



CDPP

Australia's Federal Prosecution Service

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Your Reference: SOR

24 May 2019

Ms Maddison Evans
Committee Clerk
Standing Committee on Environment
and Public Affairs
Legislative Council
Parliament House
Perth WA 6000

Dear Madam

**PETITION No. 70 - INQUIRY INTO MANDATORY REGISTRATION OF CHILDREN AND YOUNG PEOPLE
ON THE SEX OFFENDERS REGISTER**

I refer to the letter dated 15 April 2019 from the Hon Matthew Swinbourn MLC to Ms Sarah McNaughton SC, Commonwealth Director of Public Prosecutions. I write in response to the invitation to furnish a written submission addressing the terms of reference of the Standing Committee on Environment and Public Affairs Inquiry into children and young people on the Sex Offenders Register – is mandatory registration appropriate?.

The work of the Commonwealth Director of Public Prosecutions

The Commonwealth Director of Public Prosecutions (CDPP) is a statutory office established under the *Director of Public Prosecutions Act 1983* (Cth) to prosecute alleged offences against Commonwealth law. Some of those offences involve aspects of criminal sexual activity. Prosecutions for offences involving, for example, using a carriage service to access or otherwise deal with child exploitation material comprise a not insignificant part of the national practice of this Office.

The CDPP prosecutes Commonwealth offences in every State and Territory in Australia.

All prosecutions of which the CDPP has carriage are considered and conducted in accordance with the *Prosecution Policy of the Commonwealth* ("the *Prosecution Policy*").

Prosecutions involving young persons

Paragraph 2.15 of the *Prosecution Policy* provides the framework within which decisions to prosecute young persons¹ for Commonwealth offences must be made.

The Prosecution Policy provides (*inter alia*):

The welfare of the juvenile must be considered when prosecutorial discretion is exercised in relation to an offence alleged to have been committed by a juvenile. Prosecution of a juvenile should always be regarded as a severe step, and generally speaking a much stronger case can be made for methods of disposal which fall short of prosecution unless the seriousness of the alleged offence or the circumstances of the juvenile concerned dictate otherwise. In this regard, ordinarily the public interest will not require the prosecution of a juvenile who is a first offender in circumstances where the alleged offence is not serious.

A number of factors are outlined in paragraph 2.16 as to particular considerations in deciding whether the public interest warrants the prosecution of a young person, including the seriousness of the alleged offence(s) and whether there any available alternatives to prosecution.

In addition to these considerations, the Commonwealth Attorney-General is required to consent to the commencement or continuation of a prosecution of a young person for certain offences. For example, section 474.24C of the *Criminal Code* (Cth) (“the Code”) requires that the Commonwealth Attorney-General consent to the commencement of a prosecution of a young person for any of the offences in Subdivision D of Division 474. That subdivision contains offences relating to using a carriage service to access or otherwise deal with child pornography material and child abuse material.

In deciding whether to consent to the commencement of such a prosecution, the Attorney-General will ordinarily have regard to the considerations set out in the Prosecution Policy.

For the reasons set out in the Prosecution Policy, and given that the Attorney-General will only consent in serious cases, it is rare for this Office to prosecute a defendant who was under the age of 18 at the time of the alleged offending for such offences. Offences involving “sexting” alleged to have been committed by a young person, for example, will be prosecuted only where the alleged conduct is so serious that the public interest requires a criminal prosecution.

From 1 January 2016 to the date of this letter, this Office nationally has had carriage of sixteen prosecutions against young persons involving unlawful sexual activity of some kind, six of which are ongoing matters. Two of those matters were prosecuted in Western Australia.

Sections 4M and 4N of the *Crimes Act 1914* (Cth) (“the *Crimes Act*”) provide that a child under the age of 10 cannot be liable for an offence against the Commonwealth, and a child aged over 10 but under 14 can only be liable if the prosecution proves that the child knew that his or her conduct was wrong. I am not aware of any prosecution of a person under the age of 14 undertaken by this Office.

Registration of offenders convicted of Commonwealth sex offences in Western Australia

The registration of offenders convicted of sex offences in WA is governed by the *Community Protection (Offender Reporting) Act 2004* (“the *CPOR Act*”).

¹ A reference in this letter to a “young person” or “young offender” is a reference to a person who was under the age of 18 at the time an offence is alleged to have been committed.

A person who is sentenced by a court for a “reportable offence” is a reportable offender (section 6(1) *CPOR Act*). A “reportable offence” is a Class 1 offence, Class 2 offence or a Class 3 offence (if the person has previously been found guilty of another Class 3 offence) (section 9 *CPOR Act*)². The *Community Protection (Offender Reporting) Regulations 2004* (WA) prescribe a number of Commonwealth offences as Class 1 and Class 2 offences, including:

- i. Sexual intercourse with a child under 16 outside Australia (section 272.8 of the Code);
- ii. Procuring a child to engage in sexual activity outside Australia (section 272.14 of the Code);
- iii. Using a carriage service to access, transmit, publish or distribute child pornography material (section 474.19(1) of the Code);
- iv. Using a carriage service to groom or procure a child to engage in sexual activity (sections 474.26 and 474.27 of the Code).

I note that many of the offences contained in Subdivision F of Division 474, including using a carriage service to groom or procure a child to engage in sexual activity with the accused, cannot be committed by a child. Those offences require the person using the carriage service (the accused) to be at least 18 years of age.

Sentencing juvenile offenders for Commonwealth offences in Western Australia

Where a person is to be sentenced for a Commonwealth offence committed before reaching the age of 18 years in Western Australia, the combination of section 20C of the *Crimes Act*, sections 4 and 50B of the *Young Offenders Act 1984* (WA) and the *Sentencing Act 1995* (WA) has the following effect:

- i. The sentencing court may sentence the offender in accordance with Part 1B of the *Crimes Act* or the *Young Offenders Act 1984* (WA);
- ii. If a court decides to sentence in accordance with the *Young Offender’s Act 1984* (WA), where an offender is under the age of 18 years at the time of sentence, the principles and sentencing options set out in the *Young Offender’s Act 1984* (WA) apply; and
- iii. Where an offender is over the age of 18 years at the time of sentence, the principles and sentencing options set out in the *Sentencing Act 1995* (WA) apply.

Where a sentencing Court decides to sentence a Commonwealth young offender in accordance with the *Crimes Act*, all of the sentencing options in Part 1B are available.

Sentencing dispositions involving no conviction

One of the sentencing options available to a Court in sentencing a young offender is an order pursuant to section 19(b)(1) of the *Crimes Act*. In accordance with that provision, a Court may dismiss the charge(s), or impose a good behaviour bond with conditions without recording a

² For completeness, I note that a “reportable offence” also includes an offence in relation to which an “offender reporting order” is made pursuant to s13 of the *CPOR Act* – this is a discretionary power to make an order declaring that a person who has not committed a Class 1, 2 or 3 offence be subject to the reporting requirements of the *CPOR Act* if they nonetheless pose a risk to the lives or sexual safety of one or more persons, or persons generally. This power is rarely, if ever, used in relation to Commonwealth offences, or offences of which the Commonwealth DPP has carriage, as (i) the offences in the Code and *Customs Act 1901* (Cth) that might give rise to the exercise of that discretion are already listed as Class 1 or 2 offences, and (ii) Western Australian offences that are not listed as Class 1 or 2 offences but that might enliven the discretion are, by nature, so serious that they would not likely be dealt with by the Commonwealth DPP.

conviction. Such orders are similar, though not identical, to spent conviction orders in the *Sentencing Act 1995* (WA).

The Court may make such an order if it is satisfied that, having regard to:

- i. the character, antecedents, age, health or mental condition of the person;
- ii. the extent (if any) to which the offence is of a trivial nature; or
- iii. the extent (if any) to which the offence was committed under extenuating circumstances;

it is inexpedient to inflict any punishment, or to inflict any punishment other than a nominal punishment, or that it is expedient to release the offender on probation.

The fact that a spent conviction order has been made for an offence does not affect the status of the offence as a reportable offence (section 111(1) of the *CPOR Act*). Orders under section 19B(1) of the *Crimes Act 1914* (Cth) are not referred to in section 111(1), though it may be that they fall within the scope of section 111(2), and thereby have no impact as to whether the particular Commonwealth offence is a reportable offence.

The Standing Committee may wish to consider whether Commonwealth young offenders who are sentenced in accordance with section 19(b)(1) in respect of a Class 1 or Class 2 offence should automatically be made reportable offenders.

Other jurisdictions

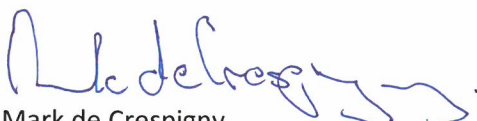
Every State and Territory in Australia has an equivalent statutory regime of subjecting offenders convicted of certain offences to ongoing reporting requirements. The primary statutes of those regimes are as follows:

- i. The *Child Protection (Offenders Registration) Act 2000* (NSW);
- ii. The *Sex Offenders Registration Act 2004* (Vic);
- iii. The *Child Protection (Offender Reporting) Act 2014* (Qld);
- iv. The *Child Protection (Offender Reporting and Registration) Act 2004* (NT);
- v. The *Crimes (Child Sex Offenders) Act 2005* (Tas); and
- vi. The *Child Sex Offenders Registration Act 2006* (SA).

Conclusion

This Office rarely prosecutes young persons for Commonwealth offences that may give rise to a reporting requirement under the *CPOR Act*. Where a young person is prosecuted for such offences and is sentenced in accordance with section 19(1)(b) of the *Crimes Act*, the Standing Committee may wish to consider whether the sentencing Court should have a discretion to order that the young person be made a reportable offender.

Yours faithfully



Mark de Crespigny
Deputy Director
Human Exploitation and Border Protection