

# The Shopfront

## YOUTH LEGAL CENTRE

CPOR Act Review  
Ministry for Police and Emergency Services  
GPO Box 5434  
SYDNEY NSW 2001

23 August 2013

### ***Child Protection (Offenders Registration) Act Review***

The Shopfront Youth Legal Centre welcomes the opportunity to make a submission in response to your Discussion Paper.

#### **About the Shopfront Youth Legal Centre**

The Shopfront Youth Legal Centre is a free legal service for homeless and disadvantaged young people aged 25 and under. Established in 1993 and based in Darlinghurst in inner-city Sydney, the Shopfront is a joint project of Mission Australia, the Salvation Army and the law firm Herbert Smith Freehills.

The Shopfront's main area of practice is criminal law. Two of our solicitors are accredited specialists in criminal law; one is also an accredited specialist in children's law. Our four solicitors appear almost daily for vulnerable young people in the Local, Children's, District and occasionally Supreme Courts. We also provide legal advice and assistance to young people in their capacity as victims of crime.

The Shopfront's clients come from a range of cultural backgrounds, including a sizeable number of indigenous young people. Common to nearly all of our clients is the experience of homelessness: most have been forced to leave home due to abuse, neglect, domestic violence or extreme family dysfunction. Most of our clients have limited formal education and therefore lack adequate literacy, numeracy and vocational skills. A substantial proportion also have a serious mental health problem or an intellectual disability, often co-existing with a substance abuse problem.

#### **Scope of this submission**

In this submission we will focus on the registration obligations of young people who have committed registrable offences when aged under 18.

In our view, greater discretion should be built into the legislation to ensure that young people who do not pose a risk to the safety of children are not placed on the register. We are also of the view that reporting obligations for juvenile offenders should be modified so they are more appropriate to the offender's age and circumstances.

The Shopfront has worked with thousands of young people who have been sexually assaulted or abused as children, mainly by adults but sometimes by older children, often within their own family. We have also acted for a relatively small number of young people who have been charged with committing sexual offences against other young people.

We also provide legal advice and education to young people, youth workers and adolescent health professionals about legal issues relating to the age of consent, the provision of sexual health services, and behaviours such as sexting.



We are deeply concerned about the protection of children from sexual abuse. However, we are also concerned about young people being inappropriately criminalised for sexual behaviours which do not cause significant harm or pose a risk to other children.

We would welcome the opportunity to make further comments or to attend consultations if you consider this would be helpful. In this regard, please do not hesitate to contact me, preferably by email at [jane.sanders@theshopfront.org](mailto:jane.sanders@theshopfront.org)

Yours faithfully



**Jane Sanders**  
Principal Solicitor

## **1 Application of Child Protection (Offenders Registration) Act to juvenile offenders**

The current Act applies to juvenile offenders in much the same way as it applies to adult offenders, with some modifications. The main differences between the treatment of adult and juvenile offenders under the Act are:

- (a) A single act of indecency or child pornography offence committed by a juvenile is not a registrable offence.
- (b) The reporting periods that apply to adult offenders are halved for juvenile offenders (or, the case of lifetime reporting, reduced to 7½ years).

While these provisions somewhat soften the impact of the act on juvenile offenders, in our view they are inadequate. They fail to acknowledge that juvenile offenders are inherently different from adult offenders, and do little to ensure that juveniles who commit offences against other children are dealt with in a manner appropriate to their age and circumstances.

## **2 Impact of registration obligations on juvenile offenders**

The following case study illustrates the impact that registration obligations may have on juvenile offenders. While this is an unusual (some would say extreme) case, it illustrates the inappropriateness of automatically applying registration obligations to juvenile offenders.

Gina (not her real name) is 20 years of age, and was referred to us when she was 17 by her alcohol and other drug counsellor.

At the age of 13, Gina was groomed online by a man in his twenties posing as a teenage boy. After several months he persuaded Gina to strip and to perform sexually explicit acts in front of a webcam. He eventually persuaded her to get her 9-year-old brother involved.

It turned out that the perpetrator was an overseas resident who was being investigated by police in several countries for online grooming of young people. Police discovered images of Gina and her brother on his computer, and traced them back to Gina.

Gina was charged with several counts of "incite victim under 10 years to commit indecent act". Faced with the photographic evidence, Gina pleaded guilty and was sentenced to probation. When the matter was finalised, Gina was 14 years old and placed on the child protection register for 7½ years. Complying with her reporting obligations was extremely difficult due to her young age and the fact that her already dysfunctional relationship with her parents had now broken down completely.

When Gina was referred to us at 17, she was facing victims compensation restitution proceedings. Her brother had been awarded compensation by the Victims Compensation Tribunal, and her mother had also been awarded compensation as a secondary victim, and the Tribunal was trying to recover money from Gina as the offender. We successfully argued that Gina should only have to pay a token amount, given that she had very limited capacity to pay and was a victim as much as an offender.

The repercussions of Gina's trauma continue. After the breakdown of her family relationships, she became homeless. Her efforts to find stable housing were undermined by the fact that she experienced domestic violence at the hands of her boyfriend. Despite the efforts of her counsellor, Gina's alcohol and other drug use became more of a problem and her mental health significantly deteriorated.

Just before Gina turned 18, she was charged with failing to comply with her reporting obligations under the *Child Protection (Offenders Registration) Act*. Due to her homelessness and mental health problems, she had failed to make her annual report to the police. While the Children's Court was somewhat sympathetic to her circumstances, and placed her on a 6-month bond, Gina still has a finding of guilt on her criminal record. Her reporting obligations continue until she is almost 22 years old, and she risks further prosecution if she fails to comply.

Over the last three years Gina has been charged with a number of other offences, mostly physical assaults committed while intoxicated and unable to control her feelings of anger and helplessness. None of her victims have been children and she has not been charged with any further sex offences.

### **3 Nature of risk posed by juvenile offenders**

Children who offend against other children are not the same as adults who offend against children. The nature of the offending is often peer-to-peer, as opposed to offending by older people targeting vulnerable children. Young people who offend against peers do not necessarily pose an ongoing risk to the safety of children.

In recent years, these differences have been recognised by Parliamentary and Government bodies in NSW, and have been the foundation for legislative reform.

#### **3.1 NSW Legislative Council Standing Committee on Law and Justice report on *Spent Convictions for Juvenile Offenders***

Firstly, we refer to the NSW Legislative Council Standing Committee on Law and Justice report on *Spent Convictions for Juvenile Offenders*, published in July 2010<sup>1</sup>.

The Committee made a number of recommendations aimed at ensuring that convictions for juvenile sex offences would be capable of becoming spent under new model spent convictions legislation.

In coming to its recommendations, the Committee recognised that the majority of juveniles who commit sex offences do not necessarily pose an ongoing risk to their community so as to justify convictions remaining on their record for life. The Committee recommended that, where there is thought to be an ongoing risk, an application could be made to a court for an order directing that the conviction not be spent (see Recommendation 6).

The Committee's findings will be discussed in more detail below.

#### **3.2 Recent changes to the Working With Children Check**

A new Working With Children Check regime commenced in mid-2013, with the commencement of the *Child Protection (Working with Children Check) Act 2012*.

Under the new regime, adults who have committed certain types of offences against children are automatically barred from working with children (subject to some exceptions and appeal rights). Significantly, people who have committed such offences as juveniles are no longer automatically barred, but are instead subject to a risk assessment.

The new legislation was based largely on recommendations made in the Report on the Statutory Review of the *Commission for Children and Young People Act (2011)*<sup>2</sup>.

The following extract from Paragraph 4.6 of the report is relevant:

"The Review proposes removing the automatic bar for offences committed as a juvenile and suggests continuing consideration of how to treat offences in the nature of "carnal knowledge" under the Working With Children Check.

Applicants with a juvenile barring offence would have a risk assessment instead of being automatically barred from working with children. This approach to juvenile offending is proposed on the basis that juvenile offences do not provide as clear an indicator of risk as offences of mature adults. In many cases, the offending conduct is not targeting children, but is peer focused, where the peer happens to be a child."

<sup>1</sup>

[http://www.parliament.nsw.gov.au/prod/parliament/committee.nsf/0/f899977baa4ddc8dca25775800057df4/\\$FILE/100706%20Spent%20convictions%20for%20juvenile%20offenders%20Report%2042.pdf](http://www.parliament.nsw.gov.au/prod/parliament/committee.nsf/0/f899977baa4ddc8dca25775800057df4/$FILE/100706%20Spent%20convictions%20for%20juvenile%20offenders%20Report%2042.pdf)

<sup>2</sup> <http://www.kids.nsw.gov.au/Publications---Resources/Submissions/Review-of-the-Commission/Review-of-the-Commission>

#### **4 Differences between juvenile and adult offending - generally**

In general, juvenile offending is different from adult offending in a number of respects. This has been the subject of much research and is now well-established. See, for example, the Australian Institute of Criminology Research Report *What makes juvenile offenders different from adult offenders?*<sup>3</sup>.

In its report on *Spent Convictions for Juvenile Offenders*, the NSW Legislative Council Standing Committee on Law and Justice went into considerable detail about the nature of juvenile offending. At Paragraphs 4.1 to 4.11, the report summarised the profile of juvenile offenders in a general sense, before going on to comment at Paragraph 4.12:

"The Committee notes the evidence that juvenile sexual offenders are not a distinct group of offenders, but have much in common with other juvenile offenders convicted of non-sexual offences. Witnesses gave evidence that as with other juvenile offenders, juvenile sexual offenders often come from backgrounds of significant disadvantage. In addition, Inquiry participants observed that juvenile sexual offenders may have experienced sexual abuse or observed sexual dysfunction."

#### **5 Differences between juvenile and adult offending – child sex offences**

In relation to sex offences committed against children, there are significant differences between adult and juvenile offending.

Adults who commit sexual offences against children, particularly where there is a significant age difference between the offender and the victim, are likely to be sexual predators who exploit power imbalances between them and their victims.

In contrast, juveniles who commit sex offences against other children are often offending against people of similar age. We do not wish to trivialise such offences, particularly where they involve an actual (as opposed to presumed) absence of consent on the part of the victim. However, there is an inherent difference between true "paedophiles" and young people who offend against peers. While these young offenders may continue to offend as adults, their offending is more likely to be against peers and they do not pose the sort of risks to children that the Act seeks to manage.

In its report on *Spent Convictions for Juvenile Offenders*, the NSW Legislative Council Standing Committee on Law and Justice made a number of observations about the differences between sex offences committed by juveniles and those committed by adults. The nature of juvenile sex offending is discussed at Paragraphs 4.13 to 4.27, and some relevant comments are extracted here:

"4.14 Inquiry participants advised that there are many factors contributing to juvenile sexual offending. Juvenile Justice gave evidence that:

The reasons for sexual offending are multi-factorial and complex. These include impulsivity, immaturity and peer pressure – factors which are also related to nonsexual offending. Some young people are opportunistic or may be groomed by adult sexual offenders to commit sexual offences.

4.15 The Commission for Children and Young People noted that '...for many young people sexual offending may be one part of an overall pattern of risk taking behaviour', involving other nonsexual offences and antisocial behaviour. Further, the Commission advised that:

Research shows that much sexual offending among young people is impulsive in nature and committed as a result of their immaturity, and often peer pressure. Increased novelty seeking, increased risk-taking and a shift towards more peer-based interactions are all behaviour changes that occur during adolescence.

<sup>3</sup> Trends and Issues in Crime and Criminal Justice, No 409, February 2011:  
<http://www.aic.gov.au/documents/4/2/2/%7b4227C0AD-AD0A-47E6-88AF-399535916190%7dtandi409.pdf>

4.16 According to Mr Tolliday: 'Young people's capacity to make judgments is not the same as an adult. When substances such as alcohol are involved that impairs judgment further'.

4.17 Juvenile Justice noted that the 2006 review of the Sex Offender Program found that 'most sexual offences (approximately 71 per cent of young people) appear to be impulsive or influenced by the presence of peers or the disinhibiting influences of drugs'.

4.18 The majority of magistrates in the NSW Children's Court, with the exception of one dissentient senior magistrate, believed that 'most sexual offences that are prosecuted in the Children's Court amount to adolescent or pre-pubescent sexual experimentation'. The Children's Court also advised that 'equally, some juveniles convicted of sexual offences in the Children's Court suffer from intellectual or mental disabilities and do not understand the consequences of their actions'. Magistrate Hannam elaborated in evidence:

The idea that children are just like little adults committing the same sort of offences just is not correct. In many aspects of our criminal law the same sort of assumptions that are correct for adults are not correct when applied to children. There is a very good reason why sex offences are in a different category for adults. For children they [sexual offences] should not be treated as in a different category for that very reason: children can get caught up in situations.

...

4.20 Further, the NSW Government noted that '... there is increasing evidence that adolescent and adult sex offenders are distinct populations' and that 'research indicates that important offending characteristics of juvenile sex offenders differ from those of adult offenders. This includes both their capacity to rehabilitate and the nature of their offending behaviour'."

The Committee then went on to discuss adolescent brain development at paragraphs 4.23 to 4.27, and the risk of re-offending by juvenile sexual offenders at paragraphs 4.28 to 4.61.

The Committee noted at paragraph 4.30 that "studies have tended to find relatively low rates of sexual re-offending among juveniles." At paragraph 4.34, the report refers to the NSW Government submission which indicated that "rates of transition from adolescent to adult sex offenders are much lower than originally thought". The Committee also noted that juvenile sex offenders are likely to re-offend in various ways, rather than being "specialist" sex offenders.

At paragraph 4.43, it was noted that, according to evidence given by Professor Dianna Kenny and Dr Christopher Lennings, "there is a small group of highly deviant young people who must be identified and carefully considered as a sub-group".

At paragraphs 4.51 to 4.58, the Committee commented that, although there is a widespread community perception that juvenile sexual offenders pose a high risk of re-offending, this perception is not supported by the bulk of the evidence.

At paragraph 4.59, the Committee noted that "a number of credible research studies have demonstrated that juvenile sexual offenders have relatively low rates of recidivism for sexual offences" and "This is important when considering the risk of juvenile sexual offenders becoming child sexual offenders as adults."

## **6 Offences involving consensual underage sex**

Further, due to the manner in which NSW's age of consent laws are framed, juveniles may be criminalised for consensual sexual activity with peers of similar age. Young people may also be criminalised for child pornography offences as a result of behaviour such as "sexting" among peers.

In our view, there is a pressing need for reform of the age of consent and child pornography laws to ensure that young people are not criminalised by laws that were clearly intended to apply to adults who abuse children.

While the current laws remain in place, there is a need for reform of the *Child Protection (Offenders Registration) Act* to ensure that young people are not inappropriately placed on the register.

It is true that, in appropriate cases, consensual age-appropriate sexual activity or sexting-type behaviour may be dealt with under s33(1)(a) of the *Children (Criminal Proceedings) Act*, thus

exempting the offender from registration obligations. However, it cannot be assumed that this sentencing option will be applied in every such case.

In its report on *Spent Convictions for Juvenile Offenders*, the NSW Legislative Council Standing Committee on Law and Justice discussed offences involving consensual underage sex at paragraphs 5.1 to 5.18. At paragraph 5.16, the report says:

“The Committee recognises the substantial long term consequences for juveniles convicted of consensual sexual intercourse with a person under 16.... The offender will live with the stigma of a conviction for a sexual offence, although this stigma may not be warranted by the circumstances of the offence.”

## **7 Recommendations for reform**

For the reasons expressed above, we are of the view that it is inappropriate to apply registration obligations to juvenile offenders unless it is established that they pose an ongoing risk to the safety of children.

Further, reporting obligations for juvenile offenders need to be modified so they are appropriate to the child’s age and circumstances.

Our proposals for reform of the Act are as follows:

### **7.1 Juvenile offenders not to be registrable persons unless court makes Child Protection Registration Order**

We propose that the Act should be amended to provide that an offence committed by a person aged under 18 is not a registrable offence unless the court decides to make a Child Protection Registration Order.

This would help ensure that registration obligations are only imposed on juveniles in appropriate cases. Further, it would help ensure that juveniles have their registration obligations explained to them while they are at court and (in most cases) have a legal representative to assist them to understand their obligations.

Requiring matters to be considered by the courts on a case-by-case basis would not be unduly burdensome on the courts. According to the report of the Inquiry into *Spent convictions for juvenile offences*, the number of children dealt with for sex offences is quite small<sup>4</sup>, and it would be reasonable to assume that not all such offences involve victims who are children.

### **7.2 Juvenile offenders not to be registrable persons unless sentenced according to law**

If the above proposal is not accepted, we alternatively propose that registration obligations should apply automatically to juveniles only where they are sentenced “according to law” by a superior court.

Juvenile offenders are sentenced according to law for “serious children’s indictable offences”<sup>5</sup>, which by definition are not capable of being finalised in the Children’s Court. Children may also be sentenced according to law for other indictable offences where the child has been committed to a superior court and where the judge has not decided to remit the matter to the Children’s Court or to apply the sentencing options set out in the *Children (Criminal Proceedings) Act*.

Young people sentenced by the Children’s Court (or by superior courts under the *Children (Criminal Proceedings) Act*) would be registrable persons only if the court makes a Child Protection Registration Order.

### **7.3 Procedure for juvenile offenders to apply to be excused from reporting obligations**

If neither of the above proposals are accepted, and reporting obligations continue to be automatically imposed on children convicted of registrable offences, we submit that there should be

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<sup>4</sup> See Paragraphs 3.51 and 3.52.

<sup>5</sup> These are defined in section 3 of the *Children (Criminal Proceedings) Act* and include sexual offences such as aggravated sexual assault, assault with intent to have sexual intercourse, and sexual assault by forced self-manipulation (where the victim is under 10 years of age).



an appeal or review mechanism so that a juvenile offender may apply to be released from reporting obligations. Such an application would be granted where the relevant court or tribunal is satisfied that the applicant does not pose an unacceptable risk to the lives or sexual safety of children.

#### **7.4 Modification of reporting obligations for juvenile offenders**

The reporting obligations faced by registrable persons are onerous (particularly since the amendments made to the Act in 2007). While such obligations may be appropriate for offenders who can best be described as "paedophiles" and who pose a significant risk to children, many of these obligations are unduly onerous for juvenile offenders.

Firstly, some of the obligations are not framed in a developmentally-appropriate way and may be difficult for young people to understand and comply with.

Secondly, offenders who are children will inevitably have contact with other children simply by virtue of their age. For example, registrable persons are required to provide names and ages of children with whom they ordinarily reside or have unsupervised contact; they are also required to provide details of their affiliation with any club or organisation with child participation or membership. These obligations are meaningless when the registrable person is also a child.

If juvenile offenders are to be subject to reporting obligations, these obligations should be significantly modified, at least until the offender reaches adulthood.

**The Shopfront Youth Legal Centre  
August 2013**

