

# Inquiry into Mandatory Registration of Children and Young People on the Sex Offenders Register

## Evidence at Upper House Standing Committee ADDITIONAL QUESTIONS

1. Has the Children's Court dealt with any offences covered under section 13 of the Act where it has a discretion whether to place the offender on the register?

I do not believe a s. 13 issue has ever arisen in the Children's Court.

2. If so, how did the Court exercise its discretion in those cases and did it encounter any issues in doing so?

See answer to question 1.

3. Are you of the view the factors listed in section 13(4) that the Court may take into account in deciding whether to order the offender be placed on the register would be appropriate if it had full judicial discretion to make such an order in relation to class 1 and class 2 offences? Are there other factors/resources the Court has in place/would need should the law be changed to permit full judicial discretion to carry out this function?

I consider the factors listed in s. 13(4) would enable the court to properly exercise judicial discretion. The court orders reports that are prepared through Youth Justice Services (YJS). The issue of future risk of offending is usually dealt with in psychological reports. An additional issue dealing with whether the risk would be reduced from registration and reporting under the *Community Protection (Offender Reporting) Act 2004 (CPORA)* could be included in reports relating to class 1 and class 2 offences.

4. What diversionary programs are available for young offenders?

The Children's Court imposes the penalty or order on the young person when sentencing under the *Young Offender's Act 1994 (YOA)*. It is then the obligation of the Youth Justice Officers employed by the Department of Justice to facilitate and supervise the orders and to encourage compliance and completion. The sorts of diversionary programs that may be imposed as part of an order are usually set out in the Youth Justice Report prepared for the court. Accordingly I have passed on your request for details of diversionary programs to YJS, Department of Justice.

5. Do the circumstances of juvenile sexual offending mean that some aggravating factors are more likely to occur – such as the victim also being a child or the offender is in company with someone else?

The victim is more likely to be a child when the offender is a child.

Charges that fall under the (CPORA) schedules that have been lodged over the past 5 calendar years in the Children's Court are as follows:

- I. Number of charges lodged that fall under the Act where aggravation is a part of the offence type.
- II. Number of charges lodged that fall under the act where "Aggravation" is part of the offence type description:

Aggravation	2014	2015	2016	2017	2018	Grand Total
No	276	278	324	390	496	1,764
Yes	65	22	21	36	48	192
<b>Grand Total</b>	<b>341</b>	<b>300</b>	<b>345</b>	<b>426</b>	<b>544</b>	<b>1,956</b>

- III. Number of charges lodged that fall under the act where "Under 13" is part of the offence type description:

Under 13	2014	2015	2016	2017	2018	Grand Total
No	181	164	152	235	297	1,029
Yes	160	136	193	191	247	927
<b>Grand Total</b>	<b>341</b>	<b>300</b>	<b>345</b>	<b>426</b>	<b>544</b>	<b>1,956</b>

- IV. Number of charges lodged that fall under the act where "Over 13 under 16" is part of the offence type description.

Over 13 under 16	2014	2015	2016	2017	2018	Grand Total
No	330	267	312	345	456	1,710
Yes	11	33	33	81	88	246
<b>Grand Total</b>	<b>341</b>	<b>300</b>	<b>345</b>	<b>426</b>	<b>544</b>	<b>1,956</b>

6. In what circumstances might the court impose no punishment, a conditional release order or a non-conviction order for a registrable offence?

The majority of sex offences are listed on schedules to the YOA precluding referral to a juvenile justice team. This means that the young person is required to appear in court. If the young person pleads guilty to the charge and the magistrate is of the view that it is a matter that could be dealt with by court conferencing then sentencing will be adjourned to enable the young person to take part in mediation, programs and counselling, community activities and punishment at home as set out in the report. Once this is undertaken it is open to the magistrate to impose no further punishment pursuant to s. 67 YOA if the magistrate is satisfied that sufficient punishment has already been served. Section 67 YOA states:

**Division 3 — No punishment but conditions**

**67. Undertakings and informal punishment**

- (1) The court may refrain from imposing any punishment upon being satisfied that —
  - (a) such undertakings as the court may approve have been or will be given by the offender or a responsible adult; or

- (b) such punishment as the court may approve has been, or on the undertaking of a responsible adult will be, inflicted on the offender.
- (2) The power given by subsection (1) is independent of the power given by section 66(1).

The penalties that may be imposed are set out in the YOA. The sort of penalties that are usually imposed for sexual offences are:

- A Youth Community Based Order (YCBO) –  
This will require the preparation of a YJS Report and an agenda setting out what the young person is required to do.
- An Intensive Youth Supervision Order (IYSO) –  
This is also a community release, however the order, supervision and supporting is more stringent.
- An Intensive Youth Supervision Order (with detention) (Juvenile Conditional Release Order) (JCRO) –  
A detention period is imposed however the young person is not required to serve that detention period so long as they perform the IYSO attached to the detention period. In the event that the young person breaches the order by reoffending or failing to comply with the order then the young person will be brought back to court. The period of detention may be imposed.
- Immediate detention-  
The YOA sets out that this is the penalty of last resort. I have set out the details of the principles and objectives of the YOA in my third submission (undated).

- (a) What is the purpose, or intention of the Court, in imposing these types of sentences?

The court must follow the principles and objectives of the YOA and the principles and objectives of sentencing. Part 7 of the Act sets out the principles and considerations to be applied in sentencing young offenders in s. 46. I have included this in full in my third submission. The court is to impose the penalty that will best address the principles and objectives of the YOA in s. 6 and s. 7 and the principles and consideration to be applied to young offenders in s. 46 of the Act. The court is guided by the expert reports it receives, submissions from counsel appearing on behalf of the Director of Public Prosecutions and submissions of defence counsel appearing for the young person, case law and precedent. The purpose or intention of the court in imposing this sentence is to address the legislative requirements of the principles and objectives.

- (b) What proportion of young offenders would receive non-custodial sentences for registrable offences?

74% of young offenders receive sentences other than detention sentences for registerable offences.

- (c) Do these sentences reflect an assessment of the seriousness of the offending and an assessment of risk?

Yes. Section 120 of the YOA states that a custodial sentence is a sentence of last resort.

**120. Custodial sentence is sentence of last resort**

- (1) The court cannot impose any custodial sentence unless it is satisfied that there is no other appropriate way for it to dispose of the matter.
- (2) A court that imposes on a young person a custodial sentence is to give written reasons why it considers that there is no other appropriate way for it to dispose of the matter.
- (3) In subsection (2) —  
*written reasons* includes reasons that are —
  - (a) given orally and subsequently transcribed; or
  - (b) given orally but also recorded electronically in a format that enables them to be subsequently transcribed.

7. The table on page 2 of your submission shows the age of young registered offenders between 2014 and 2018. Seventy nine out the total of 262 young offenders, were under the age of 14. The Committee would like to gain an understanding of the types of offences that result in children and young people becoming registered offenders.  
What types of registrable offences are young children under 14 being sentenced for?

- (a) What behaviour is involved in the various offences?  
E.g. kissing or touching – what offences might these constitute?

Children under the age of 14 years are likely to be placed on the register for any of the sexual offences relating to children under the age of 16 years or under 13 years of age.

The most prevalent offences would be indecent dealing with a child under the age of 13 years or sexual penetration of a child under 12 years of age.

A dealing is a willed or deliberate act. There is no statutory definition of indecent however a direction often used is:

"The expression indecency means conduct which is unbecoming or offensive to common propriety. The community sets the standard of what constitutes indecency. The assessment must consider the time, place and circumstances.

As a matter of law it is necessary for the dealing to have a sexual connotation. The sexual connotation may arise from the area of the body which is touched or it may arise because the offender uses an area of his body which would give rise to sexual connotations. The genitals and anus of both males and females and the breasts of females are areas which fall within this category."

Sexual penetration of a child, be it under 13 or over 13 and under 16 can take many forms. Section 319 of the *Criminal Code* defines sexual penetration as follows:

*to sexually penetrate* means —

- (a) to penetrate the vagina (which term includes the *labia majora*), the anus, or the urethra of any person with —
  - (i) any part of the body of another person; or
  - (ii) an object manipulated by another person, except where the penetration is carried out for proper medical purposes; or
- (b) to manipulate any part of the body of another person so as to cause penetration of the vagina (which term includes the *labia majora*), the anus, or the urethra of the offender by part of the other person's body; or
- (c) to introduce any part of the penis of a person into the mouth of another person; or
- (d) to engage in cunnilingus or fellatio; or
- (e) to continue sexual penetration as defined in paragraph (a), (b), (c) or (d).

Accordingly penetration of or beyond the labia majora or penetration of the anus by a finger or by an object constitutes sexual penetration. Full penetration of the vagina is not required to prove sexual penetration. Penetration of the vagina by penis does not require ejaculation to constitute penetration.

Examples given in the *WA Law Reform Commission Inquiry into the Community Protection (Offenders Reporting) Act 2004* that include acts of touching and sexual penetration as defined between those under the age of 14 years and same aged or younger children in circumstances of playing games such as hide and seek or swimming pool games, taking a younger child to an isolated location in the house, impulsive and opportunistic touching of the child in a sexual way, requesting that the younger child touch the older child in a sexual way with a "bullying" component such as a threat to tell on the younger child, offering an incentive (such as the older child will allow the younger child to use his Xbox or have access to some other coveted item if he allows touching etc.) are all common scenarios. The child under the age of 14 years needs to know that their conduct is wrong however in many cases the child may not have a full understanding of sexual acts, issues of consent, issues relating to appropriate boundaries with other children etc. The psychological report and other reports received by the court may recommend programs and counselling for a young person under the age of 14 that would enable the young person to understand precisely why the conduct is wrong. The programs may need to address the young person's impairment (foetal alcohol spectrum disorder (FASD), autism spectrum disorder (ASD), intellectual impairment, ADHD etc.).

- (b) What proportion would be considered serious sexual offending?

Statistics for the last 5 calendar years show that one offender who started offending at the age of 11 and offended through to the age of 17 was sentenced to immediate detention and one offender who offended at 11 and again at 14 years was sentenced to an immediate term of imprisonment at the age of 18 years. Two additional offenders were sentenced for conduct

when they were 13. One was aged 14 at the time of sentence and the other was aged 39 years. An additional three offenders were sentenced to immediate detention for offences when they were 14 years old. One was sentenced when he was 14 years, one when he was 19 years. At 12 years one was sentenced at the age of 30 years for offences that occurred when he was 12 and 14.

- (c) Is there a similar pattern for children over the age of 14 or do they tend to commit different offences? (e.g. more consensual sexual activity?).

A child aged under 16 years cannot consent to sexual activity however there are more occasions when both parties have a general understanding of sexual matters when sexual offending occurs.

8. It appears that registrable offences do not discriminate between the normal sexual development of children and young people and harmful or abusive behaviour. What is your view?

Given that a child under the age of 16 years cannot consent to sexual penetration it is very difficult to say what is normal sexual development of children. Often if a relationship is said to be consensual and that relationship ends the parties may, in hindsight and with greater understanding and maturity, decide that it was not actually consensual or even if it was consensual that having taken part in the relationship was not a good idea at all. The law recognises that it must protect children under 16 from being exposed to activity that they are not emotionally and physically mature enough to handle. It is therefore not possible to say what is part of normal sexual development that has gone too far or what is harmful or abusive behaviour generally. A further issue with young children is that sexual touching may occur in the context of bullying of the younger child or opportunistically because the offending child wants to experience a sexual activity that they have heard about or seen on online pornography but have not fully understood. In these situations childhood curiosity and a child's desire to assert themselves is normal however the conduct that they are involved in is likely to be harmful or abusive to the other child. Children change, develop and learn. Children are capable of learning that what they perceived to be normal is in fact harmful or abusive. It is therefore very difficult to discriminate between the two categories you describe.

9. You submit that young people of a similar age who engage in a consensual sexual relationship should not be treated the same as an adult 'who has taken advantage of a young person'. Is the key issue here the element of abuse?

The disparity of age and maturity is a matter that must be taken into account in sentencing. Disparity in age, being in a position of trust or authority (which adults tend to be in relation to young children), sophisticated grooming and offending for sexual gratification are issues that need to be considered when imposing specific and general deterrence on an adult. Generally an adult is not a child. An adult has a higher level of criminal culpability because he is an adult.

- (a) What proportion of cases before the Court relate to consensual relationships between young people of a similar age?

See my answer to question 8.

- (b) To what extent is the consensual nature of the relationship considered in sentencing (even though a child under 16 can't legally give consent)?

This depends on the circumstances. What is perceived to be consent may in hindsight not have been fully informed consent for the reasons I have set out in answer to question 8.

- (c) Why do some cases of consensual sexual activity between young people come before the Court? (Is it usually because a complaint is made by the parents of one of the young people?)

Often the matter will come before the court because of the requirements of mandatory reporting of sexual activity relating to children. So for example if a child goes to a doctor with concerns in relation to pregnancy or an STI then a mandatory report will follow. The child may also raise concerns about their relationship or sexual conduct with other health workers, teachers, people in authority or officers in the community etc. all of whom will have mandatory reporting obligations. In some cases the relationship may have been consensual at the time when it was on foot. For the reasons set out in question 8 in hindsight the relationship may not appear to be consensual.

10. You submit that in cases of a consensual sexual relationship between young people of a similar age, it is usually only one of the young people who is charged and ends up on the Register. Do you know why?

The reality is that young girls are more likely to be concerned about sexual health matters, unwanted pregnancies, and prepared to speak about emotional and psychological distress than young boys. Given the requirements of mandatory reporting for this reason the actions of boys are more likely to be reported than the actions of girls however this does not mean that police will necessarily charge the boy in every case of mandatory reporting. The matter will be investigated by police as required and police will exercise their discretion in relation to the way in which the matter proceeds.

- (a) Is it reflective of a gender bias?

I am not in a position to comment on this over and above my observations made in the context of question 9(c).

- (b) Is the application of prosecutorial discretion an appropriate way to decide if a child or young person is registered as a child sex offender? (e.g. It is obviously not in the public interest to prosecute all cases of consensual underage sex - only some are prosecuted).

Prosecutorial discretion may be exercised. In this court the Director of Public Prosecutions appear. DPP guidelines set out matters to be considered in relation to whether or not a matter

should proceed. The court's discretion is not prosecutorial discretion. The court is able to exercise its discretion in an open and accountable way having heard from all of the parties and properly informed itself by obtaining reports, hearing submissions and applying the law.

- (c) What is the purpose of age of consent laws – how does it differ from the purpose of the sex offender register?

The age of consent has been set by parliament as the age at which a person is deemed to be physically and sexually mature enough to make decisions in relation to sexual activity. This is not the role of the sex offender register.

11. Are you aware of any cases involving a young person in a position of care, supervision or authority (such as a sports coach or tutor) being charged or prosecuted for the Class 1 offence of sexual offences against a child over the age of 16 when the relationship was consensual?

No

12. What happens to a child's criminal record once they become an adult?

I refer to my third submission, question 12 page 11 that sets out s. 189 of the YOA.

In cases where a conviction is not recorded there will not be a conviction recorded against the young persons name.

If the young person is convicted of an offence and a period of 2 years has expired since the discharge of any sentence imposed as a result of a conviction (or every sentence if more than one sentence was imposed or the date of conviction if no sentence that required to be discharged as a result of the conviction then the conviction) is not to be considered a conviction for any purpose, except as provided in s. 189.

Section 189(7) sets out:

- (7) This section does not prevent —
- (a) a person in respect of whom a youth community based order has been made upon the person's conviction of an offence from being subsequently dealt with for the offence as a person so convicted if a condition of the order is not observed; or
  - (b) any subsequent proceedings that may be taken against the offender under this Act or on indictment in relation to the offence to which this section applies or for a subsequent offence; or
  - (c) a court having regard to a conviction for the purposes of the *Dangerous Sexual Offenders Act 2006* section 7(3); or
  - (d) the making of a record of anything that paragraph (a), (b) or (c) allows.

Section 187(9) deals with the situation where the young person is an adult at the time of sentencing. In that case a *Spent Conviction Act 1988* Order is made so that the young person is relieved of the conviction.

If the court thinks that special circumstances exist then the court may declare that the young person is discharged from any sentence even if the two year period has not expired pursuant to s. 189(3) of the Act.

13. Your submission opposes mandatory registration for children and young people. What are your reasons for this?

I refer to and adopt the contents of my three written submissions. A judge or a magistrate presiding in the Children's Court of Western Australia is required to follow the principles and objectives of the YOA. This means that issues such as the rehabilitation of the child, the age of the child, the time frame, education and family circumstances and the circumstances of the offence are all matters to be taken into account. None of these factors are considered in mandatory registration.

14. Your submission mentions the potential impact of registration for children and young people regarding future employment, as well as their home and social life.

(a) Putting aside the impact of registration for the moment, what are the criminal justice consequences for young offenders in terms of sentencing and a criminal record? Is it likely to restrict their social interaction, employment, travel?

I refer to my answer to question 12. If the young person does not reoffend then they will not have a conviction after the relevant period of 2 years. If special circumstances exist they can apply to have that record expunged in a period less than 2 years.

(b) What additional consequences or impact does registration impose?

Registration means that the young person will be subject to restrictions for up to 7 ½ years. The police determine how often and in what circumstances the young person must comply with the registration. This may limit the young person's opportunities in relation to employment, social activities, sporting activities, ability to travel, ability to interact with other young people who are of a similar age, ability to be involved in activities such as child care, training or assisting young children. The young person is also labelled with the term that is commonly used for registration which is being a sex offender on the sex offender register.

15. You've provided an example in your submission about a 13-year old vulnerable offender who was not considered a future risk to young people, whose schooling and social interaction were severely impacted by registration.

(a) Can registration actually work against the successful rehabilitation of young people? In what way?

In my view yes, see my response to questions 13 and 14 and the three submissions filed.

- (b) How is the Court aware of the consequences for young offenders (such as the case study cited) following registration? Is it because they have presented before the Court again?

The court is usually not aware of the ultimate consequences of registration for the young offender. The court is required to reach a prognosis in relation to the young person's future risks of reoffending and chances of rehabilitation consistent with the principles and objectives of the YOA as part of the sentencing process. Information about the way in which registration is likely to impact on the young person is provided by submissions by counsel, material provided on behalf of the young person, the contents of the YJS report or the attitude taken by an agency or organisation with whom the young person has had dealings.

16. Your submission discusses the difficulties for children without the support of a responsible adult to comply with reporting requirements. Do you have any suggestions for how the system can better accommodate the needs of children in these situations?

I consider that Youth Justice, Department of Justice or youth lawyers would be in a better position to answer this question.

17. Do you support a right of appeal or a review mechanism for young people on the Register?

Yes. A young person's circumstances are likely to change and every young person is different. It is appropriate to have a review mechanism for young people who are placed on the register.

18. Generally, how does the Children's Court deal with young offenders who have breached their reporting requirements, including the range of penalties imposed?

Some offenders may end up being placed on the register twice. Statistics recorded by the Children's Court record offenders who have had their matters dealt with in any jurisdiction (be it as a young offender or as an adult) and who then subsequently appear in the Children's Court and have a second registration lodged. It is entirely possible that the subsequent charges are retrospective charges relating to when the person was a child but that the charges are not dealt with until the young person is an adult.

The de-identified information of those who are on the register on more than one occasion and their ages shows as follows:

DOB	Age today
15/02/1996	24
12/07/2002	17
23/09/1992	27
29/11/1990	29
26/06/1998	21
11/12/2003	16
17/09/1999	20
5/02/1976	44
6/03/1992	28

5/10/1995	24
27/07/1994	25
31/03/1993	26
5/09/1995	24
4/08/1997	22
17/03/1994	25
26/06/1992	27
10/11/1989	30
26/10/2001	18
16/01/1999	21
13/01/1994	26
14/12/1994	25
30/06/1998	21
30/10/1991	28

The penalties for breaching reporting conditions over the period 2014 to 2018 are as follows:

Outcome Type	2014	2015	2016	2017	2018	Grand Total
Community Based Order	1					1
Conditional Release Order					2	2
Detention	1				2	3
Dismissed			1			1
Dismissed For Want of Prosecution - s25		1		1		2
Fine	5	3	1		1	10
Intensive Youth Supervision Order			3			3
Juvenile Conditional Release Order			2	2		4
Juvenile Good Behaviour Bond	2		1		2	5
No Punishment Imposed--S. 66 Young Offenders Act	1		1			2
No Punishment Imposed--s. 67 Young Offenders Act	2		3	7	16	28
Referred To A Juvenile Justice Team			1			1
Youth Community Based Order	3	3		3	4	13
<b>Grand Total</b>	<b>15</b>	<b>7</b>	<b>13</b>	<b>13</b>	<b>27</b>	<b>75</b>

19. Some submitters, as well as the Western Australian Law Reform Commission in its Inquiry into the *Community Protection (Offenders Reporting) Act 2004*, have referred to the breach of reporting requirements being disproportionately higher in regional areas and among young Aboriginal reportable offenders.

- (a) What has been your experience in this regard and how often does the Magistrate's Court deal with such offenders?
- (b) How can this be addressed? Should such offenders have their reporting requirements modified or removed and, if so, how?

The number of breaches of reporting conditions by region/metropolitan breakdown over the 2014 to 2018 period is:

Area	Count of Charges
Metro	40
Regional	34
<b>Grand Total</b>	<b>74</b>

The breakdown of breach location by suburb or regional location is as follows:

Metro	
ARMADALE	1
AUBIN GROVE	3
CANNING VALE	2
CHAMPION LAKES	4
CLOVERDALE	1
EDEN HILL	10
ELLENBROOK	1
MARANGAROO	6
MIDVALE	7
ORELIA	1
PERTH	1
Redcliffe	2
SOUTH LAKE	1
Regional	
ALBANY	7
BOULDER	1
BROOME	1
BUNBURY	1
COODANUP	4
DERBY	4
Esperance	1
FITZROY CROSSING	1
HALLS CREEK	1
KARLOO	1
KATANNING	1
KUNUNURRA	1
MERREDIN	2
NAREMBEEN	1
SOUTH HEDLAND	1
SPALDING	1
TOODYAY	1
UTAKARRA	1
WARBURTON	1
WYNDHAM	2
<b>Grand Total</b>	<b>74</b>

Given there are 34 breaches in the regional areas the number is disproportionately high given the population of regional WA. I note that concerns in relation to Aboriginal offenders being required to travel long distances, having families who are mobile and having uncertainty about their future address in remote locations may be issues that contribute to breaches. I suggest that representatives of remote Aboriginal communities are in the best position to address how this could be managed.

20. Do you have any feedback on the recommendations regarding reporting requirements in the 2012 statutory review of the Act (see page 19 of the review) and the review by the Western Australian Law Reform Commission of the Act (see pages 105 and 106 of its final report)?

I agree generally with the recommendations of the Western Australian Law Reform Commission. The 2012 statutory review recommends that discretion in relation to reporting be a matter for police. In my view it is more appropriate and open for the court to deal with any discretionary issues in relation to an offender being a reportable offender. The police are required to supervise the reporting obligations for young people who are on the register. It is in my view more appropriate to have an independent accountable judicial officer determining the appropriateness of placement on the register.

21. Is there any scope for diverting young offenders who breach their reporting requirements from the criminal justice system instead of them being charged and penalised? If yes, what diversionary programs are available?

The Western Australian Police Force encourages cautioning of young offenders to ensure that they are diverted from criminal conduct and not exposed to the criminal justice system. Cautions issued by police that make it clear to the young person that they must comply with the reportable offender obligations or a court based charge will result may be appropriate. The reason for non-compliance may not require a diversionary program. For example if the young person's family is in a remote community so he is in an area that is so remote that reporting is not possible or the young person has for cultural or family reasons moved to another location without the young person being in a position to give notice to police of the move and he has cognitive difficulties and literacy issues then a diversionary program would not assist.

Although diversionary programs are a matter for YJS, I do not think a diversionary program would necessarily address a breach in reporting requirements. Diversionary programs are usually used for issues such as alcohol and other drug issues, managing behaviours, looking at different ways to deal with conflict without violence etc. Failure to report as required may be due to circumstances rather than being due to an issue that could be addressed by diversion.