change to the offender's personal details as required under s 29 of the *Community Protection (Offender Reporting) Act 2004 (WA)*.
2. That s 66 of the *Community Protection (Offender Reporting) Act 2004 (WA)* be amended to provide that a juvenile reportable offender is not to be prosecuted for a failure to comply with section 29 of this Act if a representative of a government agency has provided the police with the required information within the stipulated timeframe.

QUESTION B [page 117]

Reporting on behalf of a juvenile reportable offender

Should the ability of a representative of a government agency to report on behalf of a juvenile reportable offender be limited to specified government agencies and, if so, what should those government agencies be?

ANSWER

Those agencies with responsibility for juveniles including the Department of Child Protection, the Disability Services Commission and the Department of Health should be able to report on behalf of a juvenile reportable offender but strict accountability guidelines need to be established. The Society would be concerned if agency reporting had the unintended consequence of reducing juvenile supervision and involvement with rehabilitative agency programmes.

PROPOSAL 3 [page 118]

PROPOSAL 3

Review of reporting frequency for juvenile reportable offenders

That the *Community Protection (Offender Reporting) Act 2004* (WA) be amended to provide that a juvenile reportable offender can seek a review of the frequency of his or her periodic reporting obligations imposed under s 28(3) of the Act.

QUESTION C [page 118]

Review of reporting frequency for juvenile reportable offenders

- (i) Do you consider that this right of review should be available before a court (and, if so, which court) or before a senior police officer (and, if so, how senior)?

ANSWER

The Society supports the view of the Chief Justice that the frequency of reporting arrangements be reviewable on application by either party to a magistrate. A supervising police officer, being a person no lower than the officer in charge of the relevant local police station, should have the power to reduce reporting obligations. We support adoption of the process suggested by Legal Aid for court applications.

- (ii) Should there be a limit on the number of times or frequency in which a juvenile reportable offender is entitled to seek a review of his or her period reporting obligations?

ANSWER

Applications for review should be available annually unless exceptional reasons are demonstrated for a more frequent review.

PROPOSAL 4 [page 120]

PROPOSAL 4

Provision of information for juvenile reportable offenders

1. That the Western Australia Police review its processes and procedures for advising juvenile reportable offenders of their obligations and rights under the *Community Protection (Offender Reporting) Act 2004 (WA)* to ensure that juvenile reportable offenders understand both their obligations and rights in relation to the scheme.
2. That the brochure provided to juvenile reportable offenders by the Western Australia Police be revised to ensure that the information is provided in a child-friendly, accessible format.

PROPOSAL 5 [page 125]

PROPOSAL 5

Power of the Commissioner of Police to suspend reporting obligations and remove a juvenile reportable offender from the register

1. That s 61(1) of the *Community Protection (Offender Reporting) Act 2004 (WA)* be amended to provide that if a person is a reportable offender only in respect of an offence committed by the person when he or she was a child, the Commissioner of Police must consider whether or not to approve the suspension of the reportable offender's reporting obligations.
2. That s 61 of the *Community Protection (Offender Reporting) Act 2004 (WA)* be amended to provide that the Commissioner of Police may, in addition to suspending the reportable offender's reporting obligations, remove the offender from the register.

PROPOSAL 6 [page 130]

PROPOSAL 6

Sex offender registration is not to provide any mitigation

That s 8 of the *Sentencing Act 1995 (WA)* be amended to provide that the fact that an offender is or may be subject to reporting obligations under the *Community Protection (Offender Reporting) Act 2004 (WA)* is not a mitigating factor.

PROPOSAL 7 [page 133]

PROPOSAL 7

Juvenile offender reporting orders

1. That s 6(4) of the *Community Protection (Offender Reporting) Act 2004 (WA)* be amended to provide that unless a person is a reportable offender because of subsection (3), a person is not a reportable offender merely because he or she as a child committed a reportable offence.
2. That a new section be inserted into the *Community Protection (Offender Reporting) Act 2004 (WA)* to provide that:
 - (a) If a court finds a person guilty of committing a Class 1 or Class 2 offence that occurred when the person was a child, the court *must* consider whether it should make an order that the offender comply with the reporting obligations under this Act.
 - (b) The court may make the order only if it is satisfied that the offender poses a risk to the lives or the sexual safety of one or more persons, or persons generally.

- (c) For the purposes of (b) above, it is not necessary that the court be able to identify a risk to a particular person or particular persons or a particular class of persons.
 - (d) The court may adjourn the proceedings if necessary to enable relevant information to be presented in court.
 - (e) If the court determines that it is necessary to adjourn the proceedings for the purpose of determining if a juvenile offender reporting order should be made, it may impose the sentence for the offence before the proceedings are adjourned for that purpose.
 - (f) The court should make the order at the time the person is sentenced for the offence or at the time the proceedings are heard after being adjourned pursuant to (e) above.
 - (g) If the court fails to consider whether it should make an order as required by (a) above, the prosecution can apply for an order to be made at any time within six months after the date of sentence.
3. That the offender or the state has a right to appeal the decision of the court to make or not to make a juvenile offender reporting order.

PROPOSAL 8 [page 133]

PROPOSAL 8

Calculation of reporting periods

That s 46 of the *Community Protection (Offender Reporting) Act 2004 (WA)* be amended to ensure that if a juvenile offender reporting order is not made in relation to a juvenile offender who was found guilty of a Class 1 or Class 2 offence and the juvenile offender again commits and is found guilty of a Class 1 or Class 2 offence, the applicable reporting period is calculated on the basis that the first abovementioned offence resulted in a juvenile offender reporting order.

PROPOSAL 9 [page 133]

PROPOSAL 9

Provision of information to the court

1. That s 21(2a) of the *Sentencing Act 1995 (WA)* be amended to provide that if the court gives instructions that it do so, a pre-sentence report is to set out matters that are relevant to the making of a juvenile offender reporting order under the *Community Protection (Offender Reporting) Act 2004 (WA)* in respect of the offender.
2. That s 47 of the *Young Offenders Act 1994 (WA)* be amended to insert a new subsection (1a) to provide that the court may request a report containing information that is relevant to the making of a juvenile offender reporting order under the *Community Protection (Offender Reporting) Act 2004 (WA)* including a psychological or psychiatric report.

QUESTION D [page 134]

Provision of information to the court

- (i) What is the best way to ensure that the court is fully informed of all relevant matters when deciding if a juvenile offender reporting order should be made?

ANSWER

The present system of juvenile justice, pre-sentence and when required, psychological reports, is adequate. Reports would need to be expanded to address the criteria on whether a juvenile reporting order should be made.

- (ii) Do you think the court should make the decision about whether a juvenile offender reporting order should be made after hearing from a wide variety of agencies and, if so, what agencies should be entitled or able to present evidence or submissions?

ANSWER

The Society would expect that the agency preparing the court ordered report would provide all of the relevant information to the court. Other agencies must co-operate in the provision of information for the report.

- (iii) Should the Commissioner of Police be empowered to direct other government agencies to provide the police with relevant information held about the offender to enable the police or the prosecution to make submissions to the court and/or present evidence?

ANSWER

The Commissioner of Police should not be empowered to obtain information. Only the Court should have the power to direct the flow of information. Ultimately the interests of policing are not the same as of the child or Court and it conceivable that if the Commissioner had such power it could lead to conflicts of interest and abuse of power.

PROPOSAL 10 [page 135]

PROPOSAL 10

Right of review for juvenile reportable offenders

1. That the *Community Protection (Offender Reporting) Act 2004* (WA) be amended to provide that a person subject to a juvenile offender reporting order (as set out in Proposal 7 above) may apply to the President of the Children's Court or to the District Court for a review of his or her registration status at any time after he or she has complied with the reporting obligations for at least half of the applicable reporting period or after he or she has attained the age of 18 years.
2. That an application for a review under this section can only be made once.
3. That upon an application the court may order that the offender is no longer subject to the juvenile offender reporting order if the court is satisfied that the offender does not pose a risk to the lives or sexual safety of one or more persons, or persons generally.
4. That the offender and the state have a right to appeal the decision of the court at the review.

PROPOSAL 11 [page 136]

PROPOSAL 11

Retrospective right of review for juvenile reportable offenders

1. That the *Community Protection (Offender Reporting) Act 2004* (WA) be amended to provide that an existing juvenile reportable offender may apply to the President of the Children's Court or to the District Court for a review of his or her registration status at any time.
2. That an existing juvenile reportable offender means a person who is subject to the *Community Protection (Offender Reporting) Act 2004* (WA) only as a result of a reportable offence committed while he or she was under the age of 18 years at, or immediately before, the commencement of the provisions that establish a discretionary juvenile reporting order.
3. That an application for a review under this section can only be made once.

4. That upon an application the court may order that the offender is no longer subject to reporting obligations under the Act and is to be removed from the register if it is satisfied that the offender does not pose a risk to the lives or sexual safety of one or more persons, or persons generally.
5. That the offender and the state have a right to appeal the decision of the court at this review.
6. That if the court hearing the application determines that the reportable offender should remain subject to the registration and reporting obligations under the *Community Protection (Offender Reporting) Act 2004* (WA) the reportable offender remains entitled to apply for a review in accordance with Proposal 10.

QUESTION E [page 138]

Alternative approach for juvenile child sex offenders

- (i) Should the court have an alternative therapeutic order available for juvenile offenders who are considered to pose a risk to the lives or sexual safety of any member of the community?

ANSWER

The Society agrees with LAWA's answer. There is much merit in the powers of the Children's Court being extended to make therapeutic orders.

- (ii) If so, what should be the requirements of the therapeutic order and what should be the consequence for successful and non-successful completion of the order?

In our view all therapeutic orders should return to court for further consideration at the conclusion of the order. Where an order has been successfully completed there should be a presumption in favour of no reporting or registration order being made. Where the order is not completed the Court should be able to extend or amend it or make reporting orders.

- (iii) Do you think that such a therapeutic order should be limited to juveniles under a certain age or should it potentially be available to all juvenile offenders who have been found guilty of a Class 1 or Class 2 offence?

Therapeutic orders should be made available to all juvenile offenders.

PROPOSAL 12 [page 152]

PROPOSAL 12

Notification of reporting obligations to children and persons with special needs

1. That the Western Australian government make regulations under s 114 of the *Community Protection (Offender Reporting) Act 2004* (WA) to provide for special measures for reportable offenders who are children and for reportable offenders with special needs who may have difficulties in understanding their reporting obligations and the consequences of non-compliance.
2. That such special measures should include the provision of a qualified interpreter, a written translation of the formal notice of reporting obligations, the assistance of a support person at the time notification is given and the provision for the person responsible for notifying the reportable offender to give notice to a parent, guardian, carer or other support person of the reporting obligations and the consequences of non-compliance.

PROPOSAL 13

Reporting on behalf of an adult reportable offender

1. That the *Community Protection (Offender Reporting) Act 2004* (WA) be amended to provide that if a government agency is involved with an adult reportable offender to the extent that the agency is empowered to make decisions that impact on the status of the reportable offender's personal details (as defined under s 3 of the Act) a representative of that agency (if that representative is aware that the offender is a reportable offender under the Act) may notify police of any change to the offender's personal details as required under s 29 of the *Community Protection (Offender Reporting) Act 2004* (WA).
2. That s 66 of the *Community Protection (Offender Reporting) Act 2004* (WA) be amended to provide that an adult reportable offender is not to be prosecuted for a failure to comply with s 29 of this Act if a representative of a government agency has provided the police with the required information within the stipulated timeframe.

QUESTION F [page 155]

Reporting on behalf of an adult reportable offender

Should the ability of a representative of a government agency to report on behalf of an adult reportable offender be limited to specified government agencies and, if so, what should those government agencies be?

ANSWER

The Society is less supportive of the concept of agency reporting on behalf of adult offenders. It should be confined to offenders who are mentally impaired and agencies which are directly involved in their care.

PROPOSAL 14 [page 157]

PROPOSAL 14

Review of reporting frequency for adult reportable offenders

That the *Community Protection (Offender Reporting) Act 2004* (WA) be amended to provide that an adult reportable offender can seek a review of the frequency of his or her periodic reporting obligations imposed under s 28(3) of the Act.

QUESTION G [page 157]

Review of reporting frequency for adult reportable offenders

- (i) Do you consider that this right of review should be available before a court (and, if so, which court) or before a senior police officer (and, if so, how senior)?

ANSWER

The officer in charge of the local police station should be able to reduce reporting requirements. There should be a right of review for either party to the Court that originally dealt with the matter.

- (ii) Should there be a limit to the number of times or frequency in which an adult reportable offender is entitled to seek a review of his or her periodic reporting obligations?

ANSWER

Applications for review should be available annually unless exceptional reasons are demonstrated for a more frequent review.

PROPOSAL 15 [pages 161–2]

PROPOSAL 15

Limited exemption for adult reportable offenders

1. That a new section be inserted into the *Community Protection (Offender Reporting) Act 2004 (WA)* to provide that if a court finds an adult offender guilty of a Class 1 or Class 2 offence and that offence would, apart from this section, result in the offender becoming a reportable offender, the court may consider whether it is appropriate to make an order that the offender is not a reportable offender if
 - (a) the offender makes an application under this section for an order that he or she is not a reportable offender; and
 - (b) the court is satisfied that the offender has demonstrated that there are exceptional circumstances.
2. That for the purpose of (1)(b) above, exceptional circumstances include:
 - (a) Where the relevant Class 1 or Class 2 offence involved consensual sexual activity with a person, not being under the care, supervision or authority of the offender, who the offender honestly and reasonably, but mistakenly, believed was of or over the age of 16 years at the time of the offence.
 - (b) Where the relevant Class 1 or Class 2 offence involved consensual sexual activity and the offender honestly believed that the conduct was not unlawful.
 - (c) Where the relevant Class 1 or Class 2 offence involved consensual sexual activity with a person under the age of 16 years and the offender was no more than 10 years older than the complainant at the time of the offence and the circumstances of the offence did not involve any abuse, coercion or breach of trust.
 - (d) Where the offender lacks the capacity to comply with his or her reporting obligations.
 - (e) Where the offender's culpability is significantly reduced because of a mental impairment or intellectual disability.
 - (f) Any other circumstance considered by the court to be exceptional.
3. That the court can only make an order that the offender is not a reportable offender if the court is satisfied that the offender has demonstrated that he or she does not pose a risk to the lives or sexual safety of one or more persons, or persons generally.
4. That for the purposes of 3 above, it is not necessary that the court be able to identify a risk to a particular person or particular persons or a particular class of persons.
5. That an application by the offender for an order that he or she is not a reportable offender must be made before the sentence is imposed.
6. That the court may adjourn the sentencing proceedings if necessary to enable relevant information to be presented to the court.
7. That if the court determines that it is necessary to adjourn the proceedings for the purpose of determining if an order should be made that the offender is not a reportable offender, it may impose the sentence for the offence before the proceedings are adjourned for that purpose.
8. That the court should make the order either at the time the person is sentenced for the offence or at the time the proceedings are heard after being adjourned pursuant to 6 above.

9. That the state or the offender has a right to appeal the decision of the court to make or not to make an order that the offender is not a reportable offender.

PROPOSAL 16 [page 162]

PROPOSAL 16

Calculation of reporting periods

That s 46 of the *Community Protection (Offender Reporting) Act 2004* (WA) be amended to ensure that if an order is made in accordance with Proposal 15 above (ie, that an adult offender is not a reportable offender in respect of a Class 1 or Class 2 offence) and the adult offender again commits and is found guilty of a Class 1 or Class 2 offence, the applicable reporting period is calculated on the basis that the offender was a reportable offender in respect of the first offence.

PROPOSAL 17 [page 162]

PROPOSAL 17

Provision of information to the court

That s 21(2a) of the *Sentencing Act 1995* (WA) be amended to provide that, if the court gives instructions that it do so, a pre-sentence report is to set out matters that are relevant to the making of an order that an adult offender is not a reportable offender under the *Community Protection (Offender Reporting) Act 2004* (WA).

QUESTION H [page 162]

Provision of information to the court

- (i) If an adult offender makes an application for an order that he or she is not a reportable offender under the *Community Protection (Offender Reporting) Act 2004* (WA) what is the best way to ensure that the court is fully informed of all relevant matters before it decides whether to make or decline to make the order?

ANSWER

The Society agrees that exemption from registration should occur where the offender satisfies the court that there were exceptional circumstances at the time of offending and demonstrates that there is no longer any risk.

- (ii) Do you think that the court should only make the decision about whether an order should be made that the offender is not a reportable offender after hearing from a wide variety of agencies and, if so, what agencies should be entitled or able to present evidence or submissions?

ANSWER

Registration applications should be dealt with at sentencing. The views of all relevant agencies should be included in the court ordered reports.

- (iii) Should the Commissioner of Police be empowered to direct other government agencies to provide the police with relevant information held about the offender to enable the police or the prosecution to make submissions to the court and/or present evidence?

ANSWER

No. The Commissioner of Police should not have such powers for the reasons expressed at D (1) above.

PROPOSAL 18 [page 163]

PROPOSAL 18

Right of review for adult reportable offenders

1. That the *Community Protection (Offender Reporting) Act 2004 (WA)* be amended to provide that an adult reportable offender may apply to the District Court for a review of his or her registration status at any time after he or she has complied with his or her reporting obligations for at least half of his or her reporting period.
2. That an application for a review under this section can only be made once.
3. That upon an application the court may order that the offender is no longer a reportable offender if it is satisfied that at the time the offender was sentenced there were exceptional circumstances and the offender does not pose a risk to the lives or sexual safety of one or more persons, or persons generally.
4. That the offender and the state have a right to appeal the decision of the court at the review.

PROPOSAL 19 [pages 163–4]

PROPOSAL 19

Retrospective right of review

1. That the *Community Protection (Offender Reporting) Act 2004 (WA)* be amended to provide that an existing adult reportable offender may apply to the District Court for a review of his or her registration status at any time.
2. That an existing adult reportable offender means a person who is subject to the *Community Protection (Offender Reporting) Act 2004 (WA)* as a result of a reportable offence committed while he or she was of or over the age of 18 years at, or immediately before, the commencement of the provisions that establish a limited discretionary system for adult offenders.
3. That an application for a review can only be made once before the qualifying period as set out in Proposal 18 above.
4. That upon an application the court may order that the offender is no longer subject to reporting obligations under the Act and is to be removed from the register if it is satisfied that there were exceptional circumstances (as defined in Proposal 15) and that the offender does not pose a risk to the lives or sexual safety of one or more persons, or persons generally.
5. That the offender and the state have a right to appeal the decision of the court at the review.
6. That if the court determines that the offender should remain subject to the registration and reporting obligations under the *Community Protection (Offender Reporting) Act 2004 (WA)* the reportable offender remains entitled to apply for a review in accordance with Proposal 18.



Hylton Quail
President