

DISCUSSION PAPER

Review of the *Child Protection (Offenders Registration) Act 2000*

Legal Aid NSW submission

to the Ministry for Police and Emergency Services

August 2013

About Legal Aid NSW

The Legal Aid Commission of New South Wales (Legal Aid NSW) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW) to provide legal assistance, with a particular focus on the needs of people who are economically or socially disadvantaged. Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house legal practice and through grants of aid to private practitioners. Legal Aid NSW also funds a number of services provided by non-government organisations, including 35 community legal centres and 28 Women's Domestic Violence Court Advocacy Services.

The Legal Aid NSW criminal law practice provides legal assistance and representation in criminal courts at each jurisdictional level throughout the State, including proceedings in Local Courts and Children's Courts, committals, indictable sentences and trials, and appeals. Legal Aid NSW provides grants of aid in certain circumstances for legal aid applicants opposing an application for a Child Protection Registration Order.

Legal Aid NSW specialist criminal law services include the Children's Legal Service (CLS), which advises and represents children and young people under 18 involved in criminal cases in the Children's Court. Another specialist service, attached to our Civil Law practice, is the Mental Health Advocacy Service, which provides and coordinates duty representation in metropolitan and regional NSW for people who are subject to involuntary treatment or detention under the *Mental Health Act 2007* and represents forensic patients under the *Mental Health (Forensic Provisions) Act 1990* (MHFPA).

Legal Aid NSW welcomes the opportunity to provide these comments. Should you require further information, please contact Annmarie Lumsden by email at Annmarie.Lumsden@legalaid.nsw.gov.au or by phone on 9219 6324.

Introduction

As the Discussion Paper notes, the registration scheme established by the Act was introduced, amongst other things, to:

- increase and improve the accuracy of police child sex offender intelligence;
- assist in the investigation and prosecution of child sex offences committed by recidivist offenders;
- provide a deterrent to re-offending;
- assist police from NSW and other jurisdictions in monitoring high-risk child sex offenders;
- assist in the management of child sex offenders in the community;
- provide child abuse victims and their families with an increased sense of security; and
- assist police to enforce the *Child Protection (Prohibited Employment) Act 1998* and the *Crimes Legislation Amendment (Child Sexual Offences) Act 1998*.

While these goals are appropriate, the design of the current registration system impacts negatively on many Legal Aid NSW clients, both adults and children, in unintended ways that do not further the goals of the scheme.

In relation to Victoria's similar registration scheme, the Law Council of Australia noted in 2011 that:¹

'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

[This] has the potential to extend a person's contact with police and the criminal justice system well beyond any sentence they receive. Likewise, it casts the constant spectre of negative exposure and unwarranted discrimination over a person's employment opportunities and engagement in the community.'

Legal Aid NSW accepts that certain infringements on the liberties of convicted offenders are justified if they further the protection of society. However, it is important that the measures taken are relative to the potential risk a person poses to the community, and that the measures target only those people who pose a risk.

This submission will not answer the specific questions asked in the Discussion Paper but rather will focus on the limited discretion of the courts under the current scheme, and the limited rights of subjects of registration to appeal a decision to place and/or keep them on the register. In particular, the submission will examine these issues as they apply to juvenile offenders and people with mental health and cognitive impairments.

Automatic inclusion on the register for Class 1 and 2 offences

Under the Act, a person automatically becomes a "registrable person" if they have been sentenced in respect of a "registrable offence" (subject to a few exceptions). While a court can make a Child Protection Registration Order in respect of people other than those sentenced for a "registrable offence", the Act does not give the court discretion to keep a person sentenced in respect of a registrable offence off the register, irrespective of the person's circumstances or the circumstances of the offence.

¹ Submission to the Victorian Sex Offender Registration Review, 8 July 2011

*Case Study 1:*²

Mary is an Aboriginal woman who has a history of mental illness and drug use. Mary stole a car in which, unknown to her, a child was in a car seat. She abandoned the car still not knowing the child was in there. She was convicted of kidnap and placed on the register. There was no mechanism open to Mary to appeal the decision on the basis that she was not a risk to children.

Application of the Act to juvenile offenders

As it currently applies, the registration scheme fails to adequately distinguish between the risks posed by adult and juvenile offenders. While the Act makes some distinctions in how the registration scheme applies to juveniles by halving the reporting periods and making some allowances in relation to indecency and child pornography offences, it does not go far enough to ensure that juveniles who commit offences against other children are dealt with in a manner appropriate to their age and circumstances.

Adults who commit sexual offences against children are likely to be sexual predators who exploit the power imbalances between them and their victims. On the other hand, while young offenders who commit sex offences against other children may continue to offend as adults, their future offending is more likely to be against peers and therefore not pose the sort of risks to children that the Act seeks to manage.

Juveniles are also unfairly impacted by the registration scheme because they may be criminalised for consensual sexual activity with people of similar age, or unknowingly commit Commonwealth child pornography offences by sending naked or sexualised images to other children of themselves or other children on their mobile phones and devices. While in some cases this behaviour is dealt with in accordance with s 33(1)(a) of the *Children (Criminal Proceedings) Act 1999*, thus exempting the offender from registration obligations, this is not always the case.

Case Study 2:

Graham pleaded guilty to 2 offences contrary to s66(C)(1) and one offence contrary to s66C(3) of the *Crimes Act 1900*.

Graham and his girlfriend were in a relationship and engaged in a consensual sexual relationship. The first of the 2 offences occurred when Graham was 16 and his girlfriend was 13, and 13 years 6 months respectively. The last offence occurred when Graham was 17 years 3 months and his girlfriend was 14 years 9 months.

The Magistrate sentenced Graham to probation orders and directed that no convictions be recorded. The Magistrate accepted the information in Juvenile Justice and psychologist reports that there was no suggestion of paedophilia. Notwithstanding, Graham is a registrable person subject to a reporting period of 7.5 years.

² Case studies have been de-identified for privacy reasons

Application of the Act to people with mental and cognitive impairments

Legal Aid NSW is of the view that the current provisions by which a person ordered to be detained in custody following a mental illness acquittal is deemed to have been sentenced are inconsistent with the verdict. They also add another layer of stigma and reporting requirements to the very stringent conditions on which such persons are conditionally released without any demonstrated benefit.

The safety of the community at large, including children, is the principle criteria which the Mental Health Review Tribunal must take this into account when ordering either conditional release or leave (ss43 and 49 *Mental Health (Forensic Provisions) Act 1990*). Typically conditions relate to compliance with treatment and monitoring of mental state, but also include drug and alcohol prohibition and testing and non-association or geographical restriction where appropriate. It is these conditions that provide a high degree of confidence in public safety with forensic patients, not the reporting and other requirements in the Act under review.

The reporting requirements imposed under the Act can also be complex and difficult to understand, particularly for a person with a mental or cognitive impairment. Legal Aid NSW knows of a number of instances where people on the register have breached their obligations, placing themselves at risk of incarceration, even while attempting to comply.

The defences in s 17(2) of the Act are not adequate in cases where, for example, a person's intellectual disability makes it unlikely that the person will be able to comply with the reporting requirements.

Case study 3

Tony has an intellectual disability. He had no criminal record before he was charged with sexual assault offences that occurred in May 1998. He was found unfit to be tried in relation to those offences as a result of his disability. It was decided that he did not understand the purpose of the hearing or the trial process. Nor did he understand the seriousness of the charges against him, or the consequences that would flow from a conviction. The District Court subsequently held a special hearing where Tony was found guilty of the offences and sentenced to a number of section 9 bonds for a period of two years. As a consequence he was placed on the Child Protection Register.

Since then Tony has been charged numerous times with failing to comply with his register reporting requirements and has on many occasions been convicted of these charges in his absence, bringing him into repeated contact with the criminal justice system and increasing his chances of being incarcerated.

Recommendations for reform

For the reasons set out above, Legal Aid NSW makes the following recommendations for reform.

1. That the Act is amended to enable a person sentenced for a registrable offence to apply for an exemption from registration at any time after sentence on the basis that the person does not pose a risk to children.

In making such a determination, it should be open to the Court to consider such factors as:

- the likelihood that the person will be unable to comply with the requirements because of physical, mental or cognitive impairment
- the fact that the incident was an isolated event that occurred some time ago and
- the fact that no beneficial purpose is served by registration.³

If such an amendment were made, the people on the register would be limited to those who posed the greatest risk to the community. This would also have the benefit of targeting limited resources more effectively.

2. That the Act is amended to provide that an offence committed by a person aged under 18 is not a registrable offence unless it is first established that they pose an ongoing risk to the safety of children.

If Recommendation 2 is not accepted, Legal Aid NSW proposes the alternatives in Recommendation 3.

3. a) That registration obligations apply automatically to juveniles only where they are sentenced “according to law” by a superior court; or
b) That the Act is amended to enable a person aged under 18 sentenced for a registrable offence to apply for an exemption from registration and/or reporting obligations at any time after sentence on the basis that the person does not pose a risk to children (as per Recommendation 1).

Conclusion

While Legal Aid NSW agrees that the policy objectives of the Act remain valid, there are a number of ways in which the terms of the Act are inappropriate to securing those objectives. The primary issue is the limited discretion of the courts under the current scheme, and the limited rights of subjects of registration to appeal a decision to place and/or keep them on the register. It is in this context that Legal Aid NSW makes the recommendations for reform.

³ See also Victorian Law Reform Commission Sex Offender Registration Review, Final Report (Tabled in Parliament on 18 April, 2012).