

# JUDICIAL OFFICERS' BULLETIN

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## The Child Protection Register and applications in the Local Court under the Child Protection (Offenders Registration) Act 2000

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The *Child Protection (Offenders Registration) Act 2000* (NSW) (the CPOR Act) is a complex piece of legislation commonly dealt with by the Local Court and on appeal to the District Court. Recent Supreme Court decisions provide some assistance in interpretation and the standard of evidence the Local Court requires in considering applications to include a person in the Child Protection Register.

### Introduction

The CPOR Act created the Child Protection Register (the Register) and an associated regime of supervision and reporting requirements.

Entry to the Register is by one of two ways, which the authors have labelled the “automatic” and the “application” pathway. The automatic pathway is engaged following sentence for a defined offence against a person under 18 years old. If a person’s conviction falls within a relevant definition in the CPOR Act, the fact of registration and the period of supervision is mandated, unless one of a limited number of exceptions apply.

The application pathway is on application by a prosecutor or NSW Police to a court. The application can be made either on a finding of guilt or within 60 days of sentence *for any offence*; the latter can only be made in the Local Court. The court must be satisfied, on the evidence presented, that the person poses a risk to the lives and sexual safety of a child or children generally. The court is required to consider mandatory factors in the assessment of future risk.

While the Register and the effect of registration are discussed in more detail below, the following points are frequently overlooked by practitioners, leading to difficulties for judicial decision makers.

Firstly, the CPOR Act is not a “consent” jurisdiction. Entry on the Register is automatic once sentenced for certain offences. Under the application pathway (ie, on conviction for any offence *and* that a person poses a risk to a child’s life or sexual safety) an application must be supported by admissible evidence and requires the court to undertake an evaluative assessment of future risk. A respondent cannot “consent” to entry on the Register.

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Secondly, the effect of the discretionary pathway is that an application may be made to place a person on the Register even if they have not offended against a child.

Thirdly, being placed on the Register can have significant and long-lasting effects on a person's life. While the legislation makes some allowance for juveniles, the CPOR Act makes only limited allowance for difficulties in reporting and supervision encountered by people with cognitive impairment or mental illness. Breaches of the supervisory regime expose people to gaol terms of up to five years. The Supreme Court has emphasised the nature and quality of evidence required to support such applications.

### The Child Protection Register

The CPOR Act was enacted in 2001. The Act created the Register, the first database in Australia that recorded the personal details of offenders who had committed sexual offences against children. Once a person becomes a "registrable person" under the Act, they remain on the Register for life and are subject to ongoing surveillance.

A "registrable person" is also required to report personal information to police for varying periods of time. For instance, such periods can range between eight years and the remainder of a person's life: s 14A. For juveniles, this period is half what would apply under s 14A or seven and a half years in the case of a reporting period for life: s 14B. During the reporting period, NSW Police can collect intelligence which is added to the registrable person's case file. In addition, the Commissioner of Police (the Commissioner) can apply at any time for a further order under the *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW), which further restricts a person's freedom of movement, association and reactivates reporting obligations if they have expired.

The principal feature of the Register is the imposition of reporting obligations and the creation of criminal sanctions for failing to comply. Registrable persons must report to NSW Police and provide an extensive list of prescribed personal information annually, or shortly following any change, to facilitate ongoing monitoring. Police officers have the power to enter a registrable person's premises and conduct inspections to test compliance with reporting obligations. Travel outside NSW is strictly monitored and overseas travel is effectively prohibited by criminal sanction unless permission has been sought and granted.<sup>1</sup>

The obligations imposed by the CPOR Act were described by Justice Fagan in *O'Neill v Commissioner of Police* as "onerous" and involving "enormous restrictions on liberty and privacy".<sup>2</sup>

The Act creates criminal offences for failing to report information without reasonable excuse and providing false information. Both offences carry a maximum penalty of five years imprisonment.

The objects of the CPOR Act are focused on the protection of children from serious harm, the early detection of offences by recidivist child sex offenders,

monitoring registrable persons and ensuring registrable persons meet their obligations under the CPOR Act.<sup>3</sup> Justice Latham summarised the legislative intention of the CPOR Act in the case of *KE (by his next friend and tutor NE) v Commissioner of Police (KE)* as being focused on the registration of offenders "who habitually relapse into the commission of offences against children, post-sentencing".<sup>4</sup>

### Pathways to entry on the Register

*The "automatic" pathway: s 3A*

As set out earlier, there are two pathways to becoming a "registrable person" under the CPOR Act. The first and most common is established by s 3A, whereby the "automatic" effect of being sentenced for a "registrable offence" is registration. A "registrable offence" is defined as including both "Class 1" and "Class 2" offences. Both classes of offences include serious sexual and violence offences against children.

Section 3A provides limited exceptions to a person becoming a "registrable person", including where an order pursuant to s 10 of the *Crimes (Sentencing Procedure) Act 1999* is imposed for a Class 1 or Class 2 offence and for certain offences committed by children. There is a limited discretion provided to treat some, more serious child offenders as non-registrable: s 3C.

Practically speaking, if an adult is found guilty or pleads guilty to a "registrable offence", entry onto the Register is automatic. The reporting period will depend upon whether the offences are categorised as "Class 1" or "Class 2" offences and how many were committed.

The position in relation to child offenders is however more complex and requires careful consideration by practitioners and judicial decision makers. Section 3A(2)(c) provides limited exemptions to becoming a "registrable person" in the case of a child offender who commits a "single offence". The phrase "single offence" is defined in s 3A(5) as including "... a reference to more than one offence of the same kind arising from the same incident". To add further complexity, included within the definitions in s 3 is the following at s 3(3):

For the purposes of this Act, 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.

Justice Latham in *KE*<sup>5</sup> stated at [25]:

The exemptions aimed at juvenile offenders, in particular, recognise that the consequences of registration impact severely and disproportionately upon them, in circumstances where immaturity and poor judgment contribute to a potentially isolated instance of offending. Those consequences would inhibit, if not terminate, access to educational opportunities, sporting activities and interactions with a peer group, all of which are important to the personal development and socialisation of

young people. Moreover, the consequences of registration would adversely affect career choices and occupational development far into the future.<sup>6</sup>

Complexities have arisen with these exemptions, most obviously in the area of possession and dissemination of child abuse material style offences, including “sexting” type offences, which do not neatly fit within the exemption framework. For example, in *KE* an appeal was brought against a child’s registration under the CPOR Act. He had pleaded guilty to two offences relating to possessing and disseminating child abuse material, in that he had copied intimate images from a friend’s phone and copied them to another computer folder within the school system. Questions arose as to whether the offences were “a single offence” in that they were “of the same kind arising from the same incident” and whether the offences were committed against the same person or a broader class of victims, namely children potentially exposed to the material. Justice Latham reviewed the exemptions aimed at children within the CPOR Act, finding that both offences were “of the same kind arising out of the same incident” because the images were of the same victim.

However, where the offending conduct involves multiple victims, the situation is more complicated. In *TM v Commissioner of NSW Police*<sup>7</sup> the child respondent was found to be in possession of child abuse material contrary to s 91H(2) *Crimes Act* 1900. He was charged with three offences of possession, which related to the same material kept on three separate storage devices, and entered onto the Register through the “automatic” pathway described above. Again, the question arose as to whether the separate offences came within the “same incident” exemption for child offenders, and further whether the words “committed against the same person” had any part to play when considering possession type offences which displayed multiple children.

Justice Adams acknowledged the complicated and inconsistent operation of the exemption aimed at children, particularly involving offences that did not have an identifiable “victim”, such as offences involving possession of child abuse material.<sup>8</sup> Her Honour ultimately found that the respondent was not a “registrable person” because his offending was properly construed as being part of the “same incident” and therefore, he received the benefit of the exemption for juvenile offenders — he was removed from the Register.<sup>9</sup>

*The “Application” pathways: ss 3D and 3E*

Even if a person has not been convicted of such a serious offence against a child, a second pathway to becoming a “registrable person” exists at Pt 2A of the Act, via ss 3D and 3E. These pathways toward registration and supervision have posed problems to practitioners and the Local Court and have been the subject of judicial review by the Supreme Court, driven by Legal Aid NSW and the Public Defenders Chambers.

Section 3D is entitled “Child protection registration orders made during criminal proceedings”. This section gives the Local Court the power, on application by the

prosecution, to order a person comply with the reporting obligations under the CPOR Act if it finds the person guilty of an offence (that is not a Class 1 or Class 2 offence) *and* 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”: s 3D(2)(a).

Section 3E is entitled “Orders made after conclusion of criminal proceedings” and provides the Local Court the power on application by the NSW Commissioner of Police, to order a person comply with the reporting obligations under the CPOR Act if it finds the person guilty of an offence (that is not a Class 1 or Class 2 offence) *and* 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”: s 3E(2)(a). Such an application must be brought within 60 days of sentencing for the index offence: s 3E(3).

Both sections therefore require that evidence be tendered by the prosecuting authority in admissible form that goes to the central question of future risk.

Two other provisions, ss 3F and 3G, also permit applications to be made to a court to include a person not otherwise “automatically” registered that relate to foreign and old offences and orders made under the *Mental Health and Cognitive Impairment Forensic Provisions Act* 2020. These are not discussed in detail in this article. It is notable that the legal test about risk to children is the same in all forms of application proceedings pursuant to Pt 2A of the CPOR Act.

## Mandatory considerations in assessing risk

Section 3AA sets out in mandatory terms what must be considered when assessing whether a person poses a risk to the lives or sexual safety of children. Section 3AA states:

### 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.

The authors suggest that a highly relevant factor that arises from s 3AA is that the risk to be assessed is not the commission of *any* type of future criminal offending, but conduct that falls within the very serious nature of offences contained in the definitions of "Class 1" and "Class 2" offences. For example, the risk of a person committing an offence of intimidation or stalking contrary to s 19 of the *Crimes (Domestic and Personal Violence) Act 2007* would not satisfy the test, as such an offence does not fall within the "Class 1" or "Class 2" definitions.

Further, the authors suggest that s 3AA(2)(e) requires the Local Court to consider the impact of such an order on the respondent. The authors suggest this might include whether a person has the capacity to understand the effect of or comply with the requirements of such an order, for example in cases of cognitive impairment or mental illness. This is the only allowance for consideration of the effect of the making of an order on the respondent within the CPOR Act. In this way the CPOR Act differs from the assessment of "unacceptable risk" of future dangerousness under the *Crimes (High Risk Offenders) Act 2006*, which does not allow for consideration of the potential impact on the respondent.

In *O'Neill*, Justice Fagan explained the effect of these pathways as being:<sup>10</sup>

that a person sentenced for even a traffic infringement, or possession of a small quantity of an illegal drug for personal use, or a minor offence of dishonesty may be the subject of an application under this section, notwithstanding that the elements and the circumstances of the offence were in no way indicative of any threat whatsoever to children and irrespective of the relative triviality of the offence ... An application under s 3E may be made, resulting in the Local Court undertaking this inquiry as to the risk posed by the respondent, without it ever having been proved to the criminal standard that the respondent has on any occasion acted towards any child in a manner that is in any respect improper or that would give rise to a concern or suspicion that he or she may constitute a risk to children.

Justice Fagan went on to state:<sup>11</sup>

This is a quite extraordinary jurisdiction and self-evidently it must be invoked by the Commissioner of Police with care.

### How then is a person's risk to be assessed?

In *O'Neill*, the respondent was included on the Register by an application brought by the Commissioner of NSW Police, pursuant to s 3E of the Act. He had been sentenced for two minor drug-related offences, one being punishable only by a fine and licence suspension. Neither was a "registrable offence" and neither related to inappropriate behaviour toward children. The Commissioner relied on significantly dated intelligence reports about the defendant's behaviour while drug affected in the vicinity of a child care centre. On the basis of the two convictions and the dated intelligence material, the Local Court was satisfied the respondent "posed a risk to the lives of or sexual safety of one or more children". However, in judicial review proceedings, Justice Fagan overturned the Local Court decision, and provided helpful comments about the state of evidence required to satisfy the test in Pt 2A applications.

Justice Fagan stated at [7]:

In the absence of any conviction that would be relevant to child safety the Commissioner would not have a foundation for such an application without substantial evidence upon which it would be open to a magistrate to find that the respondent "poses a risk to the lives or sexual safety of one or more children, or of children generally". Absent a past conviction for an offence against children, proof of such a serious proposition against a respondent *would usually require clear evidence of a pattern of repeated conduct towards children, or proof of at least one unequivocal instance of serious threat or impropriety towards children, from which the risk could be inferred. Except, perhaps, in cases involving a past conviction for a sexual or violent offence against children, or proof of significant, unequivocal past misconduct towards children, it is difficult to see how a magistrate could be persuaded of the risk specified in s 3E(2)(a) without a professional opinion of a psychologist or psychiatrist based upon a science-based assessment.* (Emphasis added.)

### Conclusion

The Law Enforcement Conduct Commission (LECC) has acknowledged that the CPOR Act is a "complex and ambiguous" piece of legislation.<sup>12</sup> LECC had cause to investigate the management of the Register following notification of significant errors in respect of failure to include registrable persons on the register, registering people who should not have been registrable persons and miscalculating reporting periods.



Legal Aid NSW is working on rolling out continuing professional development to equip practitioners with the knowledge and skills they need to assist the court in dealing with these applications. Legal Aid is also providing legal assistance to clients regarding their status as a registrable person under the CPOR Act.

## Endnotes

- \* Criminal Law Solicitor, Indictable Crime Team 1, Accredited Specialist in Criminal Law, Legal Aid NSW.
- † The Public Defenders Chambers, Department of Justice.
- 1 *Criminal Code Act* 1995 (Cth), s 271A.1.

- 2 [2020] NSWSC 1805 at [9], [10].
- 3 *Child Protection (Offenders Registration) Act* 2000 (CPOR Act), s 2A.
- 4 [2018] NSWSC 941 at [23].
- 5 [2018] NSWSC 941.
- 6 *ibid* at [25].
- 7 [2022] NSWSC 337.
- 8 *ibid* at [66]–[111].
- 9 The authors note this matter is under appeal to the Court of Appeal for hearing in late 2022.
- 10 *above* n 4 at [6].
- 11 *above* n 4 at [7].
- 12 Law Enforcement Conduct Commission, *The NSW Child Protection Register: Operation Tusket, Supplementary Report*, 2021, Foreword, accessed 10/10/2022.

## Ngara Yura Program: Truth telling with Dr Miriam Rose AM

Dr Miriam Rose Ungunmerr Baumann AM attended the Commission this month as one of the speakers in the 2022 First Nations Speaker Series. Dr Miriam Rose is the 2021 Senior Australian of the Year, a renowned artist, Dadirri practitioner and the Northern Territory's first qualified Aboriginal teacher.

Dr Miriam Rose was born in the bush near Daly River and is a member of the Ngangiwumirr language group. "Ngangiwumirr" means "deep water sounds". Dadirri, an Aboriginal contemplative way of deep listening as Dr Miriam Rose explains, is about tapping into the deep spring within us. Dadirri is used to support the processes of sharing stories, trauma recovery and learning. It is applicable to Indigenous and non-Indigenous people alike to process trauma and resolve conflict.

The Honourable Justice Rachel Pepper chaired a Q&A session with Dr Miriam Rose who spoke about her work as an artist and teacher and the Foundation she established in 2013 following a spate of suicides of young people in her community. The Foundation is dedicated to creating opportunities for a brighter future for First Nations young people. Using the four pillars of Art, Culture, Education and Opportunity, the Foundation helps young First Nations people to walk in two worlds. For more information, see <https://www.miriamrosefoundation.org.au/>.

### Upcoming Ngara Yura Program sessions:

- 10 November 2022 at 5:15 pm: The Honorable Lucy McCallum, Chief Justice of the ACT, will present this online and in-person session, jointly hosted by the Ngara Yura Program and the Frances Forbes Society for Australian Legal History. The session will focus on the impact of protectionist policies on First Nations people. The venue is Court 1, Federal Court of Australia, Queens Square, Sydney.
- 23 November 2022 at 5–6 pm: Mr Keenan Mundine, Deadly Connections, will present this online and in-person session on the **Bugmy Justice Reports** for pre-sentencing and bail hearing matters that provide background information to a court for consideration when sentencing an Aboriginal person appearing before the court. The venue is the NSW Bar Association Common Room, 174 Phillip Street, Sydney.



Dr Miriam Rose AM with the Commission's Ngara Yura Project Officer Joanne Selfe (l) and the Honourable Justice Rachel Pepper (r) who chaired the session.

*The Judicial Commission acknowledges the Gadigal people of the Eora Nation, the traditional custodians of the land on which the Commission is based, and pays respect to their Elders past, present and emerging.*