

Child Protection Legislation Child Protection Register and Child Protection Prohibition Orders *‘Unscrambling the omelette’*

Presented by

- **Paul Coady**, NSW Public Defender
- **Dean Fernandez**, Solicitor in Charge, Sutherland Office, Legal Aid NSW
- **Diane Elston**, Accredited Specialist in Criminal Law, Indictable Team 1, Legal Aid NSW



The Child Protection Register – Major Issues

1. A finding that a person is a “Registrable Person” results in long term and onerous reporting obligations under the Child Protection (Offender Registration) Act. The risk of imprisonment for non-compliance is high.
2. A person, without a history of offending against a child, can become a Registrable Person. A wide range of trivial and non-criminal conduct can result in Registration.
3. The pathway to registration by way of application to a court is sometimes unfamiliar to lawyers and Magistrates alike, taking them by surprise in a busy list and cases have gone before the Supreme Court for judicial review.
4. Child Protection Offender Prohibition Orders (CPPO) that further restrict the liberty of registrable persons are being made more frequently and challenging solicitors to respond with sound advice and effective advocacy quickly.
5. The Child Protection Register is maintained by NSW Police and systemic errors have been identified by the Law Enforcement Conduct Commission’s Operation Tusket including mistakenly registering people and failure to register people.



What is the Child Protection Register?

- New South Wales was the first jurisdiction in Australia to introduce a mandatory registration scheme for persons convicted of sexual offences against children. In 2001 after the commencement of the *Child Protection (Offenders Registration) Act 2000* (NSW) (CPOR Act).
- After many amendments, the CPOR Act also applies to persons convicted of serious violent offences against children and those who have been ordered by a court to become a registrable person.
- Registrable persons must report their personal information to police, accurately and promptly or be liable to an offence that carries a maximum of 5 years imprisonment (ss. 17, 18 CPOR Act).
- Justice Fagan described the conditions of registration as giving rise to ‘enormous restrictions on liberty and privacy of the registrable person’ (*ON** [2020] NSWSC 1805 [10], also see [9]) and by Justice Latham as ‘onerous and extensive’ (*KE** [2018] NSWSC 941 [12]).
- Registration is the essential pre-requisite for police to apply for a Child Protection Prohibition Order (CPPO).



Police and the Child Protection Register

- The Child Protection Register is managed by NSW Police as a separate division of the Child Abuse and Sex Crimes Squad.
- A registrable person is usually assigned a case officer, that is a NSW Police officer responsible for updating a registrable person's case comments file with information about that registrable person obtained by enforcing and investigating compliance with reporting obligations and intelligence gathering.
- The case officer is often responsible for conducting 'inspections' to confirm compliance with reporting obligations at a person's residence which can be done twice in the first year after the person's initial report as a registrable person and once each year for the duration of the reporting period (s. 16C CPOR Act).
- The case officer or another officer with appropriate delegation may apply for a CPPO.



Pathways to Registration: “Automatic Registration”

- A person will be included on the register if they are a ‘registrable person’ for the rest of their life.
- A ‘registrable person’ is a person whom a court has sentenced in respect of a registrable offence (s. 3A CPOR Act) or been ordered by a court to become a registrable person.
- A ‘registrable offence’ is defined in the CPOR Act as a ‘Class 1’ or ‘Class 2’ offence. Broadly, these are offences involving very serious violence or sexual offending against a child (see s. 3 ‘Definitions’ CPOR Act for the complete list).
- There are exceptions for non-conviction and mental health diversionary orders for state offences and for young offenders. Interestingly, non-conviction for a federal offence still results in registration (**these exceptions also apply to eligibility for ‘discretionary’ registration**).
- The reporting period is time limited according to the Class of the offence/s , application of the ‘single incident’ definition, whether the person is a juvenile and whether they are a repeat offender (ss. 14A, 14B CPOR Act).



Pathway to Registration: “Discretionary Registration”

- Does the person pose a risk to the lives or sexual safety of one or more children, or of children generally?

s. 3D CPOR Act	At the sentence hearing of a non-registrable offence and an application is made by the prosecutor. Any type of offence
s. 3E CPOR Act	Within 60 days of sentence for a non-registrable offence and an application is made to the Local Court by the Commissioner of Police. Any type of offence
s. 3F CPOR Act	At anytime for old offences that are now registrable offences but previously were not such as manslaughter of a child, or foreign equivalent registrable offence i.e. sexual assault of a child committed by a person in England who comes to be in NSW. The is no time limit and no requirement to be on current supervision

- Section 3AA – “Shopping list” of mandatory factors to consider.
- Effect of order: Registration for life, 8 year reporting period



Discretionary Registration: s 3D

3D Child protection registration orders made during criminal proceedings

- 1) If a court finds a **person guilty of an offence that is not a Class 1 or a Class 2 offence**, it may order that the person comply with the reporting obligations of this Act.
- 2) A court may make an order under this section only if—
 - a) the court is satisfied that the person poses a risk to the lives or sexual safety of one or more children, or of children generally, and
 - b) the court imposes a sentence on the person in relation to the offence (other than an order under section 10 of the Crimes (Sentencing Procedure) Act 1999 or section 33 (1) (a) of the Children (Criminal Proceedings) Act 1987), and
 - c) an application for the imposition of the order is made by the prosecution.

Note—

The effect of subsection (2) (b) is to prevent a child protection registration order being made in certain circumstances if an order is made dismissing the charge or conditionally discharging the offender.



Discretionary Registration: s 3E

3E Orders made after conclusion of criminal proceedings

- 1) The Local Court may, on application by the Commissioner of Police, order a person who has been sentenced by a court of New South Wales in respect of an offence that is not a Class 1 offence or a Class 2 offence to comply with the reporting obligations under this Act.
- 2) The Local Court may make an order under this section only if—
 - a) the Court is satisfied that the person poses a risk to the lives or sexual safety of one or more children, or of children generally, and
 - b) the sentence imposed on the person in respect of the offence was not an order under section 10 of the Crimes (Sentencing Procedure) Act 1999 or under section 33 (1) (a) of the Children (Criminal Proceedings) Act 1987.

Note—
The effect of subsection (2) (b) is to prevent a child protection registration order being made if an order is made dismissing the charge or conditionally discharging the offender.

- 3) An application for an order under this section must be made within 60 days after the person with respect to whom the order is sought is sentenced for the relevant offence.
- 4) For the purposes of Division 6 of Part 3, if the Local Court makes an order in respect of a person under this section, the person is taken to have been found guilty of, and sentenced for, a Class 2 offence on the date an order under this section is made.



Discretionary Registration: s 3F

3F Orders made in relation to foreign offences and old offences

- 1) The Local Court may, on application by the Commissioner of Police, order any of the following persons to comply with the reporting obligations of this Act—
 - a) a person who has been found guilty of an offence against the law of a foreign jurisdiction that, if the offence had been committed in New South Wales, would have been an offence under the law of New South Wales, and who is not otherwise a registrable person in respect of that offence,
 - b) a person who has (at any time) been sentenced by a court for a Class 1 offence of which the person was found guilty before 15 October 2001, unless the person was a child at the time that the offence was committed,
 - c) a person who has (at any time) been sentenced by a court for an offence referred to in paragraph (a), (a2) or (c1) of the definition of Class 2 offence in section 3 (1), of which the person was found guilty before the commencement of this paragraph, unless the person was a child at the time the offence was committed.
- 3) The Local Court may make an order under this section only if it is satisfied that the person poses a risk to the lives or sexual safety of one or more children, or of children generally.
- 4) For the purposes of Division 6 of Part 3, if the Local Court makes an order in respect of a person under this section, the person is taken to have been found guilty of, and sentenced for, a Class 2 offence on the date an order under this section is made.
- 5) Section 51 of the Local Court Act 2007 does not apply to proceedings for an order under this section.
- 6) The fact that an offence in respect of which a person has been found guilty is spent does not prevent the making of an order under this section.
- 7) For the purposes of this section, an offence is spent if, under a law in any jurisdiction, the person is permitted not to disclose the fact that the person was convicted or found guilty of the offence.



- There is no legislative provision that permits the court hearing the application to act on the consent of the respondent, that is, the court must be independently satisfied that the legal test has been met even in the absence of any contest
- The court **may** make an order on application under section 3D, 3E and 3F if **'...The court is satisfied that the person poses a risk to the lives or sexual safety of one or more children, or of children generally'**.
- This test is informed by section 3AA

3AA Risk to sexual safety of children—meaning

- (1) For the purposes of this Act, a person poses a risk to the lives or sexual safety of one or more children, or of children generally if there is a risk that the person will engage in conduct that may constitute a Class 1 offence or a Class 2 offence against or in respect of a child or children.
- (2) In order for a court to be satisfied that a person poses a risk to the lives or sexual safety of one or more children, or of children generally, it is not necessary for the court to be able to identify a risk to particular children, or a particular class of children.
- (3) A court is to take the following into account in determining whether a person poses a risk to the lives or sexual safety of one or more children, or of children generally—
 - a) the seriousness of each registrable offence committed by the person,
 - b) the age of the person at the time each of those offences was committed,
 - c) the age of each victim of each of those offences at the time that the offence was committed,
 - d) the seriousness of any other offences committed by the person,
 - e) the impact on the person if the order being sought is made compared with the likelihood that the person may commit a registrable offence,
 - f) any other matter that the court considers to be relevant.

Exceptions: *KE v Commissioner of Police* [2018] NSWSC 941 and *M* v Commissioner of Police* [2022] NSWSC 337

- Highlights some of the confusing but very important exceptions that apply to young offenders:
 - same incident exclusion (s. 3A);
 - Discretionary power (s. 3C); and
 - halved reporting periods (s. 14B).
- The significance of ‘same incident’ not just for children but is relevant to calculating reporting periods for adult offenders (s. 14A(4)).
- A source of error identified in Operation Tusk and lawyers from the defence and prosecution.

3(3) ...offences arise from the **same incident** only if they are committed within a single period of 24 hours and are committed against the same person.

3C Discretion to treat child offender as non-registrable

- (1) A court that sentences a person for a sexual offence committed by the person when the person was a child may make an order declaring that the person is not to be treated as a registrable person for the purposes of this Act in respect of that offence.
- (2) While the order remains in force, the person is not a registrable person under this Act because of that offence.
- (3) A court may make an order under this section only if:
 - (a) the victim of the offence was under the age of 18 years at the time that the offence was committed, and
 - (b) the person has not previously been convicted of any other Class 1 offence or Class 2 offence, and
 - (c) the court does not impose in respect of the offence:
 - (i) a sentence of full-time detention, or
 - (ii) a control order (unless the court also, by order, suspends the execution of the control order), and
 - (d) the court is satisfied that the person does not pose a risk to the lives or sexual safety of one or more children, or of children generally.



The Child Protection (Offenders Prohibition Orders) Act – “CPPOs”

- Interim orders
 - Orders made in the absence of the respondent and the challenges around fair and reasonable notice.
- Interim and final orders in the absence of your client can be annulled (s. 4 CARA; s 70(1)(a) *Local Court Act*) and interim and final orders can be appealed to the District Court.
- The court can act on consent from the respondent (unlike CPOR 3D, 3E and 3F applications) but within limits and having regard to the interests of justice (s. 10 CPPO Act).
 - ‘Child Protection Prohibition Order Consent’ form.
- There are no standard conditions of a CPPO although police do use a ‘standard condition’ format routinely.
- Conditions are limited to prohibitions, not obligations i.e. a condition to consent is arguably outside section 8 powers.
- Orders can be made for up to 5 years but there is no limit on the number of further applications that can be made and leave is required to vary or revoke an order and there must be a change in circumstances.



Child Protection Prohibition Orders – Interim Orders

7 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.
- 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).



Child Protection Prohibition Orders – Final Orders

5 Local Court may make child protection prohibition order

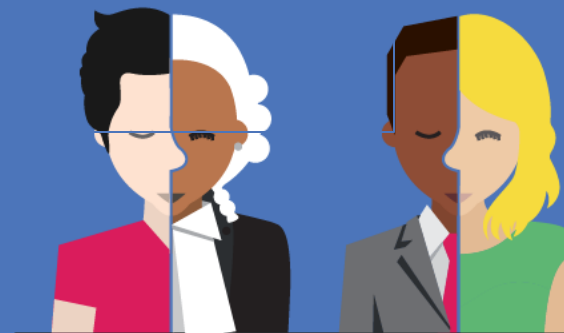
- 1) The Local Court may make a child protection prohibition order prohibiting a person from engaging in conduct specified in the order if it is satisfied that the person is a registrable person and that, on the balance of probabilities:
 - a) there is reasonable cause to believe, having regard to the 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.
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.



Child Protection Prohibition Orders – Orders by Consent

10 Orders by consent

- (1) The Local Court may make a prohibition order (other than an interim prohibition order), without being satisfied as to the matters referred to in section 5, if the applicant and the registrable person consent to the order.
- (2) The Local Court may make an interim prohibition order, without being satisfied as to the matters referred to in section 7, if the applicant and the registrable person consent to the making of the order.
- (3) The Local Court is not required to conduct a hearing before making an order under this section unless the Local Court is of the opinion that it is in the interests of justice to conduct the hearing.
- (4) Without limiting subsection (3), in determining whether it is in the interests of justice to conduct the hearing the Local Court may have regard to the following:
 - (a) whether the registrable person has obtained legal advice in relation to the order concerned,
 - (b) Whether the person:
 - (i) Has impaired intellectual functioning , or
 - (ii) Is subject to a guardianship order (within the meaning of the Guardianship Act 1987), or
 - (iii) Is illiterate, or is not literate in the English language, or
 - (iv) Is subject to some other condition that may prevent the person from understanding the effect of giving consent to the order.
- (5) A registrar of the Local Court may not exercise the functions of the Local Court under this section.



Operation Tusket

- Since 2002 the NSW Police Force has made over 700 incorrect decisions about the administration of the Child Protection Register.
- Be aware of the potential for an error when acting for a registerable person.
- Extended Legal Assistance is available to investigate potential errors and seek internal review from NSW Police.
- Some errors may be suitable for judicial review.
- LECC recommended the CPOR Act be referred to the Law Reform Commission and this has not occurred.

THE NEW SOUTH WALES CHILD PROTECTION REGISTER: OPERATION TUSKET FINAL REPORT

2019

LECC
Law Enforcement
Conduct Commission



Practical Tips

1. CPOR Act and CPPO applications are not/should not be easy, and they require solicitors in the Local Court to scrutinise them with care. Take your time with these, and seeking adjournments for a sufficient period to prepare the matter is desirable.
2. The applications filed by NSW Police (in both CPOR Act and CPPO applications) and the material filed in support of them routinely include unqualified opinion evidence as to risk and submissions relying on out-of-date materials (comprising, principally, of original 'police facts sheets') and require practitioners to 'investigate' and insist on more accurate information.
3. For CPOR Act applications (particularly those under the 'discretionary pathway' to registration under ss 3D, 3E and 3F), remember the mandatory considerations under s 3AA.
4. For CPPOs, remember there are different tests under s 7 interim orders ('necessary to prevent an immediate risk') and s 5 final orders ('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 the making of the order will reduce that risk').
5. If a CPPO is likely to be made noting instructions or court orders, advocate to ensure that conditions imposed on your client are reasonable, proportionate, and tailored enough to their 'risk profile' (although s 8 of the CPPO Act does not limit the kinds of conduct prohibited by a CPPO, s 5 does limit the making of orders that 'reduce the risk' based on the person's nature and pattern of conduct).



Thank you

Please refer to our resources sheet for
cases and materials

