

# Child Protection Prohibition Orders (CPPO)

FACTSHEET

## What is a Child Protection Prohibition Order (CPPO)?

A CPPO is a specific order that features prohibitions against a person who is 'registered' pursuant to the *Child Protection (Offenders Registration) Act 2000* (NSW) (CPOR Act).

The most common CPPOs are made under section 7 (interim orders) and section 5 (final orders) of the *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW) (CPPO Act).

These are post-conviction orders but importantly, they are not made automatically as a consequence of conviction. An application for a CPPO should be carefully considered and, in appropriate cases, rigorously defended.

**Legal aid funding to oppose a CPPO is available pursuant to policy 4.18.8.**

The following tests need to be met:

- means test;
- availability of funds test;
- Legal Aid NSW must be satisfied that the conditions of the proposed order would **unreasonably restrict the applicant's personal freedom**; and
- there must be **reasonable prospects** either of successfully opposing the application or of the application being granted on amended terms that place less restriction on the liberty of the applicant.

## Thinking about CPPOs and unreasonable restrictions?



Think practically because children are everywhere...

A 'child' is a person aged under 18 years old.

Aside from home, where can your client go without being at risk of breaching a condition?



**A CPPO can be ordered for up to 5 years... a lot can change in 5 years.**

If you left your home, even for a short trip to your local shopping centre, would you be able to ensure that you did not contact or approach a child? Children are on buses, trains, working in retail and fast food, cinemas, concerts, in pharmacies and medical clinics, at the gym, at the beach, the local park and many other places which cannot be exhaustively identified. Contact with children is part of normal and essential social activities.

Images of children are abundant across social media and other internet applications and websites such as the news headlines and in print media. Imagine how more vulnerable people in the community would struggle to comply with a condition not to possess images of children? Imagine how difficult it would be to stay connected to family and friends, social networks and groups and work without the internet, even when there is not a global pandemic forcing people to isolate.

The difficulty complying with the strictures of a CPPO is compounded for vulnerable people in the community, particularly those living with physical, mental and/or cognitive impairment.

# Child Protection Prohibition Orders (CPPO)

FACTSHEET

## What jurisdictional issues arise?

An application can only be made if a person is a 'registrable offender' pursuant to the CPOR Act.

The 'Special Jurisdiction' of the Local Court applies (see Pt 4 of the *Local Court Act 2007*).

These are application proceedings and must be commenced in accordance with the Local Court Rules (*Local Court Act 2007 s 50; Local Court Rules 2009 r 5.13*).

The *Civil Procedure Act 2005* (NSW) does not apply (see schedule 1).

## What if my client is "unfit"?

As these proceedings are not governed by civil procedure, nor are they criminal, if your client is not able to participate in the proceedings due to mental illness or disability, their recourse is to seek a stay pursuant to section 64 of the *Local Court Act*. You will need to file and serve evidence to support a stay application.

## Fair notice to the defendant of an application for interim orders

Section 7 of the CPPO Act provides that interim orders can be made in the absence of the defendant and without notice. However, just because the court has power to make an interim order in these circumstances does not mean the power should be exercised, particularly not as a matter of course.

Natural justice requires notice and procedural fairness as does the *Local Court Act 2007* (ss 49 – 53) and Local Court Rules 2009. In circumstances where leave has not been sought to proceed without adequate notice to the defendant, the matter might be adjourned for an interim hearing on this basis alone.

If leave has been granted, this should be based on evidence to identify the steps taken to serve the application. If there is no evidence of attempts at service, leave provided might be flawed and unmeritorious. In any case where notice is lacking, there is fertile ground for cross-examination of the applicant officer on an adjournment application.

## Checklist: "The police are seeking interim orders, what do I do?"

1. There have been significant problems arising from interim orders being made by consent, often in a hurry due to the applications being listed on busy list day. You will need a lot of time to consider the conditions, formulate your advice and obtain comprehensive instructions in tandem with the onerous restrictions your client might be subject to at the end of the day. An adjournment application is likely the most appropriate course.
2. For interim orders to be made in the absence of consent, there *must* be an interim hearing. At an interim hearing the rules of evidence apply. An interim CPPO hearing is not a bail application or sentence hearing, it is more like a forensic procedure application. If the applicant officer is not at court for cross examination or there is not an affidavit to identify the provenance of documents, then you will have strong grounds to object to most of the application documents and the grounds (or submissions) derived from those documents. It is important to verify the provenance of documents that are tendered. For example, the facts of prior offending should be obtained from the court file as this is likely to reflect the agreed facts rather than the original police fact sheet that may have been subject to considerable change (particularly for indictable matters).

# Child Protection Prohibition Orders (CPPO)

## FACTSHEET

3. Stand your ground when it comes to the relevant safeguards in the *Evidence Act 1995* (NSW). Go to section 4 and read it together with section 75 which is the hearsay exclusion that applies to interlocutory proceedings. Section 75, as well as the business records exception, do not automatically apply - there must be evidence of where the documents came from. Also consider if the documents have been properly obtained, should the police have issued section 16 CPPO Act notices? Providing there is no other basis under the Evidence Act on which you can object, including after consideration of discretionary factors, the evidence can be admitted.
4. Notice and leave (see above). The police should be conducting the matter as model litigants and if they have not explained the lack of notice and lack of procedural fairness being afforded to your client then this may be relevant to a later costs application.
5. All CPPO proceedings must be conducted in closed court (see section 14 CPPO Act) including mentions and hearings. If the police are pressing for an interim hearing, it is reasonable to estimate that it will take about an hour of court time. Sometimes reading the documents filed with the application alone will take close to half an hour, in addition to time for you to cross-examine the applicant officer if necessary and mount your various objections to the documentary evidence.
6. The matters for the court's consideration are the exercise of discretion and application of the risk test. Therefore, even if the court perceives there to be an immediate risk, it retains broad discretion not to make an interim order.
7. Is an interim order necessary in response to an immediate risk to children? Are there any relevant forms of supervision already in force? For example, a CCO, ICO, parole order, ADVO, Extended Supervision Order (ESO), Community Treatment Orders for mental health, NDIS support.

If there is a supervisory regime in force that may be a comforting fact for a magistrate to consider when balancing whether they can fit an interim hearing in the list without notice.

8. If there are proceedings in the Supreme Court relating to an ESO or a strict parole order then the CPPO application may be an abuse of process, at least while there are similar proceedings on foot or a similar supervisory regime that is enforceable.

## Interim hearing test

### Section 7 CPPO Act: Interim prohibition orders

- (1) The Local Court *may* make an interim child protection prohibition order prohibiting a registrable person from engaging in specified conduct if it appears to the Local Court that it is necessary to do so to prevent an immediate risk to the lives or sexual safety of one or more children, or children generally.
- (2) An interim prohibition order may be made by the Local Court whether or not:
  - (a) the registrable person is present at the proceedings, or
  - (b) the registrable person has been given notice of the proceedings.
- (3) The Local Court is not required to be satisfied that the person is likely to pose a risk to a particular child or children or a particular class of children.
- (4) If an interim prohibition order is made by the Local Court, the Court must issue a court attendance notice requiring the registrable person to attend the Court for a further hearing of the matter as soon as practicable after the interim order is made.

# Child Protection Prohibition Orders (CPPO)

## FACTSHEET

- (5) At the further hearing, the Local Court may confirm the prohibition order (with or without variation) or revoke it.
- (6) An interim prohibition order remains in force until it is revoked or the relevant application is withdrawn or dismissed, whichever occurs first.
- (7) Section 5 does not apply to an application for an order under subsection (1).

Despite the limitation at subsection 7(7), as a general principle, it is desirable that an interlocutory hearing evaluates the final issue in dispute when determining any interim relief being sought: *Kolback Securities Ltd v Epoch Mining NL* (1987) 8 NSWLR 533. Having regard to this principle, it makes sense to consider the final outcome, including the question of whether it is possible for the evidence to be produced in admissible form at final hearing.

## Conditions

If you cannot resist an interim hearing and the magistrate is inclined to make an interim order, drill down on exactly what the conditions are, how they will affect your client and importantly, whether your client is going to be able to comply with the conditions. Remember, the purpose of the order is not to eliminate risk completely, but to strike an appropriate balance.

These orders are not dynamic. There is no one tasked with monitoring daily compliance with the order or providing your client with any form of flexibility as their behaviour improves. Instead, the orders remain ridged for up to 5 years. You can structure the conditions of the CPPO to include 'sunset clauses' so that the restrictions can be relaxed over time (a sunset clause would limit the length which some conditions of the CPPO apply). However, ideally a shorter order would allow police to bring another application to the court for review once the original order is close to expiration.

The types of conditions can **only** be prohibitions or restrictions. The orders should not include positive obligations, nor should conditions be framed as a means to abrogate the statutory protections pursuant to the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) by ordering consent to searches of a person or property (including electronic devices).

### Section 8 CPPO Act: Conduct that may be the subject of orders

- (1) A **prohibition order may prohibit conduct** of the following kind:
  - (a) associating with or other contact with specified persons or kinds of persons,
  - (b) being in specified locations or kinds of locations,
  - (c) engaging in specified behaviour,
  - (d) being a worker (within the meaning of the *Child Protection (Working with Children) Act 2012*) of a specified kind.
- (2) Subsection (1) does not limit the kinds of **conduct that may be prohibited** by a prohibition order.

The application will contain numerous proposed conditions. There is no 'pro forma' set of conditions similar to AVOs. While the conditions of CPPOs are usually similar, they vary as they are drafted by different police officers at different PACs.

## Negotiating

If you are instructed to negotiate the terms of the order, consider making offers "*without prejudice save as to costs*" in case you later seek to rely on your offer as a 'Calderbank offer' in a later costs application. For example, if you are instructed to make an offer to consent to certain conditions for a specific period of time but the offer is rejected, if a later hearing occurs and orders are made consistent with your offer, you may have a strong basis for a costs application.

# Child Protection Prohibition Orders (CPPO)

FACTSHEET

If you are instructed to consent to a CPPO, make sure you advise your client that be aware that any breach of a CPPO constitutes an offence that may render the person eligible for an Extended Supervision Order under the *Crimes (High Risk Offenders) Act 2007* (NSW). A CPPO will also trigger reporting obligations or either continue past the statutory period or recommence if the statutory period has expired pursuant to section 20A CPOR Act.

## Costs

Bear in mind that this is a costs jurisdiction. Costs could be awarded to either party pursuant to section 69 of the *Local Court Act 2007* (NSW):

- (1) The Court may award costs in application proceedings at its discretion and may determine by whom, to whom and to what extent costs are to be paid in or in relation to application proceedings.
- (2) The Court may order costs to be assessed on the basis set out in the legal costs legislation (as defined in section 3A of the *Legal Profession Uniform Law Application Act 2014*) or on an indemnity basis.
- (3) This section is subject to this Act, the rules and any other Act.

If the police proceed with an interim hearing without having witnesses present and prepare the evidence for the interim hearing inappropriately such that their conduct of the matter causes an undue waste of court time, you might consider either making a costs application or asking that "costs be reserved" (and ordering the transcript to better assess the merit of your costs application).

Whilst it is important to be wary of an adverse costs order, liability for costs should not deter you from advising your client to make appropriate challenges. Costs does not follow the proceedings like it does in civil cases and remember, even in criminal proceedings a defendant can be liable for costs.

## Take a cautionary approach to advice and acting on instructions to consent

When a person is legally represented and consents to an order, the court is entitled to act on that consent pursuant to section 10 of the CPPO Act, without having to be satisfied that the evidence meets the legal test (section 7 or section 5) unless the court is satisfied that it is in the interests of justice to conduct a hearing.

If your client refuses to accept advice about appropriate conditions, or you do not feel confident acting on instructions, for example, because your client is mentally ill or cognitive impaired, you might consider acting on their consent but urging the court to conduct a hearing because it is in the interests of justice.

## What happens next?

Before the final hearing, orders will be made for the filing and service of evidence. If the police believe they have filed all of their evidence, even if it is not in admissible form in your opinion, encourage them to state that on the record. You can then prepare your defence including engaging an expert without later being taken by surprise by new evidence.

Ideally the evidence of both parties will be filed and served before another mention date so that a hearing can be set and the parties can notify each other of witnesses required for cross-examination and the availability of those witnesses.

## Final hearing test

Section 5 of the CPPO Act (omitting subsections 5 and 6):

- (1) The Local Court **may** make a child protection prohibition order prohibiting a person from engaging in conduct specified in the order if it is satisfied that the person is a registrable person and that, on the balance of probabilities:
  - a) **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 one or more children, or children generally,** and
  - b) the making of the order will reduce that risk.

**NOTE: Even if the court is satisfied of the test, they still have the discretion not to make the order.**

The Second Reading Speech will help the court apply this test. It can be found [here](#).

- (2) The Local Court may make an order under this section against a young registrable person only if, in addition to the matters set out in subsection (1), it is satisfied that all other reasonably appropriate means of managing the conduct of the person have been considered before the order was sought.
- (3) In determining whether to make an order under this section against a registrable person, the Local Court is to consider the following:
  - a) the seriousness of each offence with respect to which the person is a registrable person,
  - b) the period of time since those offences were committed,
  - c) the age of the person when those offences were committed,
  - d) the age of each victim of the offences when they were committed,
  - e) the difference in age between the person and each such victim,
  - f) the person's present age,
  - g) the seriousness of the person's total criminal record,
  - h) the effect of the order sought on the person in comparison with the level of the risk that a further registrable offence may be committed by the person,
  - i) to the extent that they relate to the conduct sought to be prohibited, the circumstances of the person, including the person's accommodation, employment needs and integration into the community,
  - j) in the case of a young registrable person, the educational needs of the person,
  - k) any other matters it thinks relevant.
- (4) The Local Court is not required to be satisfied that the person is likely to pose a risk to a particular child or children or a particular class of children.

# Child Protection Prohibition Orders (CPPO)

FACTSHEET

## Appeals and Annulment Applications

If an order is made against your client at the conclusion of a contested hearing (including an interim CPPO hearing), an appeal can be filed in the District Court, but the orders will not be stayed (section 70, *Local Court Act 2007* (NSW)).

Appeals are made to the District Court pursuant to Part 3 of the *Crimes (Appeal and Review) Act 2001* (NSW) (CARA). Your client has 28 days to appeal or 3 months with leave of the District Court. An appeal in the Supreme Court may also be appropriate in circumstances which an error of law might have occurred.

The Supreme Court can also hear appeals of interim and final CPPO application decisions per the table below:

Supreme Court Appeals	Question of law	Question of fact	Question of mixed law and fact
Interim Order	Yes	No	No
Leave required?	Yes	N/A	N/A
	Section 52 of CARA and section 70(3) Local Court Act	Section 53(3) of CARA and section 70(3) Local Court Act	Section 53(3) of CARA and section 70(3) Local Court Act
Final Order	Yes	Yes	Yes
Leave required?	No	Yes	Yes
	Section 52 of CARA and section 70(3) Local Court Act	Section 53(1) of CARA and section 70(3) Local Court Act	Section 53(1) of CARA and section 70(3) Local Court Act

An interim or final CPPO can also be annulled at the Local Court (section 70(1)(a) of the *Local Court Act* and section 4 of CARA).

The reason this section has been included is to raise awareness of appeal avenues in higher courts which may add to the limited jurisprudence in this area of law.

## Revocation and variation

Applications to vary or revoke CPPOs can be made to the Local Court. These applications may be served on the original applicant officer or someone from the PAC where the applicant officer was working when the original application was filed.

Applications to vary or revoke a CPPO are made pursuant to section 11 of the CPPO Act and require leave. The applicant must satisfy the court that it is in the interests of justice for leave to be granted having regard to changes in the circumstances since the order was granted or last varied.

Clients can contact Legal Aid NSW to obtain advice about this at any time during the term of the CPPO. Legal Aid funding is available for variation or revocation applications in compliance with policy 4.18.9.

## Offences and defences

The offence of contravening a CPPO without reasonable excuse (CPPO Act s13) carries a maximum penalty of 5 years imprisonment.

Subsection 13(1A) of the CPPO Act also creates a defence (with the defendant bearing the onus of proof), if they have not received a copy of the prohibition order and were otherwise unaware of their obligations.

# Child Protection Prohibition Orders (CPPO)

## FACTSHEET

Unlike the CPOR Act, the CPPO Act does not prescribe the circumstances that might give rise to a 'reasonable excuse'. Subsection 17(2) of the CPOR Act may offer some guidance in this context. It prescribes the following factors that the court **must** have regard to in determining whether a registrable person had a 'reasonable excuse' for failing to comply with their reporting obligations:

- 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,
- c) 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,
- d) any matter prescribed by the regulations,
- e) any other matter the court considered appropriate.

It is possible that other defences may be available such as honest and reasonable mistake of fact.

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