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

2019

# LECC

Law Enforcement  
Conduct Commission



31 October 2019

The Hon John Ajaka MLC  
President  
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Parliament House  
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## Dear Mr President and Mr Speaker

In accordance with section 132(3) of the *Law Enforcement Conduct Commission Act 2016*, the Commission hereby furnishes to you its final report in relation to its investigation in Operation Tuskett, entitled *The New South Wales Child Protection Register: Operation Tuskett Final Report*.

Pursuant to section 142(2) of the Act, I recommend that this report be made public immediately.

Yours sincerely



**The Hon M F Adams QC**

Chief Commissioner

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# LIST OF FINDINGS

Finding 1: Since 2002 the NSW Police Force has made over 700 incorrect decisions about the administration of the Child Protection Register, including:

- incorrect decisions that 96 people were not ‘registrable persons’ under the CPOR Act;
- incorrect decisions that 43 people were ‘registrable persons’ under the CPOR Act;
- incorrectly calculating the reporting periods of 485 registrable persons as being shorter than the periods required by the CPOR Act, and
- incorrectly calculating the reporting periods of 144 registrable persons as being longer than the periods required by the CPOR Act.

These incorrect decisions arose, wholly or in part, from mistakes of law or fact. .... 59

Finding 2: As a result of the incorrect decisions referred to in Finding 1, the NSW Police Force unlawfully required persons to report their personal details to police for a number of years. Some of these persons were also subjected to unlawful home inspections by the NSW Police Force, in purported reliance on the power in s 16C of the CPOR Act.....62

Finding 3: As a result of the incorrect decisions referred to in Finding 1, the NSW Police Force charged and arrested persons for failing to comply with reporting obligations or providing false or misleading information under the CPOR Act, when those persons were not under any obligation to report under that Act at the relevant time. These were actions of a serious nature which, although not unlawful, were unjust or oppressive in their effects.....62

Finding 4: The NSW Police Force made decisions to write letters to Mr DD, Mr NN and Mr KK about their obligations under the CPOR Act, which were in effect misleading. These decisions, although not unlawful, were unreasonable or unjust in their effects..... 86

## LIST OF RECOMMENDATIONS

- Recommendation 1: Notify persons who may have been subjected to unlawful or unjust actions by the NSW Police Force.** The NSW Police Force write to each of the 277 people identified by the CPR case review who may have been subjected to unlawful or unjust actions by the NSW Police Force as a result of errors in the Child Protection Register. Each letter should:
- explain the specific error that was made in their case;
  - identify each of the types of actions that the NSW Police Force may have mistakenly subjected the person to as a result of that error, and
  - apologise for these errors, and suggest the person may wish to obtain independent legal advice.....91
- Recommendation 2: Adopt a responsive model of resourcing for the Child Protection Registry.** The NSW Police Force ensure that the resourcing of the Registry is reviewed at least every two years, and that staffing is maintained at a level sufficient to perform statutory functions under the CPOR Act efficiently and accurately. .... 115
- Recommendation 3: Refer the CPOR Act to the NSW Law Reform Commission for review.** The Attorney-General urgently refer the *Child Protection (Offenders Registration) Act 2000* (NSW) to the NSW Law Reform Commission for comprehensive review, to be completed within six months..... 128
- Recommendation 4: Introduce a statutory review mechanism.** A provision should be included in the *Child Protection (Offenders Registration) Act 2000* (NSW) (or any Act which replaces it) which gives a person the right to seek review by the NSW Police Force of the decision that they meet the definition of a registrable person under the Act, and/or the decision as to which reporting period applies to the person. Consideration should be given to providing a right of appeal from the NSW Police Force review to a tribunal or court..... 129
- Recommendation 5: Establish a dedicated legal officer position in the Child Protection Registry.** The NSW Police Force establish at least one ongoing legal officer position within the Registry that is dedicated solely to supporting Registry staff, and fill that position as a matter of priority. .... 132
- Recommendation 6: Provide reasons for decisions under the CPOR Act.** The NSW Police Force provide written notification to each person placed on the Register of the basis upon which their status as a registrable person and their reporting period has been determined, including the sections of the CPOR Act relied on. For persons already on the Register, this information is to be provided upon request..... 133
- Recommendation 7: Prioritise the ‘CPR COPS’ upgrade project.** The NSW Police Force prioritise the recruitment for the CPR COPS upgrade project to ensure that the project is completed as soon as possible. .... 157
- Recommendation 8: Establish an Interagency Child Protection Register Committee.** The NSW Police Force initiate the establishment of a Child Protection Register Committee with relevant authorities to discuss and decide the obligations,

compliance risks and mitigation strategies of each authority in relation to the statutory framework governing the Register. ....163

**Recommendation 9: Develop an interagency governance framework.**

The NSW Police Force initiate the creation and implementation of a robust interagency governance framework to ensure consistent service delivery in accordance with each authority's responsibilities under the statutory framework for the Register.....163

**Recommendation 10: Implement a Child Protection Register governance framework.**

The NSW Police Force develop and implement a governance framework to ensure compliance by all local commands across New South Wales with the statutory framework for the Register. This framework should:

- leverage the expertise of the Child Protection Registry to support local commands and provide quality assurance;
- ensure that emerging compliance risks are identified and addressed, and
- contain appropriate reporting mechanisms to ensure future accountability...167

**Recommendation 11: Introduce independent compliance auditing of the Child Protection Register.** Provisions should be included in the *Child Protection (Offenders Registration) Act 2000* (NSW) (or any Act which replaces it) for independent compliance audits of the Register, with publicly reported (and de-identified) results, similar to those in the *Sex Offenders Registration Act 2004* (Vic).....169

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# FOREWORD BY THE CHIEF COMMISSIONER

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In 2001, with the commencement of the *Child Protection (Offenders Registration) Act 2000* (NSW) (CPOR Act), New South Wales became the first jurisdiction in Australia to introduce a mandatory registration scheme for persons convicted of sexual offences against children.

The NSW Commissioner of Police reports that the Child Protection Register has been ‘a highly successful initiative to protect children from serious harm and monitor registrable persons.’ The Register is not merely a list of names; it is a police database containing a wealth of personal information about each ‘registrable person’. It assists the NSW Police Force to investigate offences against children and, through monitoring, to intervene to prevent risks to other children.

In the 18 years since the Register was introduced, our understanding as a society of the crime of child sexual abuse has developed considerably, in particular as a result of public inquiries such as the Commonwealth Royal Commission into Institutional Responses to Child Sexual Abuse. As our understanding of the nature and impact of these crimes has become more sophisticated, our systems for responding to allegations of such crimes, in terms of reporting, investigation and prosecution, have also evolved.

As a consequence, an increasing number of people are being convicted of child sex offences. From 2001 to 2018, the number of people convicted in New South Wales of child sex offences each year more than doubled.

Improvements in our systems for prosecuting child sex offences therefore necessarily have a flow-on effect on the size of the Register. The Register has also been expanded by Parliament over time to include new groups of offenders, and new reporting requirements. In August 2019 there were 4,344 people on the Register.

As the size and scope of the Register has increased over the years, so too has the burden on the NSW Police Force, and in particular, on the Child Protection Registry, the specialist unit within the State Crime Command with responsibility for maintaining the Register.

The pressures on the Child Protection Registry have been compounded by the fact that very soon after the Register commenced, the NSW Police Force - it seems out of necessity - assumed responsibility for making decisions about which offenders the CPOR Act requires to be registered, and the length of their reporting periods. It was not Parliament’s intention that the NSW Police Force would have this role. It was assumed that the provisions of the CPOR Act would be so simple to apply that court staff would ‘automatically’ be able to identify when a person’s conviction and sentence qualified them as a ‘registrable person’.

Unfortunately, this assumption proved incorrect. As a result, the Registry has faced considerable challenges in seeking to implement the Register in accordance with the statutory framework.

I acknowledge the hard work and dedication of the officers working in the Child Protection Registry. It was Registry officers themselves who, in 2014, first identified that there were significant issues with the Register. In the following months and years those officers took steps to identify, correct and prevent the errors that they could, and submitted numerous internal reports warning about systemic problems contributing to errors which lay beyond the control of their unit to address. It was

their reports which led the NSW Police Force to initiate a review of all Register files in 2016, which, when completed two years later, revealed the extent of the errors. The officers in the Child Protection Registry are to be commended for their continued commitment to the important work of maintaining the Register in difficult circumstances.

The catalyst for the intervention by the Law Enforcement Conduct Commission (the Commission) in 2017 was a public interest disclosure made to the Commission by a person who was at the time an officer in the NSW Police Force. The benefits to the community that have flowed from that officer's decision to make a complaint illustrate the great public value of public interest disclosures. That disclosure sparked a two-year investigation, during which the Commission and the NSW Police Force have worked together to identify and address gaps in systems and resources, to improve the implementation of a scheme that is designed to protect children from serious harm.

I thank the NSW Police Force for the collaborative approach it has taken during this investigation, acknowledging issues, providing detailed operational information, and implementing a number of our recommendations and suggestions. While some issues remain outstanding, the NSW Police Force has made substantial changes which have significantly improved its administration of the Register. As a result, the number of errors in the Register has been dramatically reduced, and the 44 per cent error rate uncovered by the NSW Police Force CPR case review is now a historical matter.

However, the NSW Police Force and the Commission agree that the risk of errors in the Register of the type documented in this report has not been eliminated, and cannot be eliminated until the legislative framework for the Register is simplified. The complexity and ambiguity of key provisions in the CPOR Act make it inevitable that errors will be made in implementation. The Act is a legislative minefield, a fact laid bare by the analysis in Appendix 2 of this report.

Following the Royal Commission, Parliament has strengthened the framework of laws that protect children in New South Wales, including by introducing a new offence of failing to report child abuse and new grooming offences. These and other amendments will likely increase the number of convictions for registrable offences in the longer term. It is therefore both appropriate and necessary that attention is now turned to urgently fixing the problems with the statutory framework of the Child Protection Register. The Commission's view, which is supported by the NSW Police Force, is that a simplified statutory framework, and the introduction of an independent compliance audit mechanism, will help ensure the Child Protection Register is a robust and accurate tool which assists police to protect children from harm.



**The Hon M F Adams QC**

Chief Commissioner



# EXECUTIVE SUMMARY

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The NSW Police Force established the Child Protection Register (the Register) in 2001, following the passage of the *Child Protection (Offenders Registration) Act 2000* (NSW) (CPOR Act). The CPOR Act requires offenders who have been convicted and sentenced for certain offences involving children or child abuse material to register with police when they re-enter the community. They must then provide reports to police of their personal details for a number of years. The purpose of the Register is to protect children from serious harm and ensure the early detection of offences by repeat child sex offenders who are in the community. The Register is a database that assists police to monitor and investigate these offenders.

The Commission's investigation has established that there have been problems with the Register for 17 years. Significant errors in the application of the CPOR Act started occurring as early as 2002. These errors have included incorrect decisions by the NSW Police Force about which persons should be included on the Register, and incorrect decisions about how long persons were legally required to make reports of their personal information to police under the CPOR Act (their 'reporting period').

Some of these errors have resulted in child sex offenders being in the community without being monitored by the NSW Police Force as required by the CPOR Act. The Commission reviewed one case in which a person reoffended while unmonitored. Other errors have caused the NSW Police Force to unlawfully require people to report their personal information to police for a number of years. As a result, people have been wrongly convicted, and even imprisoned, for failing to comply with CPOR Act reporting obligations, when in fact those obligations did not apply to them at the relevant time. Two persons were unlawfully imprisoned for more than a year in total.

The NSW Police Force has been aware for a number of years that there were significant issues with the Register. In 2014 the NSW Police Force Child Protection Registry (the Registry), the specialist unit in the State Crime Command responsible for maintaining the Register, started filing internal reports warning of systemic issues causing inaccuracies in the Register. Multiple reports from the Registry prompted the NSW Police Force to review 5,749 Register case files. This review was started in 2016 and took two years to complete. In October 2018 it concluded that 44 per cent (2,557) of those Register case files had contained errors.

There are a number of factors which have contributed over time to the errors in the Register. One of the most significant factors is the difficulty of interpreting and applying the provisions of the CPOR Act. Another is the insufficient resources allocated to the Registry to handle an ever-increasing workload.

The CPOR Act places obligations on courts and certain government agencies to assist the NSW Police Force to implement the registration scheme. However, almost since its inception, this multi-agency system has not been functioning as Parliament intended, particularly in relation to the identification of who are registrable persons.

The NSW Police Force has taken a number of significant steps since the start of the Commission's investigation to improve the administration of the Register, including doubling the staff in the Registry. This report contains 11 recommendations to remedy the unlawful conduct that has occurred and prevent further errors in the Register. Our key recommendations are that the NSW Police Force ensures that adequate resources are allocated to the Registry now and into the future to enable it to maintain the Register; that the CPOR Act be urgently referred to the NSW Law Reform Commission for comprehensive review so that the fundamental problems

with the legislative framework can be addressed and the various statutory responsibilities of the NSW Police Force, courts and government agencies reconsidered, and that an independent body conduct audits of the Register.

In **Chapter 1** we describe how we conducted our investigation, referred to as Operation Tusk. Our investigation commenced in September 2017 on the basis of information provided in a public interest disclosure. Early in the investigation the NSW Police Force acknowledged there were a significant number of errors in the Register. The Commission and the NSW Police Force adopted a collaborative approach, sharing information and expertise to identify and address issues throughout the investigation.

In **Chapter 2** we set out the key elements of the Child Protection Register. We explain the purposes of the Register, and what are the consequences under the CPOR Act if a person is determined to be a 'registrable person'. We describe the roles and responsibilities of the NSW Police Force Child Protection Registry and other police officers in relation to the Register. We explain that the Register is part of a national framework of different statutory registration schemes for sex offenders across Australia.

In **Chapter 3** we discuss the nature and extent of the errors that have occurred in the Register over time, including the results of the review of Register case files initiated by the NSW Police Force (called the 'CPR case review'). We highlight the serious consequences of these errors through several case studies. We found that since 2002 the NSW Police Force has made over 700 incorrect decisions about who were 'registrable persons' under the CPOR Act, or about the length of registrable persons' reporting periods. We also found that the NSW Police Force has unlawfully required people to report their personal information, and conducted unlawful inspections of persons' homes, as a result of incorrect information in the Register. The NSW Police Force has also charged and arrested people for not complying with CPOR Act reporting obligations when those people were not under any obligation to report under that Act. As a result, at least seven people were wrongly convicted of offences under the CPOR Act.

**Chapter 4** explores the responses of the NSW Police Force to those persons who have been subjected to unlawful or unjust actions as a consequence of the errors in the Register. The NSW Police Force was generally proactive in seeking annulments from the courts when it identified that persons had been wrongly convicted for offences under the CPOR Act. However, in 2016 the NSW Police Force made the decision not to notify persons that it had made errors in their cases. Relying on internal legal advice, the NSW Police Force intentionally limited the information it provided to such persons, to avoid the prospect of civil claims. We found that on at least three occasions, the NSW Police Force wrote letters which were in fact misleading. The NSW Police Force now acknowledges that these letters are misleading, and has agreed to notify all those who may have been subjected to unlawful or unjust actions as a result of errors in the Register.

In Chapters 5 to 8 we discuss the systemic problems which have contributed to the occurrence of so many errors in the administration of the Register.

**Chapter 5** looks at the resourcing of the Registry over time. There has been a steady increase in the demand, complexity and scope of the Registry's work. In October 2003 there were 916 persons on the Register. By August 2019 there were 4,344. The Registry's resources were not increased proportionate to its increasing workload. This resulted in the Registry being understaffed, which impacted on the accuracy of its work, its ability to engage in proactive investigative activities, and the welfare of its staff. Since the start of our investigation the NSW Police Force has added 14 officers to the Registry. We recommend that the NSW Police Force adopt a responsive model of resourcing for the Registry into the future.

**Chapter 6** examines the legislative framework for the Register. The NSW Police Force and the Commission agree that the CPOR Act is so complex and ambiguous in important respects that it creates an inherent risk of errors in the Register that the NSW Police Force cannot effectively mitigate. The legislative framework creates such practical difficulties that it undermines the Act's object of ensuring that registrable persons are monitored and comply with their obligations. The Commission's analysis of the CPOR Act, incorporating input from the NSW Police Force, identified over 20 issues. These issues are set out in full in **Appendix 2**, with examples of cases in which the complexity or ambiguity in the Act have led to errors. We recommend that the Attorney-General urgently refer the CPOR Act to the NSW Law Reform Commission for comprehensive review, to be completed within six months.

In **Chapter 7** we explain that courts and 'supervising authorities' have obligations under the CPOR Act to assist the NSW Police Force to implement the Register. However, there have been problems with compliance with some of these obligations for many years. Since 2003 authorities have been relying on the NSW Police Force to determine who the CPOR Act requires to be registered, even though the Act does not contemplate this role being performed by police. This shift away from the system envisioned by the CPOR Act has resulted in the NSW Police Force making decisions under that Act without access to adequate information. The NSW Police Force has already adopted some of our recommendations for interim solutions to improve the Registry's access to the information necessary to implement the CPOR Act. However, ultimately, the respective roles of the courts, the NSW Police Force and other authorities in relation to the Register need to be reconsidered as part of the review of the CPOR Act recommended in Chapter 6.

In **Chapter 8** we discuss the electronic systems that the Registry uses to keep the information on the Register about offenders' reporting obligations up to date. In 2014 Registry officers began to notice issues with these systems, and in 2015 it was reported that these problems had resulted in registered child sex offenders being released into the community without being monitored by the NSW Police Force under the CPOR Act. The NSW Police Force approved an IT project in 2017 to fix the issues with the electronic systems. At the time of writing, this project had not yet been completed. We recommend that the NSW Police Force take steps to ensure that the project is completed as soon as possible.

In **Chapter 9** we consider mechanisms to improve governance, quality assurance and accountability in relation to the Register. We recommend that an interagency committee and governance framework, involving the NSW Police Force, courts and supervising authorities, be established to improve compliance with each authority's obligations under the CPOR Act. We also recommend that the NSW Police Force develop an internal governance framework to ensure all local commands comply with the statutory framework when managing registrable persons. We further recommend that the statutory framework for the Register be amended to provide for independent compliance audits of the Register, similar to the *Sex Offenders Registration Act 2004* (Vic).

# 1. OUR INVESTIGATION PROCESS

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## 1.1 INITIATION OF OPERATION TUSKET

In 2017 the Law Enforcement Conduct Commission (the Commission) received a complaint from an officer (who has since left the NSW Police Force) alleging that there were serious problems with the NSW Child Protection Register (the Register). Based on the information provided by the officer, the Commission determined the complaint qualified as a public interest disclosure under the *Public Interest Disclosures Act 1994* (NSW).<sup>1</sup> On the basis of this disclosure, in September 2017 the Commission commenced an investigation into the administration of the Register by the NSW Police Force.

The investigation, referred to as Operation Tuskett, was initiated under s 51(1)(d) of the *Law Enforcement Conduct Commission Act 2016* (NSW) (LECC Act). That section states that the Commission may exercise its investigation powers in respect of conduct that is, or could be, 'agency maladministration'. Agency maladministration is a drafting device which refers to:

any conduct (by way of action or inaction) of the NSW Police Force other than excluded conduct:

- (a) that is unlawful (that is, constitutes an offence or is corrupt conduct or is otherwise unlawful), or
- (b) that, although it is not unlawful:
  - (i) is unreasonable, unjust, oppressive or improperly discriminatory in its effect, or
  - (ii) arises, wholly or in part, from improper motives, or
  - (iii) arises, wholly or in part, from a decision that has taken irrelevant matters into consideration, or
  - (iv) arises, wholly or in part, from a mistake of law or fact, or
  - (v) is conduct of a kind for which reasons should have (but have not) been given, or
- (c) that is engaged in in accordance with a law or established practice, being a law or practice that is, or may be, unreasonable, unjust, oppressive or improperly discriminatory in its effect.<sup>2</sup>

Agency maladministration may constitute 'serious maladministration' if:

- (a) ... the conduct involved is unlawful (that is, constitutes an offence or is corrupt conduct or is otherwise unlawful), or
- (b) ... the conduct involved is of a serious nature and, although it is not unlawful:
  - (i) is unreasonable, unjust, oppressive or improperly discriminatory in its effect, or
  - (ii) arises, wholly or in part, from improper motives.<sup>3</sup>

Operation Tuskett was the Commission's first investigation into agency maladministration.

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<sup>1</sup> *Public Interest Disclosures Act 1994* (NSW) s 12A(1).

<sup>2</sup> *Law Enforcement Conduct Commission Act 2016* (NSW) s 11(1).

<sup>3</sup> *Law Enforcement Conduct Commission Act 2016* (NSW) s 11(3).

## 1.2 THE SCOPE OF OUR INVESTIGATION

The NSW Police Force established the Register in October 2001, following the commencement of the *Child Protection (Offender Registration Act) 2000* (NSW) (the CPOR Act). It is a confidential database containing a range of personal information about offenders who have been sentenced for sexual or certain violent offences against children, or offences involving child abuse material.

The CPOR Act governs which offenders must be included on the Register, the reporting obligations each person must comply with, and the period of time for which those reporting obligations apply to those persons. While other agencies have responsibilities under the CPOR Act, the NSW Police Force is primarily responsible for maintaining the Register.<sup>4</sup>

The Register is managed by the Child Protection Registry (the Registry), a specialist unit within the Child Abuse and Sex Crimes Squad of the NSW Police Force.

Operation Tuskett examined the administration of the Register by the NSW Police Force under the CPOR Act. We used a range of investigation, research, and consultation strategies.

At the outset of our investigation, the NSW Police Force acknowledged there was a significant error rate in the Register. It informed us that it had initiated a review of all of its Register case files in 2016 to correct these errors (the CPR case review). The review was ongoing at the time our investigation was initiated, and it was finalised in October 2018.

Given this acknowledgement, and the fact the CPR case review was underway, it was not necessary for the Commission to conduct its own audit of Register case files to establish there were problems with the information in the Register. We focused on identifying the consequences of the errors contained in the Register cases. In particular, we looked at the actions taken by the NSW Police Force on the basis of incorrect information in the Register.

It became clear during our investigation that a number of systemic factors were hampering the ability of the Registry to accurately maintain the Register, including problems with the statutory framework. We prioritised the analysis of these systemic problems, and the development of interim and long term solutions.

## 1.3 COLLABORATIVE APPROACH

The Commission wishes to acknowledge the co-operation provided by the NSW Police Force throughout Operation Tuskett. The NSW Police Force provided significant assistance to the Commission in undertaking this investigation, by providing detailed information and explanations about the operation of the Registry and the Register. This enabled Commission investigators to gain a comprehensive understanding of the challenges faced by the Registry in seeking to implement the CPOR Act.

By acknowledging at a very early stage in our investigation the extent of the errors in the Register, the NSW Police Force also enabled us to focus a significant part of our

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<sup>4</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) s 19.



investigation on exploring solutions to the systemic problems that had contributed to these errors.

The Commission also assisted the NSW Police Force to address issues discovered during Operation Tuskett. Commission investigators raised issues directly with the NSW Police Force as they were identified, and the NSW Police Force responded promptly to these issues. As a result, there have been a number of improvements to NSW Police Force processes and systems during the course of this investigation. Examples include:

- We provided the NSW Police Force with our analysis of the list of criminal charges it was using to identify offenders who may need to be included on the Register. We identified 58 charges that were missing from that list, 56 charges that were incorrectly classified, and six charges that needed to be removed from the list. The NSW Police Force subsequently adjusted its list of charges and as a result identified one new offender to add to the Register.<sup>5</sup>
- We raised concerns with the NSW Police Force that it had not undertaken a process to identify if there were registrable persons who were missing from the Register. The NSW Police Force subsequently undertook such a process, and identified 94 people who had been incorrectly determined not to be registrable persons under the CPOR Act.<sup>6</sup> Along with the person who had been identified because of the missing charges, this meant that as a result of our investigation the NSW Police Force found a total of 95 offenders who had been missing from the Register.
- Commission investigators identified incorrect decisions in some Register case files which had not been identified by the NSW Police Force.<sup>7</sup> We brought these errors to the attention of the NSW Police Force and it promptly re-reviewed those files.
- In July 2018 the Commission facilitated a meeting between the NSW Police Force and Corrective Services NSW to discuss access for Registry staff to Corrective Services NSW Offender Integrated Management System (OIMS).
- In August 2018 the Commission provided the NSW Commissioner of Police with a confidential interim report on its investigation, which included provisional recommendations. By December 2018 the NSW Police Force had implemented two of these recommendations, by securing access for Registry staff to OIMS and to JusticeLink, the central database used by all courts in New South Wales to record the outcomes of proceedings. Direct access to the information in these systems has reduced the administrative burden on Registry staff who need that information to implement the CPOR Act.<sup>8</sup>

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<sup>5</sup> Discussed in Chapter 6 section 6.3.1 and Appendix 2 (part 3.4).

<sup>6</sup> See Chapter 3 section 3.4.

<sup>7</sup> See Chapter 3 section 3.5.2 (Case Study 2), and Chapter 6 section 6.3.6 and Appendix 2, part 6.3 (Example 8).

<sup>8</sup> See Chapter 7 section 7.6.

## 1.4 NSW POLICE FORCE INFORMATION

Part 6 of the LECC Act contains the Commission's coercive powers of investigation, including the powers in s 54 and s 55 to require the production of information, documents or other things through issuing notices.

During our investigation we served seven notices on the NSW Police Force under s 55 of the LECC Act, requiring it to produce certain documents within a specified timeframe. These notices targeted NSW Police Force information held by the Registry, the Office of the General Counsel and the Performance and Program Support Command. As a result we received and analysed over 5,000 pages of documents.

We also investigated the cases of 21 individuals who the NSW Police Force had placed on the Register. We chose these cases for review as they had been referenced in NSW Police Force documents as being cases in which errors had been made. The purpose of our review was to identify the precise nature of the errors, what had caused them, the consequences of those errors, and what remedial action the NSW Police Force had taken upon their discovery.

As part of our case file reviews we interrogated records in the NSW Police Force Computerised Operational Policing System (COPS) and in JusticeLink, in order to:

- verify each person's criminal history to identify the errors that had been made in applying the CPOR Act in their case;
- identify instances where police had searched residences in purported reliance on a power in the CPOR Act,<sup>9</sup> and
- check for charges, arrests and convictions for offences under the CPOR Act.

The case studies in this report are drawn from our review of these files.<sup>10</sup> All offenders mentioned in these case studies or elsewhere in the report have been given pseudonyms.

Although the Commission has the power to hold public and private examinations under Part 6 of the LECC Act, it was not considered necessary to hold any examinations in Operation Tuskett.

## 1.5 LEGAL RESEARCH, ANALYSIS AND LITERATURE REVIEW

We reviewed academic literature about sex offender registers and topics relevant to the management of sex offenders in the community post-sentence. We reviewed the reports of inquiries and reviews that considered the CPOR Act or the Register more broadly.<sup>11</sup>

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<sup>9</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) s 16C.

<sup>10</sup> See the list of case studies at the front of this report.

<sup>11</sup> New South Wales Ombudsman, *Review of the Child Protection Register: Report under s 25(1) of the Child Protection (Offenders Registration) Act 2000* (2005); Ministry for Police (NSW), *Report to Parliament: Review of Child Protection (Offenders Registration) Act 2000* (2007); Ministry for Police and Emergency Services (NSW), *Report: Statutory review of the Child Protection (Offenders Registration) Act 2000* (2013); NSW Sentencing Council, *Penalties Relating to Sexual Assault Offences in New South Wales*, volume 3 (2009); New

As part of our focus on identifying the systemic factors contributing to errors in the Register, we undertook an extensive analysis of the CPOR Act, the final results of which are contained in Appendix 2. We also analysed relevant civil proceedings and New South Wales case law, and undertook a comparative analysis of the equivalent statutory frameworks in all Australian jurisdictions, New Zealand and the United Kingdom.

## 1.6 INFORMATION FROM THE NSW BUREAU OF CRIME STATISTICS AND RESEARCH

We requested datasets from the NSW Bureau of Crime Statistics and Research (BOCSAR) to explore trends in the numbers of persons added to the Register between its commencement in 2001 and the present.<sup>12</sup> These datasets included the number of persons convicted of child sexual offences, and in particular child abuse material offences,<sup>13</sup> and the number of these offences which were proven in New South Wales courts between 2001 and 2018.

## 1.7 CONSULTATIONS

During Operation Tuskett we held multiple consultations with police officers and legal officers from the Registry, the Child Abuse and Sex Crimes Squad, the Prosecutions Command, the Performance and Program Support Command and the Professional Standards Command of the NSW Police Force. The Commission particularly thanks those Registry officers and legal officers in the State Crime Command who spent a significant amount of time in consultations with Commission investigators discussing the technical aspects of the operation of the Register.

The Chief Commissioner wrote to the Commissioner of Police to notify him of the initiation of Operation Tuskett,<sup>14</sup> to provide him with our Interim Report,<sup>15</sup> to seek his approval for our consultation with State Crime Command staff about the problems

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South Wales Ombudsman, *Responding to Child Sexual Assault in Aboriginal Communities: A report under Part 6A of the Community Services (Complaints, Reviews and Monitoring) Act 1993* (2012); Ministry for Police and Emergency Services, Department of Attorney General and Justice (NSW), *Statutory Review of the Child Protection (Offenders Prohibition Orders) Act 2004* (2013); Joint Select Committee on Sentencing of Child Sexual Assault Offenders, Parliament of New South Wales, *Every Sentence Tells a Story – Report on Sentencing of Child Sexual Assault Offenders*, Report 1/55 (2014).

<sup>12</sup> Email from NSW Bureau of Crime Statistics and Research to Law Enforcement Conduct Commission, 14 June 2018 (BOCSAR Ref.18-16301); Email from NSW Bureau of Crime Statistics and Research to Law Enforcement Conduct Commission, 23 November 2018 (BOCSAR Ref.18-16994); Email from NSW Bureau of Crime Statistics and Research to Law Enforcement Conduct Commission, 23 September 2019 (BOCSAR Ref. 19-18087).

<sup>13</sup> These are referred to as child pornography offenses in the BOCSAR data.

<sup>14</sup> Letter from Chief Commissioner, Law Enforcement Conduct Commission, to the Commissioner of Police, NSW Police Force, 18 September 2017.

<sup>15</sup> Letter from Chief Commissioner, Law Enforcement Conduct Commission, to the Commissioner of Police, NSW Police Force, 9 August 2018.

with the CPOR Act,<sup>16</sup> and to provide him with a draft of our final report for comment.<sup>17</sup>

The Chief Commissioner, the Commissioner of Integrity, the Solicitor to the Commission and Commission investigators met with the NSW Police Force Deputy Commissioner (Investigations and Counter Terrorism), the NSW Police Force General Counsel and the Commander of the State Crime Command on a number of occasions.

We also consulted with the NSW Ombudsman, Corrective Services NSW, the Independent Broad-based Anti-corruption Commission (Victoria) and Victoria Police.

## 1.8 INTERIM REPORTS

During Operation Tuskett we provided the NSW Police Force with interim reports and briefings, and sought its response. This process helped us to clarify areas of consensus and disagreement and further develop our recommendations. It also provided the NSW Police Force with the opportunity to implement improvements to relevant practices in a timely manner.

### 1.8.1 OPERATION TUSKET: INTERIM REPORT, AUGUST 2018

In August 2018 we provided the NSW Commissioner of Police with a confidential report, *Operation Tuskett: Interim Report*, setting out our provisional analysis, findings and recommendations.

The Commissioner of Police provided a written response in October 2018 indicating support for our analysis and a number of the recommendations. We then met with the Deputy Commissioner (Investigations and Counter Terrorism), Assistant Commissioner (Professional Standards Command) and the Assistant Commissioner (State Crime Command) to discuss the NSW Police Force response.

In December 2018 we provided a further report to the NSW Police Force detailing our outstanding concerns and met again with the Deputy Commissioner (Investigations and Counter Terrorism), the General Counsel for the NSW Police Force, and others.

### 1.8.2 CONSULTATION BRIEFING ON ISSUES WITH THE CHILD PROTECTION (OFFENDERS REGISTRATION) ACT 2000 (NSW), OCTOBER 2018

We prepared a report for the NSW Police Force which identified the areas of complexity, ambiguity and errors in the CPOR Act which we consider have contributed or may contribute to errors being made in determining who the Act applies to and the obligations it imposes on them. In October 2018 we provided this report to Registry staff and legal officers attached to the State Crime Command and conducted a consultation to hear their views on the issues they experience when applying the Act. Our final analysis, incorporating the feedback from the State Crime

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<sup>16</sup> Letter from Chief Commissioner, Law Enforcement Conduct Commission, to the Commissioner of Police, NSW Police Force, 31 August 2018.

<sup>17</sup> Letter from Chief Commissioner, Law Enforcement Conduct Commission, to the Commissioner of Police, NSW Police Force, 7 August 2019.

Command officers, identified more than 20 problems in the CPOR Act (this analysis is contained in Appendix 2).

## 1.9 FINAL REPORT ON OPERATION TUSKET

This final report of Operation Tuskett is made under s 132(1) of the LECC Act. It outlines our investigation, our findings and our recommendations.

This report does not include any findings against individual officers. It includes four findings against the NSW Police Force as an agency.

The Commission notes that as all findings in this report concern the NSW Police Force as an agency, and not any particular officers, there are no individuals who are 'affected persons' within the meaning of s 133(3) of the LECC Act. There is therefore no need for the Commission to include a statement as referred to in s 133(2) of that Act.

Although there are no individuals who are 'affected persons' for the purposes of this report, the Commission gave certain individuals whose conduct is discussed in this report an opportunity to make comments to the Commission in response to a draft. The Commission considered the submissions it received from those individuals and consequently revised parts of the draft report.

A copy of the draft report, including proposed recommendations, was then provided to the NSW Commissioner of Police for his response on behalf of the NSW Police Force in August 2019. The Commissioner of Police provided his response on 30 September 2019, and the report was updated to reflect those comments.

## 2. THE NSW CHILD PROTECTION REGISTER

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## 2.1 INTRODUCTION

New South Wales was the first Australian jurisdiction to introduce a mandatory registration scheme for persons convicted of sexual offences against children.<sup>18</sup> The Child Protection Register (the Register) was established in 2001 under the *Child Protection (Offenders Registration) Act 2000* (NSW) (CPOR Act). The purpose of the Register is to protect children from serious harm and ensure the early detection of offences by repeat child sex offenders.<sup>19</sup> The Register is primarily a database to assist police; it cannot be accessed by members of the general public.

In this chapter we explain the key statutory elements and purposes of the Register. We also discuss the roles and responsibilities of the NSW Police Force Child Protection Registry and other police officers in relation to the maintenance of the Register, and the national context regarding the registration of sex offenders.

## 2.2 KEY ELEMENTS OF THE CHILD PROTECTION REGISTER

### 2.2.1 OFFENDERS SENTENCED FOR 'REGISTRABLE OFFENCES' ARE 'REGISTRABLE PERSONS'

The CPOR Act requires all 'registrable persons' to report their personal details to the NSW Police Force. Registrable persons under the CPOR Act are those who have been sentenced for 'registrable offences'.<sup>20</sup> The registrable offences mentioned in the CPOR Act include sexual offences against or in relation to children, certain violent offences against children, and offences involving child abuse material.<sup>21</sup> The registrable offences are categorised into two 'classes', with 'Class 1 offences' generally being crimes that attract higher penalties than those listed as 'Class 2 offences'.<sup>22</sup>

Under the CPOR Act the NSW Commissioner of Police is responsible for ensuring that a Child Protection Register which contains the details of all registrable persons is established and maintained.<sup>23</sup> As at 31 August 2019 there were 4,344 people listed by

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<sup>18</sup> Victorian Law Reform Commission, *Sex Offenders Registration* (2012) para 1.10. The *Child Protection (Offenders Registration) Act 2000* (NSW) was introduced in response to Recommendation 111 of the Royal Commission into the New South Wales Police Service (Wood Royal Commission): New South Wales, *Parliamentary Debates*, Legislative Assembly, 1 June 2000, p 6475 (Paul Whelan, Minister for Police).

<sup>19</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) s 2A.

<sup>20</sup> There are a few limited exceptions to registration for first time juvenile offenders who have been sentenced for a registrable offence, as well as a discretion in relation to registration for certain juvenile offenders: see *Child Protection (Offenders Registration) Act 2000* (NSW) s 3A(2) and s 3C.

<sup>21</sup> 'Child abuse material' is defined in s 91FB of the *Crimes Act 1900* (NSW).

<sup>22</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) s 3 (definition of 'registrable offence', 'Class 1 offence' and 'Class 2 offence'). Persons who have been convicted of offences that are not 'Class 1' or 'Class 2' offences may become registrable under the Act if a court makes a child protection registration order in relation to the person: see *Child Protection (Offenders Registration) Act 2000* (NSW) pt 2A.

<sup>23</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) s 19.



the NSW Police Force as ‘currently registered’ under the CPOR Act.<sup>24</sup>

## 2.2.2 REGISTRABLE PERSONS ARE REQUIRED TO REPORT THEIR PERSONAL INFORMATION TO POLICE

Every registrable person is required to attend a police station to make an initial report of their personal details, generally within seven days of being sentenced (or if sentenced to imprisonment, within seven days of being released).<sup>25</sup> They are required to provide the NSW Police Force with a considerable amount of personal information, including:

- places of residence and details of employment, and details of any motor vehicle owned or hired by the person;
- all phone numbers, names of internet service providers, email addresses, and all user names the person uses online, including for instant messaging services or chat rooms;
- the names and dates of birth of each child who generally resides with the person;
- affiliation with any club or organisation which has children as members or participants in activities, and
- the names, dates of birth and addresses of each child with whom the person has had contact because, for example, the person was supervising or caring for the child, or the child was visiting the person’s household, or the person exchanged contact details with the child.<sup>26</sup>

This information is entered into the Register and used by the NSW Police Force to monitor registrable persons, investigate breaches of reporting obligations and investigate offences committed against children.<sup>27</sup> Police officers have the power to take a registrable person’s fingerprints and photographs when they are making a report, and these may be retained and used for identification, law enforcement or child protection purposes.<sup>28</sup>

The registrable person is required to make annual reports to the NSW Police Force of their personal information, and in between these reports, notify it of any changes to any of the information listed above, generally within days.<sup>29</sup> Registrable persons are also required to report travel plans and intended changes of address.<sup>30</sup>

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<sup>24</sup> Letter from Commissioner of Police, NSW Police Force, to Chief Commissioner, Law Enforcement Conduct Commission, 30 September 2019 (Annexure D: Updated Statistics from the CPR Monthly Report and about Travel Requests).

<sup>25</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) ss 9A-9C, and s 12A(1)(a).

<sup>26</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) s 9.

<sup>27</sup> NSW Police Force, *Child Protection Register Standard Operating Procedures* (2016) NSW Police Force response to item 7 of Law Enforcement Conduct Commission Notice 929 of 2017, p 9.

<sup>28</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) ss 12E-12H.

<sup>29</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) ss 10 and 11.

<sup>30</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) ss 11A-11F.



### 2.2.3 CALCULATION OF REGISTRABLE PERSONS' 'REPORTING PERIODS'

The number of years for which a registrable person is required to make reports to police (their 'reporting period') is determined by applying formulas in the CPOR Act.<sup>31</sup> The reporting period for an adult offender will either be eight years, 15 years, or the rest of his or her life, and for juvenile offenders either four years or 7.5 years.<sup>32</sup> The length of the person's reporting period will depend on which 'class' of offence the person was sentenced for, how many other Class 1 or Class 2 offences the person had been found guilty of previously, and whether the person was 18 years or older at the time of the offending.

A registrable person's reporting obligations will be suspended while they are in custody or travelling outside New South Wales.<sup>33</sup> The NSW Police Force is then required to extend their reporting period by the length of time they spent in custody, and in certain cases, for time spent travelling.<sup>34</sup> The NSW Police Force must also extend the person's reporting period if they are late in making an initial or annual report by more than one month.<sup>35</sup>

It is an offence for a registrable person to fail to comply with any of the reporting obligations under the CPOR Act without reasonable excuse, or to knowingly provide false or misleading information in a report.<sup>36</sup> These offences are punishable by up to five years' imprisonment.

There is generally no ability under the CPOR Act for a person who is given a reporting period of less than life to apply to have the reporting period revised.<sup>37</sup> For those who have been given a life-time reporting period, they may, if certain conditions are met, apply to the NSW Civil and Administrative Tribunal for suspension of their reporting obligations, but only after 15 years (as long as they have not been sentenced for further registrable offences).<sup>38</sup>

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<sup>31</sup> The one exception relates to persons who are sentenced for offences in other jurisdictions but then move to New South Wales and are classified as 'corresponding registrable persons', in which case their reporting period in New South Wales is the period which was prescribed for them in the jurisdiction in which they offended: see *Child Protection (Offenders Registration) Act 2000* (NSW) ss 19BB-19BD.

<sup>32</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) ss 14A-14B.

<sup>33</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) s 15(1).

<sup>34</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) s 15(2) and (3).

<sup>35</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) s 15(4) and (5).

<sup>36</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) ss 17 and 18.

<sup>37</sup> The only limited exception is that those registrable persons who have had their reporting period extended by the NSW Police Force under s 15(3) for periods of travel can apply to the NSW Civil and Administrative Tribunal to essentially suspend these extensions: *Child Protection (Offenders Registration) Act 2000* (NSW) s 16(1)(b) and (3A).

<sup>38</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) s 16.

## 2.2.4 OTHER RESTRICTIONS AND OBLIGATIONS APPLICABLE TO REGISTRABLE PERSONS

There are significant legal consequences for a person who is placed on the Register, in addition to the reporting obligations.

Following recent amendments to Commonwealth legislation, it is now an offence for a registrable person who has reporting obligations to travel overseas without permission from a 'competent authority' (in New South Wales this is the NSW Police Force).<sup>39</sup> A registrable person may also have their passport denied or cancelled at the request of a competent authority.<sup>40</sup>

Registrable persons are also subject to restrictions on applying for changes to their names<sup>41</sup> and engaging in child-related work.<sup>42</sup> They can be subjected to unannounced home inspections by the NSW Police Force under s 16C of the CPOR Act, for the purpose of verifying that they are complying with their reporting obligations.<sup>43</sup> They can be ordered to provide their DNA to police.<sup>44</sup> They also may be made the subjects of child protection prohibition orders which impose further restrictions on their activities.<sup>45</sup> Section 19BA of the CPOR Act allows certain scheduled agencies to collect and share the personal information of registrable persons, including the NSW Police Force, Corrective Services NSW, the Department of Education and Communities, the Department of Family and Community Services and the Ministry of Health.<sup>46</sup>

It should be noted that a person does not cease to be a 'registrable person' under the CPOR Act once their reporting period ends. This means that some of the restrictions mentioned above (such as restrictions on name changes, applying for child-related work and being made the subject of child protection prohibition orders) will generally apply to all registrable persons for life.<sup>47</sup>

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<sup>39</sup> *Criminal Code Act 1995* (Cth) s 271A.1; *Australian Passports Act 2005* (Cth) s 12 and Explanatory Memorandum, *Passports Legislation Amendment (Overseas Travel by Child Sex Offenders) Bill 2017* (Cth), p 10.

<sup>40</sup> *Australian Passports Act 2005* (Cth) s 12.

<sup>41</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) pt 3A.

<sup>42</sup> Under the *Child Protection (Working with Children) Act 2012* (NSW) s 18 and sch 2 cl 1(1)(ac).

<sup>43</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) s 16C. It is an offence for a registrable person to refuse to allow police to enter and inspect their residential premises under s 16C, or to not cooperate with police while they do so: s 16C(4) and (5) and s 17.

<sup>44</sup> *Crimes (Forensic Procedures) Act 2000* (NSW) pt 7B.

<sup>45</sup> *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW) ss 3-5.

<sup>46</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) sch 1.

<sup>47</sup> The only circumstances in which a person ceases to be a 'registrable person' are set out in s 3B of the *Child Protection (Offenders Registration) Act 2000* (NSW), and relate to quashing or setting aside of their conviction for the offence that made them registrable, or the reduction of their sentence for that offence.

## 2.3 PURPOSES OF THE CHILD PROTECTION REGISTER

When the CPOR Act was introduced into Parliament, the Minister for Police stated it would:

- increase and improve the accuracy of intelligence held by police about child sex offenders;
- assist in the investigation and prosecution of child sex offences committed by recidivist offenders;
- provide a deterrent to re-offending;
- assist the monitoring and management of child sex offenders in the community, and
- provide child abuse victims and their families with an increased sense of security.<sup>48</sup>

The NSW Ombudsman was required to review and report on the first two years of operation of the CPOR Act following its commencement in 2001.<sup>49</sup> The NSW Police Force advised the NSW Ombudsman that the Register had proven to be ‘an invaluable investigative tool’ even within its first two years.<sup>50</sup> In his report, the NSW Ombudsman noted that intelligence made available to the NSW Police Force through the Register had assisted in the investigation of child sexual assault cases, and the NSW Police Force had reported that the monitoring of registered offenders had ‘realised benefits in terms of prevention and intervention’ regarding risks to children.<sup>51</sup>

## 2.4 STATUTORY RESPONSIBILITY FOR IMPLEMENTING THE REGISTER

The CPOR Act places obligations on courts and other government agencies to assist the NSW Police Force to implement the registration scheme. Courts that sentence registrable persons for registrable offences (referred to as ‘sentencing courts’), and other authorities such as Corrective Services NSW and the Ministry of Health (referred to as ‘supervising authorities’) have obligations to inform registrable persons of their reporting obligations and the consequences of non-compliance.<sup>52</sup>

Sentencing courts have the responsibility under the CPOR Act to notify the NSW Commissioner of Police, and the relevant supervising authority, that a registrable person has been sentenced.<sup>53</sup> However, as will be discussed in Chapter 7, since the

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<sup>48</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 1 June 2000, p 6475 (Paul Whelan).

<sup>49</sup> New South Wales Ombudsman, *Review of the Child Protection Register: Report under s 25(1) of the Child Protection (Offenders Registration) Act 2000* (2005).

<sup>50</sup> *Ibid* p 153.

<sup>51</sup> *Ibid* pp 153-154.

<sup>52</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) s 4(1) and *Child Protection (Offenders Registration) Regulation 2001* (NSW) regs 6 – 7. For further discussion on the role of other agencies in relation to the Register, see Chapter 7.

<sup>53</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) s 4(2).

early years of the Register, court staff found it difficult to determine who was a registrable person.<sup>54</sup> As a result, the NSW Police Force has in practice assumed responsibility for interpreting and applying the CPOR Act to identify registrable persons and determine the length of their reporting periods.

## 2.5 THE NSW POLICE FORCE CHILD PROTECTION REGISTRY

The Child Protection Registry (the Registry) is a specialist unit within the Child Abuse and Sex Crime Squad of the State Crime Command of the NSW Police Force, established to monitor and maintain the Register on behalf of the Commissioner of Police.<sup>55</sup>

Officers in the Registry identify and determine which offenders are 'registrable persons' under the CPOR Act.<sup>56</sup> Registry staff rely on an automated flagging function in the NSW Police Force Computerised Operational Policing System (COPS) which identifies persons who have been charged with potentially registrable offences.<sup>57</sup> If a flagged charge is proven at court, a Registry officer will determine if the person meets the statutory threshold for registration. If so, the Registry officer will create a COPS 'CPR case' for the person.<sup>58</sup> At this point it can be said the person has been 'placed on the Register'. The Registry officer will also calculate the person's reporting period by identifying which formula in the CPOR Act applies, and record the person's reporting period in their COPS CPR case.<sup>59</sup>

## 2.6 ROLES AND RESPONSIBILITIES OF OFFICERS IN NSW POLICE FORCE LOCAL COMMANDS

Once the Registry has placed a person on the Register, the monitoring and management of the registrable person generally becomes the responsibility of officers in the Police Area Command or Police District (both referred to in this report

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<sup>54</sup> New South Wales Ombudsman, *Review of the Child Protection Register: Report under s 25(1) of the Child Protection (Offenders Registration) Act 2000* (2005) p 55.

<sup>55</sup> NSW Police Force, *Child Abuse and Sex Crime*, <[https://www.police.nsw.gov.au/crime/sex\\_crimes/child\\_abuse](https://www.police.nsw.gov.au/crime/sex_crimes/child_abuse)>.

<sup>56</sup> NSW Police Force, *Child Protection Register Standard Operating Procedures* (2016) NSW Police Force response to item 7 of Law Enforcement Conduct Commission Notice 929 of 2017, p 16.

<sup>57</sup> When an officer enters a charge for a person into COPS, the system checks the unique law part code for the charge against a list of law part codes that are flagged in the system as 'CPR-related' offences: NSW Police Force, *Child Protection Register Standard Operating Procedures* (2016) NSW Police Force response to item 7 of Law Enforcement Conduct Commission Notice 929 of 2017, p 12; List of law part codes for registrable offences, NSW Police Force response to item 3 of Law Enforcement Conduct Commission Notice 929 of 2017.

<sup>58</sup> NSW Police Force, *Child Protection Register Standard Operating Procedures* (2016) NSW Police Force response to item 7 of Law Enforcement Conduct Commission Notice 929 of 2017, p 17.

<sup>59</sup> Ibid.

as ‘local commands’) in which the registrable person makes their initial report.<sup>60</sup> Until recently there were no authorised positions in local commands dedicated to the management of registrable persons in accordance with the CPOR Act. However in 2019 15 officers have been deployed to local commands for the specific purpose of managing registrable persons, and the NSW Commissioner of Police has stated that more will be allocated over the next few years.<sup>61</sup> This is discussed further in Chapter 5, section 5.6.

Officers in local commands are also involved in implementing the CPOR Act through conducting inspections of registrable persons’ residences under s 16C of the CPOR Act, and investigating and commencing prosecutions for breaches of reporting obligations. In conducting these tasks, the officers necessarily rely on the accuracy of the information in the Register.

The Registry takes over responsibility for managing a registrable person if their reporting obligations need to be suspended, or if the person moves interstate and their file needs to be transferred to a different jurisdiction.<sup>62</sup> The Registry is also responsible for finalising all Register cases once a registrable person reaches the end of their reporting period.<sup>63</sup>

The Registry is also responsible for a growing list of additional tasks connected to the Register, as discussed in Chapter 5, section 5.3.

## 2.7 PART OF A NATIONAL APPROACH TO REGISTRATION OF CHILD SEX OFFENDERS

The CPOR Act is part of a national approach to the registration of offenders who commit sexual and other serious offences against children. Following New South Wales’ lead, there are now similar, but not uniform, offender registration laws in all Australian states and territories.<sup>64</sup>

These offender registration laws provide for mutual recognition of reporting obligations across jurisdictions. When an offender registered in one jurisdiction moves to a new jurisdiction while still being required to report in the first jurisdiction, the registration law in the new jurisdiction will generally ‘pick up’ those obligations

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<sup>60</sup> Manager, Child Protection Registry, NSW Police Force, *Management of the Child Protection Register in New South Wales: Michael O’Brien Scholarship 2017* (2018), NSW Police Force response to item 1 of Law Enforcement Conduct Commission Notice 929 of 2018, p 24.

<sup>61</sup> Letter from Commissioner of Police, NSW Police Force, to Chief Commissioner, Law Enforcement Conduct Commission, 30 September 2019, p 2.

<sup>62</sup> *Staffing Submission: Child Protection Registry*, pp 6-7, attachment to Child Protection Registry, NSW Police Force, *Submission of staffing report requesting five (5) additional sworn positions ...*, 16 June 2015, D/2015/294868, NSW Police Force response to Law Enforcement Conduct Commission Notice 914 of 2017.

<sup>63</sup> *Ibid* p 7.

<sup>64</sup> *Sex Offenders Registration Act 2004* (Vic); *Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004* (Qld); *Community Protection (Offender Reporting) Act 2005* (Tas); *Child Protection (Offender Reporting and Registration) Act 2004* (NT); *Crimes (Child Sex Offenders) Act 2005* (ACT); *Child Sex Offenders Registration Act 2006* (SA); *Community Protection (Offender Reporting) Act 2004* (WA).

and require the person to comply with them in the new jurisdiction (in the CPOR Act these persons are referred to as 'corresponding registrable persons').<sup>65</sup>

There is also a national database of all offenders who are registered in Australia, called the Australian National Child Offender Register (the ANCOR).<sup>66</sup> Police in each jurisdiction have agreed to maintain the ANCOR by uploading and keeping up to date information about all the registrable persons in each of their jurisdictions, in accordance with minimum standards set out in national protocols.<sup>67</sup> The Registry is responsible for ensuring that the correct information for each registrable person in New South Wales is entered into the ANCOR.<sup>68</sup>

The ANCOR enables authorised police officers to register, case manage and share information about registered offenders across jurisdictions.<sup>69</sup> Members of the public cannot access the ANCOR.

While the NSW Police Force uses the 'CPR' section of its COPS as its primary recording system for the Register, police in other Australian jurisdictions use the ANCOR as their primary register, and do not have their own separate database. These jurisdictions therefore 'rely heavily' on the accuracy and consistency of the data inputted by the NSW Police Force into ANCOR to identify and manage registrable persons who enter their jurisdictions from New South Wales.<sup>70</sup>

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<sup>65</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) pt 3, div 10; *Sex Offenders Registration Act 2004* (Vic) s 9 and s 37; *Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004* (Qld) s 7 and s 39; *Community Protection (Offender Reporting) Act 2005* (Tas) s 11 and s 26; *Crimes (Child Sex Offenders) Act 2005* (ACT) ss 11 and 11A and s 94; *Child Protection (Offender Reporting and Registration) Act 2004* (NT) s 8 and s 40; *Child Sex Offenders Registration Act 2006* (SA) ss 7-8, and ss 35-36; *Community Protection (Offender Reporting) Act 2004* (WA) ss 7-8, ss 49-50.

<sup>66</sup> The ANCOR is part of the National Child Offender System (NCOS) which is maintained and supported by the Australian Criminal Intelligence Commission: Australian Criminal Intelligence Commission, *National Child Offender System* (14 April 2019) <<https://www.acic.gov.au/our-services/child-protection/national-child-offender-system>>.

<sup>67</sup> *Standard Operating Procedures: National Protocols for Police Jurisdictions using the National Child Offender System (NCOS) Comprising ANCOR and MPS*, 28 May 2013, NSW Police Force response to item 8 of Law Enforcement Conduct Commission Notice 929 of 2017.

<sup>68</sup> There is now an interface between COPS and ANCOR which enables ANCOR to automatically update mandatory fields by pulling information from COPS once every 24 hours, however some information and documentation still needs to be manually uploaded: Law Enforcement Conduct Commission consultation with NSW Police Force, Parramatta, 5 October 2017; Workforce Intelligence Unit, Human Resources Command, NSW Police Force, *HR Analysis: Child Protection Register Staffing Review*, 20 July 2017, D/2017/630614, NSW Police Force response to item 1 of Law Enforcement Conduct Commission Notice 929 of 2017, p 33.

<sup>69</sup> Australian Criminal Intelligence Commission, *National Child Offender System* (18 July 2018) <<https://www.acic.gov.au/our-services/child-protection/national-child-offender-system>>.

<sup>70</sup> Child Protection Registry, NSW Police Force, *Further issues and risks identified within the Child Protection Registry*, 16 October 2015, D/2015/527743, NSW Police Force response to Law Enforcement Conduct Commission Notice 914 of 2017, pp 2-3.



# 3.

## NATURE, EXTENT AND IMPACT OF ERRORS IN THE REGISTER

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*'The [errors in the Register] are not attributable to a single officer, or single error that has been repeated constantly. There have been a number of combined human and systems errors that have occurred since the inception of the [Register]. Whilst many such issues have been remedied along the way, some have continued throughout. Unfortunately these errors are widespread and impact heavily on the integrity and accuracy of [Register] records and management of child sex offenders who reside in the community.'*

- Officer, Child Protection Registry, NSW Police Force, May 2016<sup>71</sup>

## 3.1 INTRODUCTION

The Commission's investigation has established that there have been problems with the NSW Child Protection Register (the Register) for over 17 years. Substantive errors started occurring in the Register as early as 2002.

The NSW Police Force has been aware for a number of years that there were significant errors in the Register. The Child Protection Registry (the Registry) has been internally reporting issues with the information in the Register, and emphasising the need for the NSW Police Force to address systemic issues, since at least 2014.

After several reports from Registry staff, in 2016 the NSW Police Force initiated an internal review of 5,749 Register case files, referred to as the CPR case review. The CPR case review was finalised in October 2018, a year into our investigation. It found that 44 per cent of the Register case files had been affected by errors. The most significant errors involved incorrect decisions by the NSW Police Force that certain persons should be included on the Register, and in other cases incorrect decisions about how long persons were legally required to make reports of their personal information to police under the *Child Protection (Offenders Registration) Act 2000* (NSW) (CPOR Act).

As a result of our investigation, the NSW Police Force has also identified 95 offenders who it had incorrectly decided not to place on the Register. In addition to one other offender that the NSW Police Force had identified in 2016, this meant that since 2001 there have been a total of 96 offenders who the NSW Police Force incorrectly left off the Register.

This chapter outlines the extent and nature of the errors that have occurred in the Register over time. It explores the serious consequences of these errors in certain cases. Some of these errors have resulted in child sex offenders being in the community without being monitored by the NSW Police Force under the CPOR Act. Errors in other cases have resulted in the NSW Police Force unlawfully requiring persons to report their personal information to police for a number of years. The case studies included in this chapter illustrate examples of individuals being wrongly charged, convicted and sentenced to imprisonment for breaching CPOR Act

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<sup>71</sup> Child Protection Registry, NSW Police Force, *Serious concerns raised regarding the Child Protection Register (CPR) reporting period timeframes and lack of review of matters prior to case finalisation*, 26 May 2016, D/2016/277899, NSW Police Force response to item 7 of Law Enforcement Conduct Commission Notice 914 of 2017, p 5.



reporting obligations, when in fact they did not have any such obligations under that Act at the relevant time.

The CPR case review team corrected the errors in the Register files as they were identified. Chapter 4 considers what remedial action the NSW Police Force took in cases in which it had subjected persons to unlawful actions under the CPOR Act because of these errors.

This chapter contains the Commission's findings in relation to the errors in the Register. In summary, the Commission found that:

- The NSW Police Force has since 2002 made over 700 incorrect decisions, arising wholly or in part from mistakes of law or fact, as to whether certain individuals were registrable persons under the CPOR Act, or about the length of registrable persons' reporting periods.<sup>72</sup>
- As a result of these incorrect decisions, the NSW Police Force:
  - unlawfully required persons to report their personal information to police for a number of years;
  - conducted unlawful inspections of persons homes,<sup>73</sup> and
  - charged and arrested persons for failure to comply with reporting obligations, or providing false or misleading information under the CPOR Act when they were not under any obligation to report under that Act at the relevant time.<sup>74</sup>

In the final section of this chapter we note the significant changes that the NSW Police Force has made since 2016 to improve its administration of the Register. These improvements have substantially reduced the number of errors in the Register, and made such errors less likely in future.

## 3.2 INTERNAL REPORTS BY REGISTRY OFFICERS

From 2014, Registry officers started to formally raise concerns through the NSW Police Force chain of command about systemic issues affecting the accuracy of the Register. Between November 2014 and July 2016 officers in the Registry made at least 10 internal reports and submissions which warned of errors in the Register, and noted the risks to the community and the reputation of the NSW Police Force if the causes of the errors were not addressed.<sup>75</sup>

Many of these internal reports emphasised the need for more resources for the Registry. These reports noted the steady increase in the number of persons on the Register, and the increasingly unmanageable workload of the Registry (discussed in Chapter 5, section 5.2).

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<sup>72</sup> Cf. *Law Enforcement Conduct Commission Act 2016* (NSW) s 11(1)(b)(iv).

<sup>73</sup> Cf. *Law Enforcement Conduct Commission Act 2016* (NSW) s 11(3)(a).

<sup>74</sup> Cf. *Law Enforcement Conduct Commission Act 2016* (NSW) s 11(3)(b)(i).

<sup>75</sup> Reports and submissions produced by the NSW Police Force in response to Law Enforcement Conduct Commission Notice 914 of 2017 (items 1 - 7) and Law Enforcement Conduct Commission Notice 929 of 2017 (items 11 and 12).

Some of the key internal reports from the Registry which led to the CPR case review are summarised below.

### 3.2.1 REPORT OF PROBLEMS WITH ELECTRONIC SYSTEMS IDENTIFYING WHEN A REGISTRABLE PERSON WAS RELEASED FROM PRISON

In September 2015, the Registry Manager requested ‘urgent assistance’ to address a problem in the electronic systems relied upon by the NSW Police Force to track when registered persons went in and out of custody.<sup>76</sup> The Registry Manager reported that at least two registered sex offenders had been released into the community without police knowledge, because the NSW Police Force Computerised Operational Policing System (COPS) had shown them as still being in prison with their reporting obligations suspended.<sup>77</sup> He stated that it appeared there had been problems with these systems for years, and:

it is unknown how many other Registrable Persons this may have affected ... unless a full and comprehensive audit is conducted of every Registrable Person to ever have the status of ‘Suspended in Custody’ it is impossible to determine if any more discrepancies exist. As one could appreciate, this is a significant concern and risk to the NSWPF and the community in general.<sup>78</sup>

### 3.2.2 REPORT ON ERRORS OF LEGAL INTERPRETATION SINCE START OF THE REGISTER, AND LACK OF QUALITY ASSURANCE

On 16 October 2015, the Registry Manager reported that external legal advice revealed the NSW Police Force had been working from an erroneous interpretation of the formulas for calculating reporting periods in the CPOR Act.<sup>79</sup> This had been the practice of the NSW Police Force since the commencement of the Register in 2001, up until the advice was received in mid-2015.<sup>80</sup> The result was that registrable persons who had convictions for registrable offences which pre-dated the commencement of the Register had been given reporting periods which were years too short.<sup>81</sup> The Registry Manager reported:

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<sup>76</sup> This issue is discussed in Chapter 8.

<sup>77</sup> See Case Studies 10 and 11 in Chapter 8 (section 8.3).

<sup>78</sup> Child Protection Registry, NSW Police Force, *Request for urgent assistance from Business and Technology Services*, 28 September 2015, D/2015/486821, NSW Police Force response to item 3 of Law Enforcement Conduct Commission Notice 914 of 2017.

<sup>79</sup> Child Protection Registry, NSW Police Force, *Further issues and risks identified within the Child Protection Registry*, 16 October 2015, D/2015/527743, NSW Police Force response to item 5 of Law Enforcement Conduct Commission Notice 914 of 2017, p 5; Crown Solicitor’s Office New South Wales, *Advice in relation to Child Protection (Offender Registration) Act 2000*, 6 July 2015, D/2015/322971, NSW Police Force response to item 5 of Law Enforcement Conduct Commission Notice 914 of 2017; Office of General Counsel, NSW Police Force, 10 July 2015, D/2015/282431, NSW Police Force response to item 5 of Law Enforcement Conduct Commission Notice 914 of 2017.

<sup>80</sup> Child Protection Registry, NSW Police Force, *Serious concerns raised regarding the Child Protection Register (CPR) reporting period timeframes and the lack of review of matters prior to case finalisation*, 26 May 2016, D/2016/277899, NSW Police Force response to item 7 of Law Enforcement Conduct Commission Notice 914 of 2017, p 2.

<sup>81</sup> For an example see Case Study 2 in section 3.5.2.

This is a significant issue to the organisation because it is not known how many Registrable Persons this will effect, and without a full and comprehensive audit on each and every person on the Register, and previously on the Register, it will not be known.<sup>82</sup>

The Registry Manager also reported that due to the increasing workload of maintaining the Register, the Registry only had capacity for 'minimal supervisory and quality control checks' to ensure accuracy in its work.<sup>83</sup> This had led to registrable persons 'not being registered correctly (if at all) and issues identified with reporting periods and obligations'.<sup>84</sup> The Registry Manager reported that the Registry needed 'proper staffing and resourcing of the unit, to enable staff to effectively perform their duties and minimise risks to the organisation and the community as a whole'.<sup>85</sup> He requested an independent assessment of the workload of the Registry.

### 3.2.3 REPORT OF 'SERIOUS CONCERNS' REGARDING INCORRECT FINALISATION OF REGISTER CASES, RESULTING IN NEED FOR REVIEW OF ALL CASES

On 26 May 2016, an officer in the Registry submitted a detailed report about 'serious concerns' regarding the Register.<sup>86</sup> The officer reported that since the start of the Register, the Registry had been relying on a function in COPS which automatically closed a registrable person's case when the date recorded for the end of their reporting period was reached, without any input from Registry staff.<sup>87</sup> The officer noted that, as a result:

There has been no process in place to conduct a manual/human review of the case prior to finalisation to ensure the reporting period end date is accurately reflected, and that all periods of incarceration, travel and other variables are taken into consideration before the case is finalised.<sup>88</sup>

The officer commented that the situation of having Register cases auto-finalise without any manual review was 'seriously flawed', given the identified problems with the electronic systems for tracking offenders when they leave prison, and errors of legal interpretation affecting the calculation of reporting periods.<sup>89</sup> He reported that 'there are a number of examples where a combination of both human error and systems error have seen a registered person's removal from the register far earlier [than] they should have been', and provided specific cases.<sup>90</sup>

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<sup>82</sup> Child Protection Registry, NSW Police Force, *Further issues and risks identified within the Child Protection Registry*, 16 October 2015, D/2015/527743, NSW Police Force response to item 5 of Law Enforcement Conduct Commission Notice 914 of 2017, p 5.

<sup>83</sup> Ibid p 9.

<sup>84</sup> Ibid.

<sup>85</sup> Ibid.

<sup>86</sup> Child Protection Registry, NSW Police Force, *Serious concerns raised regarding the Child Protection Register (CPR) reporting period timeframes and the lack of review of matters prior to case finalisation*, 26 May 2016, D/2016/277899, NSW Police Force response to item 7 of Law Enforcement Conduct Commission Notice 914 of 2017.

<sup>87</sup> Ibid p 1.

<sup>88</sup> Ibid.

<sup>89</sup> Ibid pp 1-2.

<sup>90</sup> Ibid p 2.

The officer commented that, based on a dip sample of 28 Register cases that revealed 11 were incorrect:

it stands to reason that there is an unacceptable quantity of finalised cases where [registrable persons] are still required by legislation to abide by reporting obligations. Similarly, there are persons who remain on the register who have long since fulfilled their legislated responsibilities under the Act. The risk to the organisation is obvious.<sup>91</sup>

Given the 'historical failings' that had affected the accuracy of information on the Register, the officer recommended an independent audit of all active Register cases.<sup>92</sup>

On 10 June 2016, when the Registry Manager read the officer's report of 'serious concerns', he recommended that a full review of all Register cases be undertaken, not just current/active cases. However, he warned that additional resources would be needed as 'the audit of all cases is too onerous for Registry staff to complete alone'.<sup>93</sup> The Registry Manager noted that the content of the officer's report 'presents a significant risk to the NSWPF and the on-going management of people on the Child Protection Register'.<sup>94</sup>

On 6 July 2016, the Acting Commander of the State Crime Command directed that a review of Register case files be initiated, starting with priority cases,<sup>95</sup> and in October 2016 the review was expanded to include all Register cases created since the start of the Register in 2001, including those already finalised (the CPR case review).<sup>96</sup>

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<sup>91</sup> Ibid p 5.

<sup>92</sup> Ibid p 7.

<sup>93</sup> Comments on Child Protection Registry, NSW Police Force, *Serious concerns raised regarding the Child Protection Register (CPR) reporting period timeframes and lack of review of matters prior to case finalisation*, 26 May 2016, D/2016/277899, NSW Police Force response to item 7 of Law Enforcement Conduct Commission Notice 914 of 2017, p 12.

<sup>94</sup> Comments on Child Protection Registry, NSW Police Force, *Serious concerns raised regarding the Child Protection Register (CPR) reporting period timeframes and lack of review of matters prior to case finalisation*, 26 May 2016, D/2016/277899, NSW Police Force response to item 7 of Law Enforcement Conduct Commission Notice 914 of 2017, p 9.

<sup>95</sup> Comments on Child Protection Registry, NSW Police Force, *Serious concerns raised regarding the Child Protection Register (CPR) reporting period timeframes and lack of review of matters prior to case finalisation*, 26 May 2016, D/2016/277899, NSW Police Force response to item 7 of Law Enforcement Conduct Commission Notice 914 of 2017, p 15.

<sup>96</sup> Child Protection Registry, NSW Police Force, *Staffing Submission for the Child Protection Registry*, 11 October 2016, D/2016/575518, NSW Police Force response to item 8 of Law Enforcement Conduct Commission Notice 914 of 2017, p 1; Sex Crimes Squad, *Workload issues impacting upon the Child Protection Register (CPR)*, 18 July 2017, NSW Police Force response to item 19(a) of Law Enforcement Conduct Commission Notice 929 of 2017.

### 3.3 ERRORS IDENTIFIED BY THE NSW POLICE FORCE CPR CASE REVIEW

The CPR case review reviewed 5,749 Register case files between July 2016 and October 2018.<sup>97</sup> It reviewed current and finalised Register cases.<sup>98</sup>

The CPR case review found that 44 per cent (2,557) of the Register case files contained significant errors which the review team needed to correct.<sup>99</sup> The table of the CPR case review results that the NSW Police Force provided to the Commission is recreated in full in Appendix 1.<sup>100</sup>

The CPR case review identified seven different categories of errors in the files. Some of these error categories relate to systems malfunction or other issues, and will be explored in other chapters of this report.

In this chapter we focus on those error categories which related to incorrect decisions by the NSW Police Force about whether a person was registrable, or the length of a person's reporting period.<sup>101</sup> The CPR case review identified:

- **485 Register cases in which it had to increase the person's reporting period** – this meant that when the NSW Police Force created the Register case it had applied the wrong formula under the Act, and concluded that the person's reporting period was shorter than the CPOR Act actually required (for example eight years, rather than 15 years);<sup>102</sup>
- **144 Register cases in which it had to decrease the person's reporting period** – this meant that when the NSW Police Force created the Register case it had applied the wrong formula under the Act, and concluded that the person's reporting period was longer than the CPOR Act actually permitted (for example 15 years, rather than eight years),<sup>103</sup> and

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<sup>97</sup> *NSW Police Force response to the interim report of Operation Tuskett*, 23 October 2018, F/2018/94374; D/2018/851613, p 1; *Grand totals year to date 2018* [results of the CPR case review], NSW Police Force response to item 1 of Law Enforcement Conduct Commission Notice 988 of 2018.

<sup>98</sup> The Commander of the State Crime Command advised the Commission that there were two categories of Register files that were excluded from the CPR case review, being files of registrable persons who moved interstate, and files of persons in custody at the time of the review. The Commander stated that both these categories were excluded as they would be subject to review through other processes: Law Enforcement Conduct Commission consultation with NSW Police Force, Sydney, 20 December 2018.

<sup>99</sup> This number is based on subtracting the number of 'correct' files and the number of 'reporting period correct but suspended in custody' files from the total of 5,749 files reviewed: see Appendix 1.

<sup>100</sup> This table was produced in the NSW Police Force response to item 1 of Law Enforcement Conduct Commission Notice 988 of 2018.

<sup>101</sup> For an explanation of reporting periods under the CPOR Act, see Chapter 2, section 2.2.3.

<sup>102</sup> See the category 'Reporting period increased – Eg 8 years to 15 years or life' in the table in Appendix 1.

<sup>103</sup> See the category 'Reporting period decreased – Eg life to 15 years or 8 years' in the table in Appendix 1.

- **45 Register cases in which the person ‘should not be on’ the Register** – this meant that the NSW Police Force had incorrectly determined that the person met the definition of a ‘registrable person’ under the CPOR Act.<sup>104</sup>

Each of these categories of errors is discussed further below.

### 3.4 MISSING REGISTRABLE PERSONS IDENTIFIED AS A RESULT OF THE COMMISSION’S INVESTIGATION

The CPR case review examined Register case files that had been created since the start of the Register in 2001. It did not include any process to identify persons who had been convicted of registrable offences in New South Wales but who may have mistakenly not been added to the Register.

As a result of our investigation, the NSW Police Force identified 95 offenders who had been missing off the Register.

One person was identified in 2018 after we advised the NSW Police Force that there were 58 charges missing from its list of charges that could result in a person becoming registrable. The NSW Police Force subsequently reviewed persons who had been convicted of the missing charges, and identified one person who it needed to add to the Register.

The other 94 missing registrable persons were identified after the Commission advised the NSW Police Force of the need to interrogate whether there were other registrable persons who were missing from the Register as a result of systems and/or human error.<sup>105</sup> In response to the Commission’s letter, the State Crime Command commenced a process in March 2019 involving the review of the details of 8,695 persons who the NSW Police Force had since 2001 decided were not registrable under the CPOR Act.<sup>106</sup> On 30 September 2019 the NSW Police Force informed the Commission that it had completed this process and concluded that 94 of those persons had in fact been registrable persons. Of the 94 people who the NSW Police Force identified in 2019 as having been incorrectly left off the Register:

- 67 persons no longer had reporting obligations, and therefore were off the Register and unmonitored by the NSW Police Force for the entirety of their reporting periods under the CPOR Act;
- 17 persons were in the community unmonitored under the CPOR Act;
- nine persons were in custody, and therefore their reporting periods had not yet commenced, and
- one person had died.<sup>107</sup>

<sup>104</sup> See the category ‘Should not be on register’ in the table in Appendix 1.

<sup>105</sup> Letter from Chief Commissioner, Law Enforcement Conduct Commission, to Deputy Commissioner, Investigations and Counter Terrorism, NSW Police Force, 28 February 2019.

<sup>106</sup> Letter from Deputy Commissioner, Investigations and Counter Terrorism, NSW Police Force, to Chief Commissioner, Law Enforcement Conduct Commission, 22 March 2019.

<sup>107</sup> Letter from Commissioner of Police, NSW Police Force, to Chief Commissioner, Law Enforcement Conduct Commission, 30 September 2019 (Annexure B: Submissions on Proposed Recommendations).



The NSW Police Force advised the Commission that it had notified each of the 17 persons who were in the community that they were registrable persons. The NSW Police Force also stated that it would write to each of the 67 persons whose reporting periods had ended to notify them that an error had been made.<sup>108</sup> This is important because the CPOR Act imposes restrictions on registrable persons that continue after their reporting period ends, such as restrictions on name changes and applying for child-related work.<sup>109</sup> Those persons can also still be made the subject of child protection prohibition order.<sup>110</sup>

The NSW Police Force has also informed the Commission that on 13 August 2019 it made a change in COPS so that any decision by an officer that a particular person is not a registrable person under the CPOR Act will now be reviewed by another officer before being confirmed.<sup>111</sup>

### 3.5 CONSEQUENCES OF THE ERRORS IN THE REGISTER

The Commission reviewed a number of Register cases in which the NSW Police Force made the types of errors identified by the CPR case review, to identify why these incorrect decisions were made, and the risks and consequences which flowed from these errors in each case. The case studies in the following sections are based on those reviews.

#### 3.5.1 NSW POLICE FORCE LEFT REGISTRABLE PERSONS OFF THE REGISTER

Prior to 2019 the NSW Police Force had not undertaken any particular process to identify persons who it had mistakenly left off the Register. In 2016 the NSW Police Force had however discovered one person who had been left off the Register in error. As Case Study 1 below shows, the NSW Police Force had initially determined that this person, Mr FF, was not a registrable person. As a result of this error, for almost eight years Mr FF did not provide the reports of his information required by the CPOR Act.

As a result of Operation Tuskett, the NSW Police Force identified a further 95 persons who it had incorrectly decided were not registrable persons. Sixty-seven of those persons were left off the Register, and therefore did not make reports to the NSW Police Force, for the entirety of their reporting period.

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<sup>108</sup> Letter from Commissioner of Police, NSW Police Force, to Chief Commissioner, Law Enforcement Conduct Commission, 30 September 2019 (Annexure B: Submissions on Proposed Recommendations).

<sup>109</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) pt 3A; *Child Protection (Working with Children) Act 2012* (NSW) s 18 and sch 2, cl 1(1)(ac).

<sup>110</sup> *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW) ss 3-5.

<sup>111</sup> Letter from Commissioner of Police, NSW Police Force, to Chief Commissioner, Law Enforcement Conduct Commission, 30 September 2019 (Annexure B: Submissions on Proposed Recommendations).

## CASE STUDY 1: Registrable person left off the Register for almost eight years

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In 2008 Mr FF<sup>112</sup> was convicted of one count of using a carriage service to access child pornography. He was given a conditional release order under s 20(1)(a) of the *Crimes Act 1914* (Cth), with conditions. The NSW Police Force considered Mr FF's conviction and sentence, but made the decision that he was not a registrable person under the CPOR Act.

In May 2016 Mr FF's case again came to the attention of the NSW Police Force. The Registry requested legal advice as to whether in fact he should have been put on the Register in 2008. The legal advice concerned whether the Commonwealth conditional release order was a sentence which would result in Mr FF being a registrable person under the CPOR Act. The legal advice ultimately concluded that Mr FF was a registrable person.

The NSW Police Force therefore created a case for Mr FF, and determined his reporting period was eight years. Mr FF therefore should have been reporting his information to police from 14 July 2008 to 13 July 2016.

The NSW Police Force notified Mr FF on 31 May 2016 that he was subject to reporting obligations under the CPOR Act, and on 10 June 2016 he made an initial report of his personal information, and was notified that his reporting period would continue for 34 days.

### 3.5.2 NSW POLICE FORCE CALCULATED PERSONS' REPORTING PERIODS AS BEING SHORTER THAN LEGALLY REQUIRED

There were 485 registrable persons identified by the CPR case review team whose reporting periods were too short. This occurred when the NSW Police Force made errors when deciding which reporting period the CPOR Act prescribed for the person, based on their criminal history.<sup>113</sup>

The Commission reviewed the cases of four persons in this category. Our reviews established that in some cases these incorrect decisions resulted in the person being unmonitored in the community when they should have been required to make reports to police and comply with other obligations under the CPOR Act. This occurred in Case Studies 2 and 3. These case studies also demonstrate how electronic system errors compounded errors of law and fact in some Register cases.

In Case Study 2, Mr AA reoffended against a 10 year old child during a period when the NSW Police Force should have been requiring him to be reporting his personal information to police. It cannot be known whether, if Mr AA had been required to comply with his reporting obligations at the relevant time, he would not have reoffended. However, if he had been correctly recorded in COPS as being required to make reports under the CPOR Act, he most likely would have been subject to

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<sup>112</sup> The CPR case file of Mr FF was produced by the NSW Police Force in response to item 2(q) of Law Enforcement Conduct Commission Notice 929 of 2018.

<sup>113</sup> For discussion of the challenges that can be involved in applying the reporting period formulas in the CPOR Act, see Chapter 6 section 6.3.3 and Appendix 2 (part 5).



increased scrutiny, and the risk of his reoffending thus reduced. Mr AA is now subject to reporting obligations for the rest of his life.

## **CASE STUDY 2: Registrable person reoffended while unmonitored**

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In 2003 Mr AA<sup>114</sup> was convicted of two offences involving aggravated indecent assault of a child. He was sentenced to imprisonment, and was released on parole in 2006. The NSW Police Force determined that he was a registrable person, however, two errors were made in the calculation of his reporting period:

- due to an error in interpretation of the CPOR Act, his conviction for a 'pre-Register' registrable offence in 1997 was not taken into account, and
- due to incomplete information in his COPS records, the two 2003 convictions were only counted as a single registrable offence (instead of two offences).

As a result, the NSW Police Force incorrectly determined that Mr AA's reporting period under the CPOR Act was eight years, rather than 15 years. Also, in 2011 Mr AA's reporting period was not extended to reflect 11 months he spent in custody.

The NSW Police Force COPS database automatically finalised Mr AA's reporting period in October 2015. However, based on his criminal record at that time, under the CPOR Act he was required to make reports until 2023.

In November 2015 Mr AA boarded a bus and committed an act of indecency in front of a 10 year old girl.

In December 2015 a detective contacted the Registry about Mr AA, at which point the errors in his Register case were identified.

In February 2016 Mr AA was convicted for the act of indecency in November 2015, and was sentenced to 12 months' imprisonment.

In October 2016 the NSW Police Force reviewed Mr AA's file and calculated his reporting period to be 15 years.

In May 2018 a Commission investigator reviewed Mr AA's file and formed the view that 15 years was the incorrect reporting period for Mr AA under the CPOR Act. Mr AA had been convicted of more than three 'Class 2' offences (in 1997, 2003 and 2016), including a Class 2 offence that was committed after he had been put on the Register and given notice of his reporting obligations. Following his conviction in February 2016, the CPOR Act therefore required Mr AA to report for the remainder of his life.<sup>115</sup>

We raised our concern with the NSW Police Force about the correctness of its conclusion that Mr AA's reporting period was 15 years. As a result, the NSW Police Force reviewed Mr AA's file once more, and agreed that the CPOR Act required

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<sup>114</sup> The CPR case file of Mr AA was produced by the NSW Police Force in response to item 2(c) of Law Enforcement Conduct Commission Notice 929 of 2018.

<sup>115</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) s 14A(c)(iii) and (2).

him to report for the remainder of his life, and corrected his COPS record to reflect this.

In Case Study 3 the errors the NSW Police Force made in calculating Mr QQ's reporting period resulted in his being in the community for almost 18 months without making reports as required by the CPOR Act. The NSW Police Force has since corrected his records in COPS to show he has reporting obligations until 2022.

### **CASE STUDY 3: Registrable person unmonitored for almost 18 months**

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In December 2006 Mr QQ<sup>116</sup> was convicted of two counts of using a carriage service to procure a person under 16 years old for sex. He was sentenced to imprisonment, and was released on parole in September 2007.

In October 2007 the NSW Police Force notified Mr QQ that he was a registrable person and that his reporting period would continue for seven years and 67 days. The NSW Police Force had made two errors in calculating this reporting period:

- Mr QQ's two 'Class 2' registrable offences had been committed on two separate days, and against two different children. They did not therefore 'arise from the same incident',<sup>117</sup> and should have been counted as two Class 2 offences warranting a reporting period of 15 years (rather than eight years for a 'single' Class 2).<sup>118</sup>
- Mr QQ's reporting period end date appears to have been calculated as if his reporting obligations had started in December 2006, when he had been sentenced. Under the CPOR Act his reporting obligations only commenced in September 2007, when he was released from prison.<sup>119</sup>

These two errors together meant that the reporting period the NSW Police Force determined for Mr QQ was seven years and nine months shorter than that required under the CPOR Act.

The risk to children posed by Mr QQ was such that in June 2009 the NSW Police Force successfully applied to the Local Court for a child protection prohibition order against him under the *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW). The order prohibited him from using the specific chat site he had used to make contact with children in the past. The order was in force until 23 September 2010.

As a result of the incorrect reporting period being recorded in Mr QQ's CPR COPS case, COPS automatically finalised Mr QQ's reporting period on 9 December 2014. Under the CPOR Act he was required to comply with reporting obligations until September 2022.

In May 2016 a Registry officer reported the errors that had occurred in the calculation of Mr QQ's reporting period, and concluded that his case should not

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<sup>116</sup> The CPR case file of Mr QQ was produced by the NSW Police Force in response to item 2(l) of Law Enforcement Conduct Commission Notice 929 of 2018.

<sup>117</sup> *Child Protection (Offender Registration) Act 2000* (NSW) s 3(3) and s 14A(4)(a).

<sup>118</sup> *Child Protection (Offender Registration) Act 2000* (NSW) s 14A(b)(ii).

<sup>119</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) s 14.

have been finalised. The NSW Police Force reopened Mr QQ's Register file and corrected his reporting period end date to 14 September 2022.

### 3.5.3 NSW POLICE FORCE PLACED INDIVIDUALS WHO WERE NOT REGISTRABLE PERSONS ON THE REGISTER

According to the CPR case review there were 45 persons who the NSW Police Force had incorrectly placed on the Register when in fact they were not registrable persons under the CPOR Act.

The Commission reviewed the cases of five of these persons, including Case Studies 4 and 5. Our review established that one of the reasons this type of error was made was because the information available to Registry about the person's offending was inaccurate or lacked crucial detail.

Our investigation revealed that there could be various consequences of the incorrect decisions of the NSW Police Force that persons were registrable under the CPOR Act. At a minimum, these persons were unlawfully required to attend police stations and report their personal information on an annual basis. However, as Case Studies 4 and 5 demonstrate, some of these persons were charged, convicted and sentenced to imprisonment for failing to comply with reporting obligations, when they did not have any such obligations under the CPOR Act.

In Case Study 4 Mr DD was arrested and charged on three separate occasions for failing to comply with CPOR Act reporting obligations. However he was not a registrable person under the CPOR Act, and therefore those obligations did not, as a matter of law, apply to him. Despite this fact, he was convicted and sentenced to periods of imprisonment on each of these charges, and spent a total of 413 days in prison over a five year period.

#### **CASE STUDY 4: Person wrongly placed on the Register was unlawfully imprisoned**

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In November 2006 the NSW Police Force determined Mr DD<sup>120</sup> was a registrable person and placed him on the Register following his conviction for indecent assault and an act of indecency against a victim under 10 years of age. Mr DD was a juvenile at the time of the offending and committed the offences against the victim within a 24 hour period in 2005.

Between 2010 and 2015 Mr DD was arrested and charged on three different occasions for three separate offences of failing to report under s 17 of the CPOR Act. He was convicted on each charge, and served three separate periods of imprisonment. Over the five year period he spent a total of 413 days in custody as a result of these charges.

In 2016, the NSW Police Force reviewed Mr DD's Register case file. The NSW Police Force realised that Mr DD fell within an exception to registration in s 3A

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<sup>120</sup> The CPR case file of Mr DD was produced by the NSW Police Force in response to item 2(e) of Law Enforcement Conduct Commission Notice 929 of 2018. Mr DD's case is also Example 2 in Appendix 2 (in part 4.1.2).

of the CPOR Act for certain juvenile first time offenders, and as a result he should not have been put on the Register at all.<sup>121</sup>

In a letter dated 27 July 2016, the NSW Police Force informed Mr DD that he was 'no longer required to comply with [his] reporting obligations' under the CPOR Act.

In June 2017 the NSW Police Force requested the Department of Attorney General and Justice apply for annulments of Mr DD's three convictions and sentences for offences against s 17 of the CPOR Act. His convictions were annulled in October 2017.

Mr NN in Case Study 5 was convicted of a sexual offence against an adult member of his family. As the victim of that offence was not a child, he did not meet the definition of a registrable person under the CPOR Act. Despite this in 2014 he was convicted of failing to comply with reporting obligations under the CPOR Act and received an 18 month good behaviour bond.

#### **CASE STUDY 5: Person wrongly placed on Register for offences against adult**

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In December 2004 Mr NN<sup>122</sup> was convicted of multiple counts of incest and attempted incest with a person aged 16 years or older. The victim was in fact 20 years old at the time. Mr NN was sentenced to imprisonment and was released on parole in February 2006.

In March 2006 the NSW Police Force placed Mr NN on the Register and he was informed that his reporting period was 15 years.

In October 2014 Mr NN was charged with failure to comply with reporting obligations under s 17 of the CPOR Act. He was convicted in November 2014 and was sentenced to an 18 month good behaviour bond under s 9 of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

In March 2017 a NSW Police Force officer reviewed Mr NN's case and realised that while the offences for which he was convicted in 2004 were flagged as registrable in Mr NN's COPS record, they had not been committed against a child. In May 2017 the NSW Police Force concluded that he was not a registrable person and should not have been put on the Register.

On 23 May 2017 the NSW Police Force wrote to Mr NN stating 'you are no longer required to comply with your reporting obligations' under the CPOR Act.

On 7 June 2017 the NSW Police Force requested that the Department of Attorney General and Justice apply for an annulment of Mr NN's conviction and sentence for the offence against s 17 of the CPOR Act. His conviction and sentence were annulled in October 2017.

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<sup>121</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) s 3(3), 3A(2)(c)(i) and (5).

<sup>122</sup> The CPR case file of Mr NN was produced by the NSW Police Force in response to item 2(h) of Law Enforcement Conduct Commission Notice 929 of 2018.

For two of the cases that the CPR case review identified as falling within the category of non-registrable persons being placed on the Register, the Commission has concluded that there was no proven error in the initial decision of the NSW Police Force to place those persons on the Register. The Commission concluded that the initial decision of the NSW Police Force that one person was a registrable person under the CPOR Act was correct.<sup>123</sup> In the case of the other person, there is insufficient information about the timing of the person's offending available to either the Commission or the NSW Police Force to conclude whether he met the definition of a registrable person under the CPOR Act, and therefore it cannot be concluded he was placed on the Register in error.<sup>124</sup> Both these cases demonstrate how difficult applying the CPOR Act can be.

### 3.5.4 NSW POLICE FORCE CALCULATED PERSONS' REPORTING PERIODS AS BEING LONGER THAN LEGALLY PERMITTED

The CPR case review identified 144 registrable persons whose reporting periods the NSW Police Force incorrectly calculated to be years longer than permitted under the CPOR Act.

The Commission reviewed five cases of persons in this category. We established that the incorrect calculations of reporting periods in some cases resulted in persons being subjected to unlawful reporting requirements, and having their homes unlawfully inspected. Some persons were also charged, convicted and sentenced for the offence of failure to comply with reporting obligations, when they no longer had reporting obligations under the CPOR Act.

In Case Study 6 we outline the details of Mr CC, a registrable person whose reporting period was incorrectly determined by the NSW Police Force to be longer than permitted under the CPOR Act. The NSW Police Force charged him on multiple occasions for breaching reporting obligations that did not apply to him. He was convicted of these charges and spent more than 540 days in custody. In 2018 he initiated civil proceedings seeking damages from the State of New South Wales.

#### **CASE STUDY 6: Registrable person wrongly imprisoned for over 540 days**

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In February 2001 Mr CC<sup>125</sup> was sentenced for aggravated sexual assault against a victim under 16 and attempted sexual intercourse with a child under 10, both offences that he committed when he was under 18 years old.

In around January 2002 the NSW Police Force determined that he was registrable under the CPOR Act, but incorrectly assumed that Mr CC was an adult at the time of his offending and therefore determined his reporting period was 15 years, rather than 7.5 years (for a juvenile offender).

As he was a juvenile offender Mr CC's reporting obligations under the CPOR Act ended in 2008. However, as a consequence of the error made by the NSW Police

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<sup>123</sup> Mr GG's case is summarised in Chapter 6, section 6.3.6, and set out in full in Appendix 2 (part 6.3, Example 8).

<sup>124</sup> Mr EE's case is Example 1 in Appendix 2 (in part 4.1.1).

<sup>125</sup> The CPR case file of Mr CC was produced by the NSW Police Force in response to item 2(p) of Law Enforcement Conduct Commission Notice 929 of 2018. Mr CC's case is also the subject of Case Study 8 (in Chapter 4, section 4.8) and Example 3 in Appendix 2 (in part 5.1).

Force when calculating his reporting period, Mr CC was charged, convicted and sentenced for offences under the CPOR Act on multiple occasions after 2008.

Between January 2010 and April 2016 Mr CC was wrongly arrested and charged on six occasions for failure to comply with reporting obligations under s 17 of the CPOR Act, and was convicted of all of these charges. He was also convicted and sentenced for an offence of providing misleading information, contrary to s 18 of that Act. As a result of these wrongful convictions, he spent a total of 545 days in custody.

In May 2016 legal representatives for Mr CC, and the NSW Police Force, became aware that an error may have been made by the NSW Police when calculating Mr CC's reporting period.

On 11 August 2016, the Registry sought advice from the NSW Police Force Office of the General Counsel regarding the annulment of convictions and sentences imposed on Mr CC, noting that a 'fundamental error' had been made in calculating his reporting period.

In March 2017 an application was listed with the Local Court for annulments of Mr CC's convictions for offences under the CPOR Act between May 2010 and November 2015. The NSW Police Force appeared in that application. These annulments were granted in April 2017.

In April 2018, Mr CC's legal representatives filed a Statement of Claim in the Supreme Court, seeking damages. Mr CC claimed that as a result of the Commissioner of Police's negligence in not ensuring the accuracy of his reporting period, Mr CC was unlawfully imprisoned for a total of 545 days. In November 2018 the State of NSW filed a defence admitting that an error had been made in calculating Mr CC's reporting period, but denying any liability. It appears that in December 2018 the matter was settled.

In Case Study 7 the NSW Police Force incorrectly calculated Mr YY's reporting period to be four years longer than permitted under the CPOR Act. During those four years police officers unlawfully required him to attend police stations to report and update his personal information on multiple occasions, and conducted two separate inspections of his home to verify this information. He was charged on multiple occasions with offences under the CPOR Act, was wrongly convicted, and spent 183 days in custody.

### **CASE STUDY 7: Registrable person subjected to unlawful home inspections**

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In November 2005 Mr YY<sup>126</sup> was convicted of two counts of assault with an act of indecency. One of Mr YY's assaults was committed against a child, the other was committed against an adult.

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<sup>126</sup> Mr YY's case was referred to in two emails produced by the NSW Police Force in response to Law Enforcement Conduct Commission Notice 977 of 2017: Email from Sex Crimes Squad, NSW Police Force, *Subject: URGENT – CPR issues*, 14 July 2016 (10:43) [case referred to under 'INCIDENT TWO'] and email from Child Protection Registry, NSW Police Force to Office of the General Counsel, NSW Police Force, *Subject: List of 'Possible' litigators re CPR*



The NSW Police Force determined Mr YY was a registrable person under the CPOR Act, but incorrectly calculated his reporting period on the basis that both offences had been committed against a child. His reporting period was therefore calculated as ending in November 2017, when in fact his reporting period under the Act ended four years earlier, in November 2013.

Due to the error in calculating his reporting period, in COPS his reporting obligations were recorded as continuing for years after November 2013. As a consequence:

- In April 2014, when Mr YY rang the NSW Police Force to advise them he was moving to a new address, he was informed that he would need to attend a police station in person to report this. Mr YY did not attend a police station until August 2014.
- When Mr YY did attend a police station in August 2014, police questioned him about his current residential address. He informed them he had been residing at a particular address for a month, with a woman and a 17 year old. He was charged with two counts of failure to comply with reporting obligations and one count of providing false/misleading information, in relation to not keeping his address up to date with police.
- In November 2014 police conducted an unannounced inspection of Mr YY's home for the purpose of verifying his personal information, on the mistaken belief that s 16C of the CPOR Act empowered them to do so. The officers conducted a visual inspection of his premises and located a mobile phone that he had not reported to the police.
- In January 2015 Mr YY attended a police station and participated in an interview where he admitted to having owned the phone for at least 12 months. He was charged with one count of failure to comply with reporting obligations, for the failure to inform the police about his mobile phone.
- In March 2015 Mr YY was convicted of all of the CPOR Act offences charged in August 2014 and January 2015, and sentenced to nine months' imprisonment, with a six month non-parole period. He was released in September 2015, having spent 183 days in custody.
- Mr YY was informed by Corrective Services NSW that he was required to report to a police station no later than 9 September 2015. He failed to report in that time.
- In December 2015 Mr YY was arrested and charged with failure to comply with reporting obligations. He was sentenced to seven months' imprisonment with a one week non-parole period, and was released, having spent six days in custody.
- In June 2016 police conducted another inspection of Mr YY's home in purported reliance on s 16C of the CPOR Act. The officers checked Mr YY's mobile phone and laptop, and asked him a series of questions about any changes to his personal information.

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*Review*, 16 August 2016 (12:19) [fifth case listed]. The Commission retrieved additional information about Mr YY's case from COPS and JusticeLink.

Between July and August 2016 the NSW Police Force became aware that Mr YY had been wrongly convicted and sentenced to imprisonment for offences under the CPOR Act after his reporting period ended in 2013.

In December 2018, following a query from the Commission about Mr YY's case, the NSW Police Force wrote to the Department of Justice requesting it apply for annulments of his convictions under the CPOR Act. In July 2019 the Local Court annulled all five of Mr YY's wrongful convictions for offences against the CPOR Act.

### 3.6 CONCLUSIONS AS TO THE EXTENT, NATURE AND IMPACT OF ERRORS IN THE REGISTER

It is clear from the CPR case review and our review of Register cases that the errors that have occurred in the Register include hundreds of occasions on which the NSW Police Force has made incorrect decisions that certain individuals were registrable persons under the CPOR Act, or about the length of registrable persons' reporting periods.

The CPR case review also identified 89 Register cases in which the reporting periods recorded by the NSW Police Force were incorrect because they had not been updated to reflect amendments to the Queensland *Child Protection (Offender Reporting) Act 2004* in 2014.<sup>127</sup> The Commission reviewed two Register case files in which this had occurred.<sup>128</sup>

The NSW Police Force has also identified a total of 96 persons who it had incorrectly determined were not registrable persons (95 of whom were identified as a result of Operation Tuskett).

The impact of these errors has been significant. The incorrect decisions of the NSW Police Force have in some cases resulted in registrable persons being in the community for a number of years without being required by the NSW Police Force to comply with their reporting obligations under the CPOR Act. This is illustrated by Case Studies 1, 2, and 3.

In other cases the NSW Police Force acted on incorrect information in the Register and required people to report their personal information to police for years when the CPOR Act did not provide any lawful basis for the NSW Police Force to do so. This is illustrated by Case Studies 4, 5, 6 and 7. For example, the error in the calculation of Mr CC's reporting period (Case Study 6) was made in 2002, but was not detected for 14 years. As a result, police officers arrested and charged him with offences under the CPOR Act in 2010, 2011, 2012, 2013, 2015 and 2016, when he no longer had any obligations to report under that Act.

In our review of documentation provided by the NSW Police Force, the Commission identified eight persons who had been unlawfully required to report their personal

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<sup>127</sup> See the category 'Interstate (Qld) Error in reporting period notification' in the table in Appendix 1. This issue is discussed in Chapter 5 section 5.2.4 and Chapter 6 section 6.3.6.

<sup>128</sup> CPR case files produced by the NSW Police Force in response to items 2(j) and 2(k) of Law Enforcement Conduct Commission Notice 929 of 2018.



information to police for a number of years.<sup>129</sup> Two of those persons had been unlawfully required by the NSW Police Force to report their personal information for over 10 years.<sup>130</sup>

In cases where the NSW Police Force unlawfully required persons to report their personal information, further consequences could follow.

Under s 16C of the CPOR Act the NSW Police Force has the power to conduct unannounced inspections of registrable persons' homes, for the purpose of verifying the personal information they are required to report to police. It is implied from the language in s 16C that the inspection power can only be exercised in relation to a registrable person who is required to make reports under the CPOR Act.<sup>131</sup>

In the eight cases reviewed by the Commission in which the NSW Police Force unlawfully required persons to make reports, it appeared that police officers also conducted inspections of those persons' homes on at least six occasions, in purported reliance on the power in s 16C.<sup>132</sup> This is illustrated in Case Study 7.

Our investigation also revealed that in some cases in which the NSW Police Force unlawfully required persons to make reports, it charged persons with offences under the CPOR Act if they did not comply with these unlawful requirements. The Commission reviewed the cases of seven persons who had been charged by the

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<sup>129</sup> Mr CC, CPR case file produced by NSW Police Force in response to item 2(p) of Law Enforcement Conduct Commission Notice 929 of 2018; Mr DD, CPR case file produced by NSW Police Force in response to item 2(e) of Law Enforcement Conduct Commission Notice 929 of 2018; Mr HH, CPR case file produced by NSW Police Force in response to item 2(j) of Law Enforcement Conduct Commission Notice 929 of 2018; Mr JJ, CPR case file produced by NSW Police Force in response to item 2(k) of Law Enforcement Conduct Commission Notice 929 of 2018, and see Child Protection Registry, NSW Police Force, *Application to the Local Court*, NSW Police Force response to item 6 of Law Enforcement Conduct Commission Notice 929 of 2017; Mr KK, CPR case file produced by NSW Police Force in response to item 2(i) of Law Enforcement Conduct Commission Notice 929 of 2018; Mr NN, CPR case file produced by NSW Police Force in response to item 2(h) of Law Enforcement Conduct Commission Notice 929 of 2018; Mr YY, Email from Child Protection Registry, NSW Police Force to Office of General Counsel, NSW Police Force, *Subject: List of 'Possible' litigators re CPR Review*, 16 August 2016 (12:19) NSW Police Force response to Law Enforcement Conduct Commission Notice 977 of 2018 [fifth case listed in email]; Mr SS, Email from Inspector, NSW Police Force to Child Protection Registry, NSW Police Force, *Subject: re reporting period errors*, 25 October 2016 (14:11), NSW Police Force response to Law Enforcement Conduct Commission Notice 977 of 2018 [fourth case listed in email].

<sup>130</sup> Mr NN, CPR case file produced by NSW Police Force in response to item 2(h) of Law Enforcement Conduct Commission Notice 929 of 2018; Mr SS, Email from Inspector, NSW Police Force to Child Protection Registry, NSW Police Force, *Subject: re reporting period errors*, 25 October 2016 (14:11), NSW Police Force response to Law Enforcement Conduct Commission Notice 977 of 2018 [fourth case listed in email].

<sup>131</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) s 16C(3), (5) and (7).

<sup>132</sup> Mr YY, Email from Child Protection Registry, NSW Police Force to Office of General Counsel, NSW Police Force, *Subject: List of 'Possible' litigators re CPR Review*, 16 August 2016 (12:19) NSW Police Force response to Law Enforcement Conduct Commission Notice 977 of 2018 [fifth case listed in email], COPS event record for 20 November 2014 and intel record for 30 June 2016; Mr HH, CPR case file produced by NSW Police Force in response to item 2(j) of Law Enforcement Conduct Commission Notice 929 of 2018, COPS event record for 6 October 2015; Mr NN, CPR case file produced by NSW Police Force in response to item 2(h) of Law Enforcement Conduct Commission Notice 929 of 2018, and COPS intel records for 12 March 2013, 1 October 2014 and 15 June 2016.

NSW Police Force with failing to comply with reporting obligations (under s 17 of the CPOR Act), or providing false or misleading information while purporting to report (under s 18 of the CPOR Act), when they were not under any legal obligations to report at the relevant time.<sup>133</sup> Within the seven cases reviewed, the NSW Police Force laid such charges on a total of 16 occasions, and on at least 10 of those occasions the persons had been arrested.

All of these seven persons were wrongly convicted and sentenced for these 'offences'. Five of these persons were sentenced to imprisonment following wrongful convictions under the CPOR Act.<sup>134</sup> For example, Mr YY (Case Study 7) was unlawfully imprisoned for 183 days, Mr DD (Case Study 4) was unlawfully imprisoned for 413 days, and Mr CC (Case Study 6) was unlawfully imprisoned for 545 days.

### 3.7 NSW POLICE FORCE RESPONSE TO THE DRAFT FINAL REPORT

In August 2019 we provided a draft of this report to the NSW Commissioner of Police for his response on behalf of the NSW Police Force. The Commissioner's response on 30 September 2019 contained the following acknowledgment of the errors that have occurred in the administration of the Register:

As the NSWPF undertook its review of the CPR [Child Protection Register], we identified that errors were made in determining whether people were required to be entered onto the CPR and in calculating how long people were required to comply with reporting obligations under the CPOR Act. The errors meant that some people were entered onto the CPR when they should not have been; some were not entered onto the CPR when they should have been; and the length of time some were required to comply with reporting obligations was calculated as being either too long or too short. Furthermore, we acknowledge that the people affected by these errors will have taken steps to comply with reporting obligations that did not apply to them including by reporting personal information to the NSWPF.

In some cases, we have taken steps to verify the reported information by inspecting an affected person's home, relying on a power under the CPOR Act that did not apply in the circumstances. In a limited number of cases, where an affected person did not take steps to comply with reporting obligations, the NSWPF may also have taken action,

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<sup>133</sup> Mr CC, CPR case file produced by NSW Police Force in response to item 2(p) of Law Enforcement Conduct Commission Notice 929 of 2018; Mr DD, CPR case file produced by NSW Police Force in response to item 2(e) of Law Enforcement Conduct Commission Notice 929 of 2018; Mr HH, CPR case file produced by NSW Police Force in response to item 2(j) of Law Enforcement Conduct Commission Notice 929 of 2018; Mr JJ, CPR case file produced by NSW Police Force in response to item 2(k) of Law Enforcement Conduct Commission Notice 929 of 2018, and see Child Protection Registry, NSW Police Force, *Application to the Local Court*, NSW Police Force response to item 6 of Law Enforcement Conduct Commission Notice 929 of 2017; Mr KK, CPR case file produced by NSW Police Force in response to item 2(i) of Law Enforcement Conduct Commission Notice 929 of 2018; Mr NN, CPR case file produced by NSW Police Force in response to item 2(h) of Law Enforcement Conduct Commission Notice 929 of 2018; Mr YY, Email from Child Protection Registry, NSW Police Force to Office of General Counsel, NSW Police Force, *Subject: List of 'Possible' litigators re CPR Review*, 16 August 2016 (12:19) NSW Police Force response to Law Enforcement Conduct Commission Notice 977 of 2018 [fifth case listed in email].

<sup>134</sup> Mr CC, Mr DD, Mr JJ, Mr KK and Mr YY (see references in previous footnote).

including arrest and charging, for what appeared at the time to be non-compliance with reporting obligations that did not apply.

These errors were made for different reasons, including misapplying the Act in particular cases; and factual uncertainties or incomplete information in other cases. None of the errors were intentional. As acknowledged in your Report, the CPOR Act is complex and ambiguous.<sup>135</sup>

## 3.8 FINDINGS

### 3.8.1 INCORRECT DECISIONS ABOUT WHO WERE REGISTRABLE PERSONS AND THE LENGTH OF REPORTING PERIODS

The results of the NSW Police Force CPR case review, combined with the Commission's review of a sample of Register cases, internal reports and other information provided by the NSW Police Force, establish that the NSW Police Force has, since the commencement of the Register:

- incorrectly determined that a person was not registrable under the CPOR Act on 96 occasions;
- incorrectly calculated a registrable person's reporting period as being shorter than the period required by the CPOR Act on 485 occasions;
- incorrectly determined that a person was registrable and placed that person on the Register when in fact they were not a registrable person under the CPOR Act on 43 occasions, and
- incorrectly calculated a registrable person's reporting period as being longer than the period required by the CPOR Act on 144 occasions.<sup>136</sup>

Each of the incorrect decisions of the NSW Police Force about whether a person was registrable under the CPOR Act, or about the length of other persons' reporting periods, constituted 'conduct that arises, wholly or in part, from a mistake of law or fact'.<sup>137</sup> As the case studies above illustrate, these incorrect decisions resulted from mistakes of fact about a person's offending, or mistakes of law in interpreting and applying the CPOR Act, or both.

The Register files reviewed by the Commission establish that the NSW Police Force started making incorrect decisions in relation to the Register in 2002.<sup>138</sup> The NSW

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<sup>135</sup> Letter from Commissioner of Police, NSW Police Force, to Chief Commissioner, Law Enforcement Conduct Commission, 30 September 2019, p 3.

<sup>136</sup> These numbers are based on the results of the NSW Police Force CPR case review (see Appendix 1), with slight alteration based on the Commission's review of two cases (see section 3.5.3) and the results of the process the NSW Police Force undertook in 2019 to identify persons incorrectly determined not to be registrable (see sections 3.4 and 3.5.1).

<sup>137</sup> Cf. *Law Enforcement Conduct Commission Act 2016* (NSW) s 11(1)(b)(vi).

<sup>138</sup> *Form 3*, 29 January 2002, and Child Protection Registry, NSW Police Force, *Request for advice from Office of General Counsel surrounding the annulment of convictions for persons placed erroneously on the Child Protection Register (CPR)*, 11 August 2016, D/2016/438915, both documents contained in NSW Police Force response to item 2(p) of Law Enforcement Conduct Commission Notice 929 of 2018; *Form 3*, 27 June 2002, *Details of Initial Case Creation: Case Number: C23380902*, 15 March 2017, and Letter from Sex Crimes Squad, NSW Police Force, to Attorney General's Department, Department of Justice, 7 June 2017, all three

Police Force has submitted that the Commission's finding should specify that the 'substantive incorrect decision-making' in relation to the Register occurred only up until 2018, when the CPR case review was completed.<sup>139</sup>

The Commission acknowledges that the NSW Police Force 'self-identified' that there were significant problems with the accuracy of information in the Register, and initiated the CPR case review in 2016 to identify and correct the errors. The Commission also acknowledges that the 44 per cent of Register case files found by the CPR case review to contain errors do not reflect the current error rate in the Register, as the CPR review team corrected errors when they identified them.

However, errors remained in some Register files even after the CPR case review. In our review of 17 Register case files, we identified two cases in which the CPR case review team itself had made incorrect decisions when applying the CPOR Act. In one case, that of Mr AA (Case Study 2) the CPR case review team incorrectly determined a registrable person's reporting period to be 15 years, when in fact he should have been reporting for life. In the other case, the CPR case review team removed the person from the Register, when in fact he was registrable.<sup>140</sup> The Commission raised these errors with the NSW Police Force when we discovered them, and the NSW Police Force urgently re-reviewed these cases.

The Commission also considers that many of the systemic issues which resulted in errors in the Register in the past continue to create risks that incorrect decisions will be made. These systemic issues are discussed in Chapters 5 to 8 of this report.

The Commission acknowledges that two of the systemic factors, being the complexity and ambiguity in the CPOR Act,<sup>141</sup> and the role of other authorities in the implementation of that Act,<sup>142</sup> are beyond the control of the NSW Police Force. We accept that the NSW Police Force cannot unilaterally address these factors.

The Commission also acknowledges that, in recent years, the NSW Police Force has taken significant steps to improve its administration of the Register (see section 3.9 at the end of this chapter).

However, as discussed in later chapters of this report, there are key steps that the NSW Police Force has not yet taken to mitigate the risk of incorrect decisions being made in the implementation of the CPOR Act. For example, the NSW Police Force has not implemented a key recommendation that the Workforce Intelligence Unit in the NSW Police Force Human Resources Command made two years ago, about the need for dedicated legal support for the Registry.<sup>143</sup>

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documents in NSW Police Force response to item 2(i) of Law Enforcement Conduct Commission Notice 929 of 2018.

<sup>139</sup> Letter from Commissioner of Police, NSW Police Force, to Chief Commissioner, Law Enforcement Conduct Commission, 30 September 2019 (Annexure A: Submissions on Proposed Findings).

<sup>140</sup> For a discussion of this case file see Example 8 in Appendix 2 (in part 6.3).

<sup>141</sup> See Chapter 6.

<sup>142</sup> See Chapter 7.

<sup>143</sup> Workforce Intelligence Unit, Human Resources Command, NSW Police Force, *HR Analysis: Child Protection Register Staffing Review*, 20 July 2017, D/2017/630614, NSW Police Force response to item 1 of Law Enforcement Conduct Commission Notice 929 of 2017, Recommendation 9.

As the CPR case review team itself made incorrect decisions about the application of the CPOR Act, and as there are systemic factors which continue to create the risk of errors being made in the administration of the Register, the Commission does not consider it appropriate to limit its finding as to time, as suggested by the NSW Police Force.

The NSW Police Force also submitted that the finding should include reference to the fact that it corrected the incorrect decisions in relation to the Register when they were identified. The Commission has acknowledged this elsewhere in the chapter where appropriate. However, a statement to this effect in the finding is unnecessary, and may also be misleading. In most of the cases we reviewed, it was only years after the incorrect decision was made that the NSW Police Force discovered and corrected it. Also, in many cases the NSW Police Force acted on its incorrect decisions, for example by requiring a person to report their information to police, prior to the decision being identified as incorrect.

The Commission emphasises that responsibility for the errors in relation to the Register lies with the NSW Police Force as an agency, rather than the Registry or the individual officers working in that unit. There have been multiple systemic issues that have contributed to these errors which have been outside the control of the Registry.

**FINDING 1:** Since 2002 the NSW Police Force has made over 700 incorrect decisions about the administration of the Child Protection Register, including:

- incorrect decisions that 96 people were not ‘registrable persons’ under the CPOR Act;
- incorrect decisions that 43 people were ‘registrable persons’ under the CPOR Act;
- incorrectly calculating the reporting periods of 485 registrable persons as being shorter than the periods required by the CPOR Act, and
- incorrectly calculating the reporting periods of 144 registrable persons as being longer than the periods required by the CPOR Act.

These incorrect decisions arose, wholly or in part, from mistakes of law or fact.

### 3.8.2 UNLAWFUL OR UNJUST ACTIONS TAKEN ON THE BASIS OF THE INCORRECT INFORMATION IN THE REGISTER

The Register cases reviewed by the Commission establish that the NSW Police Force took actions on the basis of incorrect information in the Register about persons’ reporting obligations. These actions included:

- unlawfully requiring persons to report their personal information to police for a number of years;
- unlawfully inspecting persons’ homes to verify their personal information, and
- charging and arresting persons for failing to comply with reporting obligations under the CPOR Act, when in fact those obligations did not apply to them at the relevant time.



The NSW Police Force submitted that the conduct referred to in the first dot point would most accurately be described as ‘the making of incorrect representations that persons were required by the CPOR Act to comply with reporting obligations under the Act’. The Commission does not agree. Officers in the NSW Police Force actively required members of the public to report their personal information to police, and to report any changes to this information, where there was no lawful basis for those officers to do so. The NSW Police Force did not just make representations about reporting requirements which were unlawful, it took steps to enforce those requirements.

The Commission emphasises that responsibility for all the actions listed above lies with the NSW Police Force as an agency, rather than the individual officers who executed these actions. These officers acted reasonably in relying on the Register information recorded in COPS. It was the failure by the NSW Police Force to provide for adequate quality control and assurance processes to ensure the accuracy of this Register information that led to these officers engaging in this conduct. The lack of adequate quality control mostly resulted from the inadequate staffing of the Registry.<sup>144</sup>

The number of people who have been subjected to unlawful reporting requirements, unlawful home inspections and/or wrongful charges for offences under the CPOR Act by the NSW Police Force is not known. The CPR case review does not appear to have recorded information about actions the NSW Police Force had taken on the basis of the incorrect Register information.

The Commission can definitively point to eight persons who the NSW Police Force subjected to unlawful reporting requirements. Evidence of these eight cases came from our review of NSW Police Force information about annulments for convictions under the CPOR Act that it had applied for between December 2012 and December 2017, and other reports and emails in which these persons’ cases were mentioned.

However, based on the results of the CPR case review, there are 277 persons who may have been subjected to unlawful or unjust actions by the NSW Police Force because of incorrect information about reporting obligations in the Register.<sup>145</sup> How many were in fact subjected to such actions would depend on whether the NSW Police Force corrected their cases before any officer acted on the incorrect information in the Register. In Chapter 4 section 4.10 we make a recommendation to ensure that all persons who may have been subjected to unlawful or unjust actions are notified of the error that was made in their case, and are given sufficient information about that error to enable them to identify if they were subjected to unlawful or unjust actions as a result.

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<sup>144</sup> See Chapter 5 section 5.4.1.

<sup>145</sup> This includes: the 45 persons who the CPR case review identified should not have been placed on the Register, minus the one person in this category who the Commission concluded in fact had been correctly placed on the Register (see section 3.5.3), the 144 persons whose reporting periods the CPR case review identified had been incorrectly calculated as being longer than permitted under the CPOR Act, and 89 persons whose reporting periods were not kept up to date with the law in Queensland: see the discussion in Chapter 4 section 4.10 and the table of CPR case review results in Appendix 1.

### 3.8.2.1 UNLAWFUL REPORTING REQUIREMENTS AND INSPECTIONS

While the number of persons who were told by police that they were required to report their information when in fact they were under no legal obligation to do so is unknown, the NSW Police Force accepts this occurred on many occasions.<sup>146</sup>

It is also unknown how many of these persons were subjected to unlawful home inspections by the NSW Police Force on the basis of incorrect information in the Register. Of the eight cases reviewed by the Commission in which the NSW Police Force unlawfully required persons to make reports of their personal details, in three of those cases police officers also conducted unlawful inspections of the person's home, on a total of six occasions, in purported reliance on the power in s 16C.<sup>147</sup> The NSW Police Force acknowledges that the total number of unlawful 's 16C' inspections it has conducted is likely to be higher than this.<sup>148</sup>

The Commission acknowledges that the legislative framework in question, the CPOR Act, is complex and contains ambiguous provisions, which can make it difficult for even experienced lawyers to apply in certain cases.<sup>149</sup> The Commission also acknowledges that the ability of the NSW Police Force to apply the CPOR Act correctly is affected by whether other authorities that have statutory responsibilities under the CPOR Act fulfil these responsibilities.

However, the consequences of the NSW Police Force unlawfully requiring people to report their personal information and conducting home inspections without legal authority have been serious. A considerable amount of personal information has been reported to the NSW Police Force by people who were advised they were required to do so under the CPOR Act. These people also updated police whenever there were changes to that information, because they had been informed that if they did not do so they would be committing a criminal offence. Some persons made these reports to the NSW Police Force for a number of years.

If people did not comply with these unlawful requests from police, they were at risk of being wrongly charged for offences under the CPOR Act. Some persons were in fact charged.

Those persons who were subjected to unlawful s 16C inspections had police officers arrive at their homes without prior warning, requiring that they be allowed to enter

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<sup>146</sup> Letter from Commissioner of Police, NSW Police Force, to Chief Commissioner, Law Enforcement Conduct Commission, 30 September 2019 (Annexure A: Submissions on Proposed Findings) p 4.

<sup>147</sup> Mr YY, Email from Child Protection Registry, NSW Police Force to Office of General Counsel, NSW Police Force, *Subject: List of 'Possible' litigators re CPR Review*, 16 August 2016 (12:19) NSW Police Force response to Law Enforcement Conduct Commission Notice 977 of 2018 [fifth case listed in email], COPS event record for 20 November 2014 and intel record for 30 June 2016; Mr HH, CPR case file produced by NSW Police Force in response to item 2 (j) of Law Enforcement Conduct Commission Notice 929 of 2018, COPS event record for 6 October 2015; Mr NN, CPR case file produced by NSW Police Force in response to item 2(h) of Law Enforcement Conduct Commission Notice 929 of 2018, and COPS intel records for 12 March 2013, 1 October 2014 and 15 June 2016.

<sup>148</sup> Letter from Commissioner of Police, NSW Police Force, to Chief Commissioner, Law Enforcement Conduct Commission, 30 September 2019 (Annexure A: Submissions on Proposed Findings) p 4.

<sup>149</sup> See the discussion in Chapter 6 and Appendix 2.

and inspect the residence, when the police had no power under the CPOR Act to conduct these inspections. During these inspections they were often required by police to answer questions about their personal lives, when under the CPOR Act they did not have any obligation to provide this information.

**FINDING 2:** As a result of the incorrect decisions referred to in Finding 1, the NSW Police Force unlawfully required persons to report their personal details to police for a number of years. Some of these persons were also subjected to unlawful home inspections by the NSW Police Force, in purported reliance on the power in s 16C of the CPOR Act.

### 3.8.2.2 UNJUST CHARGES AND ARRESTS

The Commission is empowered to investigate, make findings about, and report on conduct on the part of the NSW Police Force that is unjust or oppressive in its effect, especially where such conduct is of a serious nature.<sup>150</sup>

The Commission's investigation identified seven persons who were wrongly charged by the NSW Police Force with the offences of failing to comply with reporting obligations or providing false or misleading information under the CPOR Act. These persons could not, as a matter of law, have committed the offences they had been charged with, as the reporting obligations in that Act did not apply to them at the relevant times.

The NSW Police Force laid unwarranted charges against these persons on a total of 16 occasions, and on 10 of those occasions also arrested the person. The NSW Police Force acknowledges that the total numbers of unwarranted charges and arrests for offences under the CPOR Act may be higher than those the Commission identified in the subset of cases it reviewed.<sup>151</sup>

These charges and arrests constitute conduct which, although not unlawful, was 'unjust' or 'oppressive' in its effect. These persons were subjected to criminal prosecution for offences that they could not have committed. As a result of these charges, they were wrongly convicted, sentenced and in some cases imprisoned for offences that they did not commit.

In determining whether conduct that is unjust or oppressive in its effect is of a serious nature, regard must be had to the consequences of that conduct. The seriousness of the consequences of these persons being charged with offences under the CPOR Act when those offences did not as a matter of law apply to them is indisputable. Seven persons were convicted and sentenced for offences they did not commit. Five of these persons were sentenced to imprisonment for their wrongful convictions, and two of those persons (Mr DD (Case Study 4) and Mr CC (Case Study 6) were unlawfully imprisoned for over a year in total.

**FINDING 3:** As a result of the incorrect decisions referred to in Finding 1, the NSW Police Force charged and arrested persons for failing to comply with reporting obligations or providing false or misleading information under the CPOR Act, when those persons were not under any obligation to report under

<sup>150</sup> Cf. *Law Enforcement Conduct Commission Act 2016* (NSW) s 11(1)(b)(i) and (3)(b)(i).

<sup>151</sup> Letter from Commissioner of Police, NSW Police Force, to Chief Commissioner, Law Enforcement Conduct Commission, 30 September 2019 (Annexure A: Submissions on Proposed Findings) p 5.



that Act at the relevant time. These were actions of a serious nature which, although not unlawful, were unjust or oppressive in their effects.

### 3.9 IMPROVEMENTS IN THE ADMINISTRATION OF THE REGISTER SINCE 2016

Since 2016 when the CPR case review was initiated, the NSW Police Force has taken a number of significant steps to improve its administration of the Register. In addition to completing the CPR case review:

- In September 2016 the NSW Police Force held a thematic Command Performance Assessment (COMPASS) forum about the management of registrable persons.<sup>152</sup>
- In 2017 the New South Wales Police Force awarded the Registry Manager the Michael O'Brien Scholarship, which enabled him to travel overseas to examine the methods for managing registrable persons used in other jurisdictions and make recommendations for improvements in New South Wales.<sup>153</sup>
- In July 2017 the Workforce Intelligence Unit in the NSW Police Force Human Resources Command completed a comprehensive analysis of the staffing of the Registry, which made 22 recommendations (the Register Staffing Review, discussed in Chapter 5).<sup>154</sup>
- Also in July 2017, the NSW Police Force approved an IT project to upgrade the interface between COPS and Corrective Services NSW Offender Integrated Management System (discussed in Chapter 8).
- In December 2017, as part of a restructure of the State Crime Command, 11 positions were added to the Registry, including eight sworn officers. The addition of these officers enabled the Registry in 2018 to create:
  - a dedicated Quality Assurance officer, who ensures that supervisory checks are completed whenever a new Register case is created, and
  - a dedicated Training Officer role, to increase training of staff both within the Registry and in the local commands.

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<sup>152</sup> COMPASS is the NSW Police Force command performance accountability system, which 'contributes to the assessment and improvement of corporate performance'. COMPASS forums 'identify emerging risks and trends with organisation-wide consequences', and 'contribute to evidence based decision-making and explore how to best achieve corporate objectives from alternative strategies: NSW Police Force, *Annual Report 2011-12*, p 13, <[https://www.police.nsw.gov.au/\\_\\_data/assets/pdf\\_file/0020/250148/2011-12\\_NSW\\_Police\\_Force\\_Annual\\_Report.pdf](https://www.police.nsw.gov.au/__data/assets/pdf_file/0020/250148/2011-12_NSW_Police_Force_Annual_Report.pdf)>.

<sup>153</sup> Manager, Child Protection Registry, NSW Police Force, *Management of the Child Protection Register in New South Wales: Michael O'Brien Scholarship 2017* (2018), NSW Police Force response to item 1 of Law Enforcement Conduct Commission Notice 929 of 2018. The Michael O'Brien Memorial Scholarship is awarded to one member of the NSW Police Force each year to provide financial support for overseas study in relation to major criminal investigation or investigative support activities.

<sup>154</sup> Workforce Intelligence Unit, Human Resources Command, NSW Police Force, *HR Analysis: Child Protection Register Staffing Review*, 20 July 2017, D/2017/630614, NSW Police Force response to item 1 of Law Enforcement Conduct Commission Notice 929 of 2017.

- In 2018 the Registry was also given increased legal support through the loan of a full-time legal officer from the Prosecutions Command.
- After the NSW Government agreed in November 2018 to provide funding for additional officers, in 2019 15 officers were deployed to local commands for the specific purpose of monitoring registrable persons. The NSW Commissioner of Police has advised that another 33 dedicated Register positions will be allocated to local commands in the coming years.<sup>155</sup>

The NSW Police Force has also made systemic improvements following recommendations made by the Commission in August 2018 in its interim report on Operation Tuskett:

- In late 2018 Registry staff were given access to Corrective Services NSW OIMS, and JusticeLink, the electronic database used by the courts to record court outcomes (see Chapter 7 section 7.6).
- A further three sworn officer positions were allocated to the Registry in 2019.

These reviews and changes have substantially reduced the error rate in the Register, and will make future errors less likely. The new quality assurance processes in the Registry are also expected to mitigate the risk of unlawful, unjust or oppressive conduct, by ensuring that entries on the Register are reviewed before being relied upon by officers in the local commands.

However there are systemic problems which will continue to create risks of errors in the Register, at least until the legislative framework is simplified. These problems are discussed in the second half of this report.

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<sup>155</sup> Letter from Commissioner of Police, NSW Police Force, to Chief Commissioner, Law Enforcement Conduct Commission, 30 September 2019, p 2. See the discussion on dedicated officers in Chapter 5 section 5.6.

# 4. RESPONSES TO PERSONS SUBJECTED TO UNLAWFUL OR UNJUST ACTIONS

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## 4.1 INTRODUCTION

The NSW Police Force review of Child Protection Register case files (the CPR case review) established that 43 persons had been placed on the Child Protection Register (the Register) in error,<sup>156</sup> and the NSW Police Force had incorrectly calculated the reporting periods of around 144 persons as continuing for years longer than lawfully permitted under the *Child Protection (Offenders Registration) Act 2000* (CPOR Act). It also identified 89 persons whose reporting periods were incorrect in NSW Police Force records because of changes to the *Child Protection (Offender Reporting) Act 2004* in Queensland.

As outlined in Chapter 3, a number of these individuals were subjected to unlawful or unjust actions by the NSW Police Force as a consequence of the errors in the Register, including:

- persons being unlawfully required to report their personal information to police for a number of years;
- persons' homes being unlawfully inspected, and
- persons being charged, arrested, convicted and sentenced to imprisonment for offences relating to reporting obligations under the CPOR Act, when those reporting obligations did not apply to them at the relevant time.

In this chapter we discuss the responses of the NSW Police Force to these persons.

The NSW Police Force was generally proactive in seeking annulments when it discovered that persons had been wrongly convicted for offences under the CPOR Act.

The NSW Police Force also notified those persons who it identified were reporting their information to police when they had no obligation to do so under the CPOR Act, to ensure they did not continue to report their information.

However, in writing letters to these persons to notify them they did not need to report, the NSW Police Force intentionally limited the information it provided. It did not inform them that the NSW Police Force had made an error in their cases. Internal emails reveal that these letters were written, on advice of internal legal counsel, in such a way as to minimise the prospect of civil claims.

The language the NSW Police Force chose to use, combined with the information it chose to omit from at least three letters constituted a significant departure from the standards that apply to agencies of the State in dealing with persons injured, or whose legal rights were seriously breached by their actions. The decisions by the NSW Police Force to write these letters amounted to conduct on the part of the agency that was unreasonable or unjust in its effect.<sup>157</sup>

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<sup>156</sup> The CPR case review identified 45 persons in this category, but the Commission has concluded two Register files it reviewed should not be included in this category: see Chapter 3 section 3.5.3.

<sup>157</sup> *Law Enforcement Conduct Commission Act 2016* (NSW) s 11(1)(b)(i).

The NSW Police Force also made a decision in July 2016 that it did not need to send any notification to persons who had been on the Register incorrectly for a period of time, but were no longer on the Register at that point.

This chapter concludes with a recommendation that the NSW Police Force notify all those persons who may have been subjected to unlawful or unjust actions as a result of errors in the Register.

## 4.2 NSW POLICE FORCE APPLIED FOR ANNULMENTS OF WRONGFUL CONVICTIONS UNDER THE CPOR ACT

On 11 August 2016 the Manager of the Child Protection Registry (the Registry Manager) requested advice from the Office of the General Counsel (OGC) about how to apply for annulments of convictions for persons who had been wrongly convicted of offences under the CPOR Act, as a result of errors in the Register.<sup>158</sup> The OGC is a command within the NSW Police Force that provides legal services to the Commissioner of Police and other officers.<sup>159</sup> It is headed by General Counsel, and contains various units.

The Registry Manager included in his request for advice the details of three particular cases.<sup>160</sup> The Registry Manager wrote that:

The Registry is now seeking advice from the OGC regarding the annulment of convictions and sentences imposed upon the three above-mentioned persons, and any other person that may fall into the same category as those mentioned above.

...it is believed that [the] NSWPF, knowing now that these three persons should not have had their respective above charges laid, has an obligation to apply for annulment of these convictions, and subsequent sentences imposed...a request is made for advice from the OGC as to the process and in particular regarding any possible litigation that may occur.<sup>161</sup>

On 26 August 2016 a solicitor in the OGC (hereafter referred to as ‘the OGC solicitor’) provided advice in response to the Registry Manager’s request, which included the following comments:

... steps should be taken immediately to prioritise the review of cases where registrable persons are presently incarcerated and to correct any errors forthwith with the view of ensuring that registrable persons are not wrongfully imprisoned...Of course there is the moral obligation we have to ensure people are not wrongfully imprisoned. We are also

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<sup>158</sup> Child Protection Registry, NSW Police Force, *Request for advice from Office of General Counsel surrounding the annulment of convictions for persons placed erroneously on the Child Protection Register (CPR)*, 11 August 2016, D/2016/438915, NSW Police Force response to item 2(p) of Law Enforcement Conduct Commission Notice 929 of 2018.

<sup>159</sup> NSW Police Force, *Legal*, <[https://www.police.nsw.gov.au/about\\_us/organisational\\_structure/units/legal](https://www.police.nsw.gov.au/about_us/organisational_structure/units/legal)>.

<sup>160</sup> These included the cases the subject of Case Studies 4 and 6 in Chapter 3.

<sup>161</sup> Child Protection Registry, NSW Police Force, *Request for advice from Office of General Counsel surrounding the annulment of convictions for person[s] placed erroneously on the Child Protection Register (CPR)*, 11 August 2016, D/2016/438915, NSW Police Force response to item 2(p) of Law Enforcement Conduct Commission Notice 929 of 2018.

obliged to correct situations where registrable persons have been wrongfully convicted of offences even if they are not presently incarcerated.<sup>162</sup>

The solicitor provided information about how to apply for annulments, and attached a copy of the application form.

On 18 October 2016 General Counsel stated that she supported the solicitor's 26 August advice, and noted that 'OGC has notified the [Treasury Managed Fund] of potential liability for this issue'.<sup>163</sup>

In the documentation produced to the Commission, there were nine people who the NSW Police Force identified as having been wrongly convicted for offences against s 17 or s 18 of the CPOR Act.<sup>164</sup> For eight of those people, the NSW Police Force had requested or applied for annulments of their wrongful convictions and sentences prior to the Commission reviewing these cases. All the annulments were granted by the courts.<sup>165</sup> It was obviously necessary for the NSW Police Force to seek these annulments, to ensure that those wrongful convictions were removed from their criminal records.

In December 2018 Commission investigators identified that the wrongful convictions of one person (Mr YY, featured in Case Study 7 in Chapter 3) had not been annulled. This was despite the fact that by August 2016 the NSW Police Force was aware that Mr YY had been wrongly convicted and sentenced to imprisonment on three occasions for offences under the CPOR Act after his reporting period had ended. He had spent a total of 189 days in custody as a result.

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<sup>162</sup> Office of the General Counsel, NSW Police Force, [Advice in response to request D/2016/438915], 26 August 2016, NSW Police Force response to Law Enforcement Conduct Commission Notice 977 of 2018.

<sup>163</sup> Comments dated 18 October 2016 on Office of the General Counsel, NSW Police Force, [Advice in response to request D/2016/438915], 26 August 2016, NSW Police Force response to Law Enforcement Conduct Commission Notice 977 of 2018. The Treasury Managed Fund is an insurance scheme created by the NSW Government to insure NSW government agencies: insurance and care NSW, *Treasury Managed Fund*, 2019, <<https://www.icare.nsw.gov.au/government-agencies/our-funds-and-schemes/treasury-managed-fund/>>.

<sup>164</sup> Mr CC, CPR case file produced by NSW Police Force in response to item 2(p) of Law Enforcement Conduct Commission Notice 929 of 2018; Mr DD, CPR case file produced by NSW Police Force in response to item 2(e) of Law Enforcement Conduct Commission Notice 929 of 2018; Mr EE, CPR case file produced by NSW Police Force in response to item 2(f) of Law Enforcement Conduct Commission Notice 929 of 2018; Mr GG, CPR case file produced by NSW Police Force in response to item 2(g) of Law Enforcement Conduct Commission Notice 929 of 2018; Mr HH, CPR case file produced by NSW Police Force in response to item 2(j) of Law Enforcement Conduct Commission Notice 929 of 2018; Mr JJ, CPR case file produced by NSW Police Force in response to item 2(k) of Law Enforcement Conduct Commission Notice 929 of 2018, and see Child Protection Registry, NSW Police Force, *Application to the Local Court*, NSW Police Force response to item 6 of Law Enforcement Conduct Commission Notice 929 of 2017; Mr KK, CPR case file produced by NSW Police Force in response to item 2(i) of Law Enforcement Conduct Commission Notice 929 of 2018; Mr NN, CPR case file produced by NSW Police Force in response to item 2(h) of Law Enforcement Conduct Commission Notice 929 of 2018; Mr YY, Email from Child Protection Registry, NSW Police Force to Office of the General Counsel, NSW Police Force, *Subject: List of 'Possible' litigators re CPR Review*, 16 August 2016 (12:19) NSW Police Force response to Law Enforcement Conduct Commission Notice 977 of 2018 [fifth case listed in email].

<sup>165</sup> Law Enforcement Conduct Commission review of JusticeLink.

On 19 December 2018 Commission investigators raised these concerns with the NSW Police Force. The NSW Police Force immediately reviewed Mr YY's case and prepared a letter, forwarded to the Department of Justice on 3 January 2019, requesting that the Attorney-General refer Mr YY's wrongful convictions to the Local Court for annulment.<sup>166</sup> Under the *Crimes (Appeal and Review) Act 2001* (NSW) the NSW Police Force could not itself apply to the courts for the annulments, as more than two years had passed since the relevant convictions.<sup>167</sup> The NSW Police Force has stated that its failure to apply for annulments in Mr YY's case in 2016 was the result of an oversight, possibly due to a relevant officer going on leave and a mistaken belief that the annulments had already been applied for.<sup>168</sup>

The NSW Police Force was informed on 1 July 2019 that the Attorney-General had directed that Mr YY's convictions be referred to the Local Court for annulment.<sup>169</sup> On 18 July 2019 the Local Court annulled all five of Mr YY's wrongful convictions for offences under the CPOR Act.<sup>170</sup>

### 4.3 NSW POLICE FORCE DECIDED NOT TO NOTIFY PERSONS OF ERRORS WHICH RESULTED IN UNLAWFUL OR UNJUST ACTIONS

Around the end of June in 2016, prior to the discussion about annulments, the NSW Police Force realised that it would need to notify certain persons who were reporting their personal information to police when they had no obligation to do so under the CPOR Act. The purpose of this notification was to ensure that those persons did not continue to make reports to police.

A number of the persons who had been wrongly convicted were sent letters by the NSW Police Force which contained very limited, and in some cases misleading

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<sup>166</sup> Child Abuse and Sex Crimes Squad, NSW Police Force, *Request from Law Enforcement Conduct Commission (Law Enforcement Conduct Commission) for further information regarding annulments of convictions of individual, "Mr YY" in case study in Operation Tuskett*, 6 August 2019, D/2019/700337 (including attached Letter from Commander, Child Abuse and Sex Crimes Squad, NSW Police Force, to Attorney-General's Department, Department of Justice, 20 December 2018) provided to the Law Enforcement Conduct Commission by the Professional Standards Command, NSW Police Force on 13 August 2019.

<sup>167</sup> *Crimes (Appeal and Review) Act 2001* (NSW) s 4(2) and s 5.

<sup>168</sup> Child Abuse and Sex Crimes Squad, NSW Police Force, *Request from Law Enforcement Conduct Commission (Law Enforcement Conduct Commission) for further information regarding annulments of convictions of individual, "Mr YY" in case study in Operation Tuskett*, 6 August 2019, D/2019/700337, provided to the Law Enforcement Conduct Commission by the Professional Standards Command, NSW Police Force, on 13 August 2019.

<sup>169</sup> Email from Office of the General Counsel, Department of Justice to Child Protection Registry, NSW Police Force, 1 July 2019 (including attached Letter from Office of the General Counsel, Department of Justice, to Child Abuse and Sex Crimes Squad, NSW Police Force, undated), attachment to Child Abuse and Sex Crimes Squad, NSW Police Force, *Request from Law Enforcement Conduct Commission (Law Enforcement Conduct Commission) for further information regarding annulments of convictions of individual, "Mr YY" in case study in Operation Tuskett*, 6 August 2019, D/2019/700337, provided to the Law Enforcement Conduct Commission by the Professional Standards Command, NSW Police Force on 13 August 2019.

<sup>170</sup> Law Enforcement Conduct Commission review of JusticeLink.



information. The discussions within the NSW Police Force that led to these letters being sent is set out below.

### 4.3.1 INTERNAL DISCUSSIONS ABOUT THE LANGUAGE TO BE USED IN THE LETTERS

In May 2016 an officer in the Child Protection Registry (the Registry) submitted a report which highlighted the errors that had been discovered in a dip sample of Register cases, and recommended an independent audit of all active Register cases.<sup>171</sup> In that same month the NSW Police Force reviewed the reporting period of Mr CC, in response to a letter from his legal representatives (see Case Study 6 in Chapter 3), and discovered it had been incorrectly calculated, with the result that he had been wrongly convicted and imprisoned for offences under the CPOR Act on multiple occasions.<sup>172</sup>

On 1 July 2016 the Registry Manager sent an email about Mr CC's case to the OGC.<sup>173</sup> The recipient forwarded it on to the manager of the relevant unit in the OGC (referred to hereafter as 'the Manager in the OGC'), and stated in his forwarding email:

Significantly this matter has triggered a review of records of reporting obligations of registrable persons...and this has revealed from a relatively small sample 4 other matters where the reporting obligations are incorrect and I think a significant number of similar matters can be expected. Two where the reporting obligations should have expired and two which were thought to have expired but which should be continuing.

I understand Sex Crimes intend to start sending out letters about these matters next week and I indicated to the [Registry Manager] that they should get assistance from OGC regarding those letters where the reporting obligations have continued beyond the correct expiry date given the obvious liability issues.<sup>174</sup>

The Manager in the OGC then had a discussion with the Registry Manager, and was informed that there could be as many as 200 Register cases in which persons had been recorded by the NSW Police Force as being required to make reports for longer than was legally permitted by the CPOR Act. His advice to the Registry Manager, which he confirmed in an email, was that the NSW Police Force should continue to correct all incorrect Register records that it identified, but it should wait on 'sending letters to persons whose reporting obligations have been incorrectly recorded as

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<sup>171</sup> Child Protection Registry, NSW Police Force, *Serious concerns raised regarding the Child Protection Register (CPR) reporting period timeframes and lack of review of matters prior to case finalisation*, 26 May 2016, D/2016/277899, NSW Police Force response to item 7 of Law Enforcement Conduct Commission Notice 914 of 2017, p 7. This report is discussed in Chapter 3.

<sup>172</sup> Email from Child Protection Registry, NSW Police Force, to Office of the Director of Public Prosecutions (NSW), 25 May 2016, NSW Police Force response to Law Enforcement Conduct Commission Notice 977 of 2018.

<sup>173</sup> Email from Child Protection Registry, NSW Police Force, to Office of the General Counsel (OGC), NSW Police Force, NSW Police Force response to Law Enforcement Conduct Commission Notice 977 of 2018.

<sup>174</sup> Email from Manager, OGC, NSW Police Force, to Manager, OGC, NSW Police Force, 1 July 2016 (15:13), NSW Police Force response to Law Enforcement Conduct Commission Notice 977 of 2018.



being for a longer period than ought have been in place pursuant to statutory requirements', pending further consideration.<sup>175</sup>

Following this email, there were a series of emails and discussions between staff in the State Crime Command and the OGC about the content of the letters to send to persons in relation to whom the NSW Police Force had made an error when applying the CPOR Act. In the course of those emails and discussions:

- On 1 July 2016 the Registry Manager sent to the Manager in the OGC a template letter which had been drafted by a solicitor in the Police Prosecutions Command, and approved by the Commander of the Sex Crimes Squad. The template letter included an acknowledgement that the person's reporting period had been 'incorrectly determined', explained the legal basis for the person's (correct) reporting period, and stated: 'If you have any further issues or concerns, please seek your own independent legal advice'. The Registry Manager stated '[t]he intent was to tailor each letter to each individual Registrable Person, however I note your instructions in your other email, not to send them out yet.' He also attached a draft letter to a registrable person, Mr TT, whose reporting period had been needed to be extended.<sup>176</sup>
- The Manager in the OGC responded on 1 July 2016, stating: 'the concern, from a Civil Law viewpoint, is with those offenders whose period was inappropriately recorded for a longer period than it should have been and has now expired. In those circumstances, the letters are fine for those whose period is to be extended.'<sup>177</sup>
- The OGC solicitor and the Manager in the OGC were informed that some persons had been subjected to unlawful reporting requirements, and as a result had been wrongly charged, convicted, and in some cases imprisoned for failing to comply with reporting obligations under the CPOR Act when those obligations did not apply to them at the time.<sup>178</sup>
- On the morning of 14 July 2016 the Acting Commander of the Sex Crimes Squad sent an email to a superintendent in the State Crime Command which set out two examples of persons who had been wrongly imprisoned for

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<sup>175</sup> Email from Office of the General Counsel, NSW Police Force, to Child Protection Registry, NSW Police Force, 1 July 2016, NSW Police Force response to Law Enforcement Conduct Commission Notice 977 of 2018.

<sup>176</sup> Email from Child Protection Registry, NSW Police Force, to Office of the General Counsel, NSW Police Force, 1 July 2016, (including attached draft template letter from Child Protection Registry dated 22 June 2016, and draft letter from Child Protection Registry to Mr TT dated 1 July 2016), NSW Police Force response to Law Enforcement Conduct Commission Notice 977 of 2018.

<sup>177</sup> Email from Office of the General Counsel, NSW Police Force, to Child Protection Registry, NSW Police Force, 1 July 2016, NSW Police Force response to Law Enforcement Conduct Commission Notice 977 of 2018.

<sup>178</sup> Email from Manager, OGC, NSW Police Force, to Manager, OGC, NSW Police Force, 1 July 2016 (15:13), NSW Police Force response to Law Enforcement Conduct Commission Notice 977 of 2018; Email from Child Protection Registry, NSW Police Force, to Office of the General Counsel, NSW Police Force, 14 July 2016 (forwarding email from Sex Crimes Squad, NSW Police Force, *Subject: URGENT - CPR issues*, 14 July 2016), NSW Police Force response to Law Enforcement Conduct Commission Notice 977 of 2018.

offences under the CPOR Act.<sup>179</sup> He stated that the matters were ‘of significant concern’ and that:

[the Registry Manager] advises that [the Manager in the OGC] does not want us sending letters to Registrable Persons advising that they have been on the [Child Protection Register] for too long, but at the same time, in my view, we have an obligation to the [registrable persons] to advise them ASAP. I anticipate this won’t be the last of these, and we need some sort of process to ensure transparency/thoroughness on all fronts. I believe we need to arrange a meeting perhaps with yourself and later with OGC to formulate a way to deal with these matters.<sup>180</sup>

- On the afternoon of 14 July 2016 the Registry Manager forwarded the Acting Commander’s email to the Manager in the OGC, copying in the OGC solicitor, and stated:

We met with [an Assistant Commissioner in the State Crime Command] and [the superintendent in the State Crime Command] this morning who have requested we set up a meeting with you/OGC to work out how to progress, not only these matters, but to determine a way forward for any matters that we may identify. As you will see below they are quite serious and involve periods in gaol for the [persons of interest].<sup>181</sup>

- On 15 July 2016 the Registry Manager forwarded a draft letter for the legal representatives of Mr ZZ (who the NSW Police Force had determined should not have been placed on the Register) to the OGC for review. The draft letter stated: ‘Your client is not a registrable person in accordance with s 3A of the [CPOR Act].’<sup>182</sup> It also referred to the withdrawal of criminal proceedings against that client.
- In response to the above email from the Registry Manager, the OGC solicitor referred to concerns about the ‘implications of any letters sent to lawyers or their clients’ as they ‘might inadvertently contain admissions of liability and invite a flood of civil claims’. He stated ‘I have examined the one attached and am of the view that it does not admit more than it has to in order to achieve its purpose. As such please feel free to send it.’<sup>183</sup>
- On 20 July 2016 a solicitor in the Police Prosecutions Command sent the OGC solicitor two draft letters for registrable persons ‘regarding their increased reporting periods’, and ‘ending of reporting periods’ under the CPOR Act. The solicitor requested: ‘Could you please also advise of any required changes

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<sup>179</sup> These persons are the subjects of Case Studies 4 and 7 in Chapter 3.

<sup>180</sup> Email from Sex Crimes Squad, NSW Police Force, *Subject: URGENT – CPR issues*, 14 July 2016, NSW Police Force response to Law Enforcement Conduct Commission Notice 977 of 2018.

<sup>181</sup> Email from Child Protection Registry, NSW Police Force, to Office of the General Counsel, NSW Police Force, 14 July 2016, NSW Police Force response to Law Enforcement Conduct Commission Notice 977 of 2018.

<sup>182</sup> Email from Child Protection Registry, NSW Police Force, to Office of the General Counsel, NSW Police Force, 15 July 2016, (attaching draft letter from Child Protection Registry to Mr ZZ, 11 July 2016) NSW Police Force response to Law Enforcement Conduct Commission Notice 977 of 2018.

<sup>183</sup> Email from Office of the General Counsel, NSW Police Force, to Child Protection Registry, NSW Police Force, 15 July 2016, NSW Police Force response to Law Enforcement Conduct Commission Notice 977 of 2018.

prior to forwarding them to the [Registry] for signing.’<sup>184</sup> One of the attached draft letters was later used as the template for the letters sent to Mr DD and Mr NN (discussed in section 4.3.2.1 below).<sup>185</sup>

- A meeting was set up for 11:30 am on 20 July 2016, between the Registry Manager, the Manager in the OGC and others, to discuss ‘[Register] issues’.<sup>186</sup>
- On the afternoon of 20 July 2016 the OGC solicitor sent an email ‘to confirm our way forward with the identified [Register] issues’ to the Registry Manager, the Acting Commander of the Sex Crimes Squad, and solicitors in the Police Prosecutions Command, and copied in the Manager in the OGC. The OGC solicitor acknowledged that cases had been identified where the reporting periods which were recorded by the NSW Police Force were incorrect because they were too long, or persons had been put on the Register when they should not have been, and that these persons had been prosecuted, or were at risk of being prosecuted, for the offence of failing to comply with reporting obligations. He also stated that ‘[a]ll of this is due to administrative errors by us or errors of law by the courts’. The OGC solicitor stated:

While there is hope that we are not legally liable for injury suffered by those who have been incorrectly registered for the reasons we discussed, that is by no means a certainty and I think we are all in agreement that we should act promptly to eliminate the prospect of any further issues like the ones identified. Any action taken to set things right should strike a balance between the need to ensure registered people are not prejudiced and the **potentially undesirable side-effects of setting things right such as adverse media attention and/or a flood of civil claims** [emphasis added].

As such, we agree that in cases where a person was incorrectly on the register but where they are no longer because they have seen out their time, that no notice need be sent. This is because they will have already been informed that they are no longer subject to reporting conditions in the ordinary course of things and because they are no longer at risk of being arrested for failing to comply with reporting conditions.

In cases where a person was on the register for too long and where they are still incorrectly on the register or where they should not have been on the register at all but still are, a notice should be sent informing them that, and only that,

- 1) a periodical review of the register has been conducted,
- 2) that it has been determined that they are not required to be subject to reporting conditions and

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<sup>184</sup> Email from Police Prosecutions Command, NSW Police Force, to Office of the General Counsel, NSW Police Force, 20 July 2016, NSW Police Force response to Law Enforcement Conduct Commission Notice 977 of 2018.

<sup>185</sup> Draft letter from Sex Crimes Squad, NSW Police Force, attached to email from Police Prosecutions Command, NSW Police Force, to Office of the General Counsel, NSW Police Force, 20 July 2016, NSW Police Force response to Law Enforcement Conduct Commission Notice 977 of 2018.

<sup>186</sup> Email from Office of the General Counsel, NSW Police Force, *Subject: Forwarded meeting Law Enforcement Conduct Commission Notice from [Manager, Child Protection Registry]: Invitation: CPR Issues*, 18 July 2016, NSW Police Force response to Law Enforcement Conduct Commission Notice 977 of 2018.

3) that the register has been adjusted (include date) accordingly.

Of course the register must then be adjusted. This eliminates the risk of arrest for failing to comply with reporting conditions and informs the person that they are not subject to any obligation without providing more information than is necessary which might motivate a claim.<sup>187</sup>

The OGC solicitor ended the email by stating: 'Please send any letter templates to me for OGC endorsement prior to mailing them out to those on the register and/or their lawyers'.<sup>188</sup>

- On 26 July 2016 the solicitor in the Police Prosecutions Command sent an 'amended' draft letter to the OGC solicitor for approval, stating it was 'the letter to be sent to those registered persons whose reporting periods have ended'.<sup>189</sup> The OGC solicitor responded 'that looks good to go'.<sup>190</sup> The draft letter was later used as the template for the letter to Mr KK (discussed in section 4.3.2.2 below).<sup>191</sup>
- On 26 August 2016, in his advice to the Registry Manager about annulments for persons wrongly convicted for CPOR Act offences (quoted above in section 4.2), the OGC solicitor commented:

It is arguable that the State is not legally liable in negligence in these cases where registrable persons have suffered detriment based on an absence of duty of care [*Tame v New South Wales...*] Also defences against intentional torts might rightly be mounted against claims associated with these cases depending on the states of mind of arresting police and prosecutors ... By correcting our errors, we will of course be giving registrable persons notice of the error. This may well lead some of them to commence civil action. Unfortunately, this is unavoidable and I have put the [Treasury Managed Fund] on notice of the potential for claims. I have also been liaising with the [Child Protection Registry] and [solicitors in the Police Prosecutions Command] in relation to how letters notifying registrable persons of changes to their CPR status should be drafted **with the view of minimising the prospect of civil litigation** [emphasis added].<sup>192</sup>

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<sup>187</sup> Email from Office of the General Counsel, NSW Police Force, to Child Protection Registry *et al*, NSW Police Force, 20 July 2016, NSW Police Force response to Law Enforcement Conduct Commission Notice 977 of 2018.

<sup>188</sup> Email from Office of the General Counsel, NSW Police Force, to Child Protection Registry *et al*, NSW Police Force, 20 July 2016, NSW Police Force response to Law Enforcement Conduct Commission Notice 977 of 2018.

<sup>189</sup> Emails from Police Prosecutions Command, NSW Police Force, to Office of the General Counsel, NSW Police Force, 26 July 2016, NSW Police Force response to Law Enforcement Conduct Commission Notice 977 of 2018.

<sup>190</sup> Email from Office of the General Counsel, NSW Police Force, to Police Prosecutions Command, 26 July 2016, NSW Police Force response to Law Enforcement Conduct Commission Notice 977 of 2018.

<sup>191</sup> Draft letter from Sex Crimes Squad, 2016, attached to email from Police Prosecutions Command, NSW Police Force, to Office of the General Counsel, NSW Police Force, 26 July 2016, NSW Police Force response to Law Enforcement Conduct Commission Notice 977 of 2018.

<sup>192</sup> Office of the General Counsel, NSW Police Force, [Advice in response to request D/2016/438915], 26 August 2016, NSW Police Force response to Law Enforcement Conduct Commission Notice 977 of 2018.

- On 27 October 2016 the Registry Manager sent an email to the Commander of the Sex Crimes Squad, the Manager in the OGC and the OGC solicitor. The Registry Manager sought advice from the OGC about notifying persons who had been on the Register for longer than permitted by the CPOR Act, or who should never have been placed on the Register, when those persons had not been charged for any CPOR Act offences during the time they were unlawfully being required to report. The Registry Manager asked: 'what are our obligations, if any, regarding informing these [registrable persons] of our errors in these matters? My view is that we probably need to advise them, however will be guided by your advice'.<sup>193</sup> The Commission was not provided with any email sent in response.

The Commission asked General Counsel to the NSW Police Force about her knowledge in July 2016 of the content of the emails referenced above. She stated that she was aware at that time that staff in her team had been notified of issues with the Register, in particular that people 'had been recorded on the register for inaccurate periods of time'. She also stated that she was aware that the Manager in the OGC 'was concerned to ensure that the [Treasury Managed Fund] was notified of potential liability'. However, General Counsel stated that she was not aware of the advice given by the Manager in the OGC and the OGC solicitor regarding the terms of the letters to be sent to persons in relation to whom the NSW Police Force had made an error when applying the CPOR Act. She also stated that she was not involved in developing the content or terms of those letters.<sup>194</sup>

#### 4.3.2 LETTERS SENT TO PERSONS WHO HAD BEEN SUBJECTED TO UNLAWFUL REPORTING REQUIREMENTS

The Commission has reviewed five letters that the NSW Police Force wrote to persons that it had identified had either been placed on the Register in error, or who had been required to report their details for years longer than permitted under the CPOR Act.<sup>195</sup> One of those letters accurately stated 'it has been determined you are

<sup>193</sup> Email from Child Protection Registry, NSW Police Force, to Sex Crimes Squad and Office of the General Counsel, NSW Police Force, 27 October 2016, NSW Police Force response to Law Enforcement Conduct Commission Notice 977 of 2018.

<sup>194</sup> Letter from General Counsel, NSW Police Force, to Law Enforcement Conduct Commission, 19 August 2019.

<sup>195</sup> Letter from NSW Police Force to Mr DD, 27 July 2016, NSW Police Force response to item 2(e) of Law Enforcement Conduct Commission Notice 929 of 2018; Letter from NSW Police Force to Mr EE, 16 February 2017, NSW Police Force response to item 2(f) of Law Enforcement Conduct Commission Notice 929 of 2018; Letter from NSW Police Force to Mr GG, 6 February 2017, NSW Police Force response to item 2(g) of Law Enforcement Conduct Commission Notice 929 of 2018; Letter from NSW Police Force to Mr NN, 23 May 2017, NSW Police Force response to item 2(h) of Law Enforcement Conduct Commission Notice 929 of 2018; Letter from NSW Police Force to Mr KK, 16 March 2017, NSW Police Force response to item 2(i) of Law Enforcement Conduct Commission Notice 929 of 2018. The Commission reviewed a sixth letter sent by the NSW Police Force to a person who was wrongly convicted for an offence under the CPOR Act, but the Commission accepts that this letter was in fact drafted by the Queensland Police Service: see section 4.10 below.



not a registrable person in accordance with s 3A of the [CPOR Act]'.<sup>196</sup> However, none of the five letters informed the persons that an error had been made by the NSW Police Force, or that they had been subjected to unlawful reporting requirements. Three of those letters, discussed below, in fact contained information that was misleading.

#### 4.3.2.1 LETTERS SENT TO MR DD AND MR NN

Subsequent to the internal discussions in July 2016, two persons who had both been wrongly placed on the Register in 2006, Mr DD (Case Study 4 in Chapter 3) and Mr NN (Case Study 5 in Chapter 3), were sent letters from the NSW Police Force with almost identical wording. The letters (dated 27 July 2016 in the case of Mr DD, and 23 May 2017 in the case of Mr NN) stated:

Upon a periodic review of the Child Protection Register and your registrable status, it has been determined that you are no longer required to comply with your reporting obligations pursuant to the Child Protection (Offenders Registration) Act (the Act).

The Child Protection Register has been updated accordingly.<sup>197</sup>

These letters are misleading. They imply that Mr DD and Mr NN had previously been required to report to the NSW Police Force under the CPOR Act. The NSW Police Force was aware that this implication was untrue. Mr DD's Register case had been reviewed in July 2016 and it was discovered he was not a registrable person and therefore had never had any obligation to report under the CPOR Act.<sup>198</sup> Mr NN's Register case had been reviewed in May 2017 with the same result, namely that he should not have been placed on the Register.<sup>199</sup>

At the time of the letters to Mr DD and Mr NN, the NSW Police Force was also aware that as a result of its error in placing them on the Register:

- Mr DD had been wrongly charged and convicted for failing to comply with reporting obligations under the CPOR Act on three occasions, in 2010, 2013 and 2015, and had spent a total of over 13 months in prison as a result of these wrongful convictions.<sup>200</sup>

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<sup>196</sup> Letter from NSW Police Force to Mr EE, 16 February 2017, NSW Police Force response to item 2(f) of Law Enforcement Conduct Commission Notice 929 of 2018.

<sup>197</sup> Letter from NSW Police Force to Mr DD, 27 July 2016, NSW Police Force response to item 2(e) of Law Enforcement Conduct Commission Notice 929 of 2018; Letter from NSW Police Force to Mr NN (signed by Mr NN), 23 May 2017, NSW Police Force response to item 2(h) of Law Enforcement Conduct Commission Notice 929 of 2018.

<sup>198</sup> Email from Police Prosecutions Command, NSW Police Force, to Child Protection Registry, NSW Police Force, 13 July 2016, Email from Officer, Child Protection Registry, NSW Police Force, to Manager, Child Protection Registry, 13 July 2016, and Child Protection Registry, *NSW Police Force s 194 Intelligence Report for Parole Hearing of [Mr DD]*, 2 August 2016, all in NSW Police Force response to item 2(e) of Law Enforcement Conduct Commission Notice 929 of 2018.

<sup>199</sup> Email from Senior Constable, State Crime Command to Detective Senior Sergeant, NSW Police Force, 19 May 2017 (13:33) and *Details of Initial Case Creation*, 19 May 2017, NSW Police Force response to item 2(h) of Law Enforcement Conduct Commission Notice 929 of 2018.

<sup>200</sup> Email from Police Prosecutions Command, NSW Police Force, to Child Protection Registry, NSW Police Force, 13 July 2016, Email from Officer, Child Protection Registry, NSW Police Force, to Manager, Child Protection Registry, 13 July 2016, and Child Protection Registry,

- Mr NN had been wrongly convicted in November 2014 for failing to comply with reporting obligations under the CPOR Act, and had been sentenced to an 18 month bond.<sup>201</sup>

The senior officer in the (then) Sex Crimes Squad who signed the letter to Mr DD submitted to the Commission that the letter to Mr DD was based on 'the template provided by the OGC'.<sup>202</sup> The senior officer in that same squad who signed the letter to Mr NN stated to the Commission that he acted on the advice of the OGC.<sup>203</sup>

The wording used in the letters to Mr DD and Mr NN was identical to that of the draft/template letter that the solicitor in the Police Prosecutions Command sent to the OGC solicitor for approval on 20 July 2016.<sup>204</sup> The OGC was aware that the category of cases for which the drafts/templates it was sent were proposed to be used included cases like Mr DD's and Mr NN's, in which the persons should never have been put on the Register, and had been wrongly convicted for CPOR Act offences.<sup>205</sup>

#### 4.3.2.2 LETTER SENT TO MR KK

Mr KK<sup>206</sup> had been convicted in 2000 of two counts of aggravated indecent assault against a child under 16 years of age. He was sentenced to imprisonment, and was released in October 2001. The NSW Police Force determined that he was a registrable person under the CPOR Act, but incorrectly calculated his reporting period as 15 years, rather than 12 years.<sup>207</sup> The NSW Police Force reviewed his file in March 2017. It realised his reporting period had in fact ended in October 2013, and that he had had been wrongly convicted and sentenced to imprisonment for failure to comply with reporting obligations in 2014.

On 16 March 2017 the NSW Police Force wrote to Mr KK, stating:

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*NSW Police Force s 194 Intelligence Report for Parole Hearing of [Mr DD], 2 August 2016, all in NSW Police Force response to item 2(e) of Law Enforcement Conduct Commission Notice 929 of 2018.*

<sup>201</sup> Email from Senior Constable, State Crime Command to Detective Senior Sergeant, NSW Police Force, 19 May 2017 (13:33) and *Details of Initial Case Creation*, 19 May 2017, NSW Police Force response to item 2(h) of Law Enforcement Conduct Commission Notice 929 of 2018.

<sup>202</sup> Response provided to the Law Enforcement Conduct Commission, 8 July 2019.

<sup>203</sup> Response provided to the Law Enforcement Conduct Commission, 9 July 2019.

<sup>204</sup> See section 4.3.1 above.

<sup>205</sup> Email from Child Protection Registry, NSW Police Force, to Office of the General Counsel, NSW Police Force, 14 July 2016 (forwarding email from Sex Crimes Squad, NSW Police Force, *Subject: URGENT – CPR issues*, 14 July 2016), NSW Police Force response to Law Enforcement Conduct Commission Notice 977 of 2018; Email from Office of the General Counsel, NSW Police Force, to Child Protection Registry *et al*, NSW Police Force, 20 July 2016, NSW Police Force response to Law Enforcement Conduct Commission Notice 977 of 2018.

<sup>206</sup> The CPR case file of Mr KK was produced by the NSW Police Force in response to item 2(i) of Law Enforcement Conduct Commission Notice 929 of 2018.

<sup>207</sup> Under the CPOR Act in force as at 26 October 2001, Mr KK's two 'Class 2' offences gave him a reporting period of 12 years: *Child Protection (Offenders Registration) Act 2000* (NSW) (version in force as at 26 October 2001) s 14(2)(b).



Upon a periodic review of the Child Protection Register and your registrable status, it has been determined that you are no longer required to comply with your reporting obligations pursuant to the Child Protection (Offenders Registration) Act (the Act).

The Child Protection Register has been updated accordingly ...<sup>208</sup>

The letter included accurate information about restrictions under the CPOR Act that continued to apply to Mr KK as a registrable person, despite the fact his reporting obligations had ended. The language used in Mr KK's letter matches that of the draft/template letter which was approved by the OGC solicitor on 26 July 2016.<sup>209</sup>

The letter to Mr KK is misleading; in stating 'you are no longer required' to report in March 2017, it implies that his reporting obligations ceased around that time. The NSW Police Force was aware that his obligations had in fact ceased more than three years earlier, in October 2013.

#### 4.3.3 COMPARISON WITH OTHER LETTERS SENT BY THE NSW POLICE FORCE

The letters to Mr DD, Mr NN and Mr KK can be contrasted with the information the NSW Police Force included in letters to persons that it realised were required to report under the CPOR Act for **longer** than the NSW Police Force had initially calculated. The Commission reviewed four letters that the NSW Police Force wrote to persons in this situation.<sup>210</sup> Each of these letters contained information about the basis under the CPOR Act for the person's (correct) reporting period, and suggested the person seek independent legal advice if they had 'any further issues or concerns'. Three of the four letters acknowledged that an error had been made in their case. For example, the letter the NSW Police Force wrote to Mr MM on 9 July 2016 read:

On 12 March 2008 you were sentenced in respect of two Class 2 offences and as such you became a registrable person according to the [CPOR Act].

On 5 August 2008 you were...advised that your reporting obligations pursuant to the Act would continue for 8 years.

Upon a review of your registrable status, the length of your reporting period was, incorrectly determined.

Pursuant to section 14A(1)(b)(ii) of the Act, at the time you were convicted (2008); a registrable person must comply with the reporting obligations imposed by the Act for 15 years, if a person has even been found guilty of more than a single registrable offence.

[Letter then sets out the text of s 14A]

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<sup>208</sup> Letter from NSW Police Force to Mr KK, 16 March 2017, NSW Police Force response to item 2(i) of Law Enforcement Conduct Commission Notice 929 of 2018.

<sup>209</sup> See section 4.3.1 above.

<sup>210</sup> Letter from the NSW Police Force to Mr LL, 8 November 2016, NSW Police Force Response to item 2(m) of Notice 929 of 2018; Letter from NSW Police Force to Mr PP, 4 December 2017, NSW Police Force Response to item 2(n) of Notice 929 of 2018; Letter from NSW Police Force to Mr MM, 9 July 2016, NSW Police Force Response to item 2(o) of Notice 929 of 2018; Draft letter from NSW Police Force to Mr TT, 1 July 2016, NSW Police Force Response to Notice 977 of 2018.

As you were found guilty of two separate Class 2 offences your reporting obligations under the Act will continue until 5<sup>th</sup> June 2023.

If you have any further issues or concerns, please seek your own independent legal advice.<sup>211</sup>

These letters, combined with the email from the Manager in the OGC on 1 July 2016 in response to the template the Registry Manager sent to him,<sup>212</sup> establish that on the basis of the OGC's advice, the NSW Police Force deliberately took a different approach to the drafting of letters to send to persons who had been subjected to unlawful reporting requirements. This is further supported by the email sent by the OGC solicitor on 20 July 2016.<sup>213</sup>

#### 4.3.4 DECISION NOT TO NOTIFY PERSONS NO LONGER ON THE REGISTER IN JULY 2016

In the email sent by the OGC solicitor on 20 July 2016, he referred to an agreement being made (it is assumed at the meeting held earlier that day) that:

in cases where a person was incorrectly on the register but where they are no longer because they have seen out their time, that no notice need be sent. This is because they will have already been informed that they are no longer subject to reporting conditions in the ordinary course of things and because they are no longer at risk of being arrested for failing to comply with reporting conditions.<sup>214</sup>

It is understood that these comments were made in the context of discussions focusing on the need to notify persons who were still reporting their information to police, to avoid future wrongful charges.

However, persons who were 'incorrectly on the Register' would have been subjected to unlawful requirements to report their personal information to police, prior to being (belatedly) informed by the NSW Police Force that their reporting periods had ended.

The email forwarded by the Register Manager to the Commander of the Sex Crimes Squad, the Manager in the OGC and the OGC solicitor on 27 October 2016 contained examples of persons who either had been on the Register when they were not registrable persons, or had been recorded by the NSW Police Force as having reporting obligations for years longer than permitted under the CPOR Act. Three of these persons' Register cases had finalised prior to 2016.<sup>215</sup>

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<sup>211</sup> Letter from NSW Police Force to Mr MM, 9 July 2016, NSW Police Force response to item 2(o) of Law Enforcement Conduct Commission Notice 929 of 2018.

<sup>212</sup> Email from Office of the General Counsel, NSW Police Force, to Child Protection Registry, NSW Police Force, 1 July 2016, NSW Police Force response to Law Enforcement Conduct Commission Notice 977 of 2018.

<sup>213</sup> Email from Office of the General Counsel, NSW Police Force, to Child Protection Registry, *et al*, NSW Police Force, 20 July 2016, NSW Police Force response to Law Enforcement Conduct Commission Notice 977 of 2018.

<sup>214</sup> Email from Office of the General Counsel, NSW Police Force, to Child Protection Registry, *et al*, NSW Police Force, 20 July 2016, NSW Police Force response to Law Enforcement Conduct Commission Notice 977 of 2018.

<sup>215</sup> Email from Child Protection Registry, NSW Police Force, to Commander, Sex Crimes Squad, and Office of the General Counsel, NSW Police Force, 27 October 2016, (forwarding

The Registry Manager noted while none of these persons had been charged for offences under the CPOR Act, they had been required to comply with reporting obligations and may have been subjected to unlawful home inspections. The Registry Manager stated:

Even though they were never [charged for breaches of their reporting obligations], their civil rights have been impinged and they have been required to report and do things that legally we were not entitled to impose upon them.<sup>216</sup>

In that email the Registry Manager asked the OGC for advice as to whether the NSW Police Force had any obligations to inform these people of the errors in their cases, noting that his view was that ‘we probably need to advise them’, but that he would ‘be guided by your advice’.<sup>217</sup>

No email in response was contained in the documents presented to the Commission. However the Commission has not received any evidence to suggest that a different position to that reflected in the email on 20 July 2016 was adopted after the Registry Manager’s email.

#### 4.4 NSW POLICE FORCE OBLIGATION TO NOTIFY PERSONS OF ERRORS

On the advice of two lawyers in the OGC, the NSW Police Force deliberately excluded reference to relevant and important information in the letters sent to persons who had been subjected to unlawful reporting requirements, in order to ‘minimis[e] the prospect of civil litigation’. This defensiveness went so far as to not include in these letters any suggestion that these persons should seek independent legal advice (as compared with the letters like the one sent to Mr MM in the section above). Not disclosing the reason for the termination of their reporting obligations is a classic case of ‘*suppressio veri, suggestio falsi*’ (suppression of the truth is equivalent to the suggestion of what is false).

In the case of the letters to Mr DD, Mr NN and Mr KK, the language used also contained implications which the NSW Police Force knew to be untrue, in particular that those persons had an obligation to report their personal information up until the date of the letters.

These letters concealed the fact that the NSW Police Force had made an error in their cases. This concealment implied that the CPOR Act had been properly applied to them, that nothing untoward had occurred, and that the NSW Police Force was simply bringing to their attention the end of their reporting obligations.

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email from Inspector, NSW Police Force to Child Protection Registry, NSW Police Force, 25 October 2016) NSW Police Force response to Law Enforcement Conduct Commission Notice 977 of 2018.

<sup>216</sup> Email from Child Protection Registry, NSW Police Force, to Commander, Sex Crimes Squad, and Office of the General Counsel, NSW Police Force, 27 October 2016, NSW Police Force response to Law Enforcement Conduct Commission Notice 977 of 2018.

<sup>217</sup> Email from Child Protection Registry, NSW Police Force, to Commander, Sex Crimes Squad, and Office of the General Counsel, NSW Police Force, 27 October 2016, NSW Police Force response to Law Enforcement Conduct Commission Notice 977 of 2018.

The OGC solicitor was given the opportunity to make comments to the Commission in relation to a draft of this report. He asked the Commission to set out ‘what obligation there was to disclose details ... to those caught up in the error’ in the Register, and ‘where it derives from’.<sup>218</sup>

In the 1912 case of *Melbourne Steamship Co Ltd v Moorhead*, Chief Justice Griffith emphasised that there is an ‘old-fashioned traditional, and almost instinctive, standard of fair play to be observed by the Crown in dealing with subjects’.<sup>219</sup> Justice Finn in *Hughes Aircraft Systems International v Airservices Australia*, applying Griffith CJ’s comments in the context of a contract tender process, stated that ‘the law entertains expectations of fair dealing of government and of public bodies’.<sup>220</sup> In the case of *Logue v Shoalhaven Shire Council*,<sup>221</sup> Mahoney JA cited Griffith CJ’s comments in *Melbourne Steamship* in the context of a local council seeking to uphold a compulsory sale of property to recover unpaid rates which was made pursuant to a defective statutory notice. His Honour commented:

It is well settled that there is expected of the Crown the highest standards in dealing with its subjects ... What might be accepted from others would not been seen as in full accord with the principles of equity and good conscience to be expected in the case of the Crown.<sup>222</sup>

Although Mahoney JA was in dissent in that case as to the outcome, in 2008 the NSW Court of Appeal cited his Honour’s comments with approval in *Mahenthirarasa v State Rail Authority (NSW) (No 2)*.<sup>223</sup>

In *Australian Securities and Investments Commission v Hellicar* Justice Heydon on the High Court noted that ASIC accepted Griffith CJ’s comments in *Melbourne Steamship* about the standard of ‘fair play’ to be observed by the Crown:

Its powers are exercised for the public good. It has no legitimate private interest in the performance of its functions. And often it is larger and has access to greater resources than private litigants. Hence it must act as a moral exemplar.<sup>224</sup>

These standards of ‘fairness’ which apply to public servants discharging public functions are also reflected in New South Wales in Part 2 of the *Government Sector Employment Act 2013* (NSW), which contains the ‘Ethical Framework for the government sector’.

The *Police Act 1990* (NSW) contains a specific statement of values for all members of the NSW Police Force. Section 7 of that Act states that each member ‘is to act in a manner which ... places integrity above all...upholds the rule of law, [and] preserves the rights and freedoms of individuals.’ The *NSW Police Force Code of Conduct and Ethics* requires that all employees of the NSW Police Force must ‘behave honestly and in a way that upholds the values and the good reputation of the NSW Police Force’ and ‘treat everyone with respect, courtesy and fairness’.

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<sup>218</sup> Response provided to the Law Enforcement Conduct Commission, 8 July 2019, p 5.

<sup>219</sup> *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333, 342.

<sup>220</sup> *Hughes Aircraft Systems International v Airservices Australia (No 3)* (1997) 76 FCR 151, 196.

<sup>221</sup> [1979] 1 NSWLR 537.

<sup>222</sup> *Logue v Shoalhaven Shire Council* [1979] 1 NSWLR 537, 558.

<sup>223</sup> (2008) 72 NSWLR 273, 279.

<sup>224</sup> *Australian Securities and Investments Commission v Hellicar* (2012) 247 CLR 345, 434-35.

It is evident from the emails set out in section 4.3.1 that the officers in the State Crime Command who signed the letters which omitted relevant information to the detriment of the recipients, were guided by the advice of the OGC solicitor and the Manager in the OGC. It is not only reasonable that those officers would follow the advice given by NSW Police Force internal legal counsel, but expected. Officers who departed from that advice in any significant respect would do so at their peril.

In addition to the ethical obligations that apply to all members of the NSW Police Force, lawyers in the OGC, as all government lawyers, are under a specific obligation to act as ‘model litigants’, under the NSW Department of Justice’s *Model Litigant Policy for Civil Litigation* (the Model Litigant Policy).<sup>225</sup> This Policy states:

The obligation to act as a model litigant requires more than merely acting honestly and in accordance with the law and court rules. It also goes beyond the requirement for lawyers to act in accordance with their ethical obligations. Essentially it requires that the State and its agencies act with complete propriety, fairly and in accordance with the highest professional standards.<sup>226</sup>

The Model Litigant Policy further states that the obligation ‘requires that the State and its agencies, act honestly and fairly in the handling of claims and litigation by...apologising where the State or agency is aware that it has acted wrongfully or improperly’.<sup>227</sup>

While the Model Litigant Policy is described as applying ‘to civil claims and civil litigation’, it sets standards that should be adhered to even before any claim or litigation has commenced.<sup>228</sup> In any event, model litigant standards are a specific manifestation of the general duty of ‘fair play’ described by Griffiths CJ in *Melbourne Steamship*.<sup>229</sup>

## 4.5 RESPONSES TO THE DRAFT FINAL REPORT

The NSW Police Force in its response to a draft of this report agreed that ‘the letters to Mr DD, Mr NN, Mr KK (and others who were on the Register for too long or who were incorrectly determined to be registrable) were misleading by omission’.<sup>230</sup>

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<sup>225</sup> Office of the General Counsel, NSW Police Force, *Charter of Independence and Ethical Responsibilities*.

<sup>226</sup> Department of Justice (NSW), *Model Litigant Policy for Civil Litigation*, 3.1, at <<https://www.justice.nsw.gov.au/legal-services-coordination/Pages/info-for-govt-agencies/model-litigant-policy.aspx>>.

<sup>227</sup> Department of Justice (NSW), *Model Litigant Policy for Civil Litigation*, 3.2(k), at <<https://www.justice.nsw.gov.au/legal-services-coordination/Pages/info-for-govt-agencies/model-litigant-policy.aspx>>.

<sup>228</sup> See for example comments in *B & L Linings Pty Ltd v Chief Commissioner of State Revenue (No 5)* [2010] NSWADTAP 21, [114]; *Department of Attorney General and Justice (NSW) v Schoeman* [2012] NSWADTAP 31, [57]-[59] and [84].

<sup>229</sup> *Hughes Aircraft Systems International v Airservices Australia (No 3)* (1997) 76 FCR 151, 197.

<sup>230</sup> Letter from Commissioner of Police, NSW Police Force, to Chief Commissioner, Law Enforcement Conduct Commission, 30 September 2019 (Annexure C – Requests for Corrections to the Final Draft Report).

The OGC solicitor in his comments to the Commission denied any intention on his part to engage in deliberately misleading conduct.<sup>231</sup> He submitted that:

The situation was a difficult one, where urgent attention was required and where there were competing interests, and it was not one in which there was some readily identifiable standard of disclosure available to us for reference.<sup>232</sup>

He denied that any strategy was adopted to hide the errors that had led to unlawful or unjust conduct, and pointed to the fact that the NSW Police Force applied for annulments of the wrongful convictions.<sup>233</sup>

The NSW Commissioner of Police stated to the Commission that, although the NSW Police Force acknowledges that the letters were misleading, he was 'satisfied there was no intention to mislead'.<sup>234</sup>

The NSW Police Force also acknowledged that 'letters should have been written to affected persons who had been placed on the Register for too long, but who were no longer on the Register' (ie those persons discussed at 4.3.4).

The NSW Police Force stated that it would write to those people who were incorrectly determined to be registrable or who were on the Register for too long, acknowledging 'this is the right and fair thing for the NSWPF to do' (discussed further below at section 4.9).<sup>235</sup> The NSW Police Force however stated to the Commission that it disagreed that the Model Litigant Policy applied in relation to the template letters that the OGC approved in 2016. It also submitted that the Model Litigant Policy 'does not impose a legally enforceable duty',<sup>236</sup> although it accepted it is an 'ethical' standard that 'will be relevant to the exercise of judicial discretions regarding costs'.<sup>237</sup>

The NSW Police Force in its response also referred to the fact that Griffith CJ's comments in *Melbourne Steamship* and Heydon J's comments in *Australian Securities and Investments Commission v Hellicar* related to decisions made in the prosecution of a criminal matter and a civil matter respectively. It stated:

We consider that universal principles of fairness and doing the right thing, supported by the statement of values in section 7 of the *Police Act 1990* and the NSWPF Code of Conduct are the relevant guiding principles rather than the Model Litigant Policy and the GSE Act. We do not agree with the implication in...the report that the NSWPF has

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<sup>231</sup> Response provided to the Law Enforcement Conduct Commission, 8 July 2019, p 3.

<sup>232</sup> Response provided to the Law Enforcement Conduct Commission, 8 July 2019, p 5.

<sup>233</sup> Response provided to the Law Enforcement Conduct Commission, 8 July 2019, p 5.

<sup>234</sup> Letter from Commissioner of Police, NSW Police Force, to Chief Commissioner, Law Enforcement Conduct Commission, 30 September 2019, p 3.

<sup>235</sup> Letter from Commissioner of Police, NSW Police Force, to Chief Commissioner, Law Enforcement Conduct Commission, 30 September 2019 (Annexure C – Requests for Corrections to the Final Draft Report).

<sup>236</sup> The NSW Police Force referenced the comments of Craig J in *Site Plus Pty Ltd v Wollongong City Council* [2014] NSWLEC 125 in support of this proposition.

<sup>237</sup> Letter from Commissioner of Police, NSW Police Force, to Chief Commissioner, Law Enforcement Conduct Commission, 30 September 2019 (Annexure C – Requests for Corrections to the Final Draft Report).



any obligation at law to notify affected persons of errors on the register, as opposed to an ethical duty.<sup>238</sup>

## 4.6 COMMISSION'S ANALYSIS

The evidence provided to the Commission clearly shows that in July 2016 the NSW Police Force carefully limited the information that was disclosed to persons whom it knew had been subjected to unlawful or unjust actions as a result of errors in the Register.

This approach was adopted on the advice of two lawyers in the OGC (the OGC solicitor and the Manager in the OGC). It was designed to avoid or, at least, minimise the risk of civil claims being made against the NSW Police Force, as well as to avoid adverse media publicity. Those lawyers in the OGC adopted the role of approving the draft/template letters to be sent to persons affected by the errors in the Register, to ensure the letters did not 'admit' any more than they 'ha[d] to'.

The advice to limit the information in the letters, and therefore the approach adopted on the basis of that advice, is a significant breach of the ethical obligation on the NSW Police Force, as a public authority, to deal fairly with members of the public. The NSW Police Force knew that it had made errors in administering the Register. It knew that people had been subjected to unlawful or unjust actions, and in some cases even wrongful convictions and imprisonment, as a result of those errors. It was aware that those persons would likely have at least a basis for a civil claim because of its own conduct.

The OGC lawyers' advice and the consequent decisions made to censor the information to give to these persons and not to disclose what had actually happened in their cases was designed to save face and, if possible, avoid the legal liability of the State of New South Wales, rather than serve the public interest. As the standards expressed by the courts, Parliament, and the Government make clear, the public interest will require a public authority to acknowledge when it has engaged in conduct against members of the public which it knows was unlawful or unjust, particularly where this has resulted in wrongful convictions and imprisonment. All this is apart from the duty to apologise to those injured by mistakes that have been made.

The Commission is inclined to think that the two lawyers in the OGC were unfortunately unaware of the obligations of the State when its agencies have acted unlawfully. If, on the other hand, they were aware of these obligations but chose to ignore them, the position is far more serious. For the purposes of this report, the Commission is content to act on the former basis, leaving to a later occasion investigation of the latter (should it regrettably arise).

The advice given by the two lawyers in the OGC about what to say to persons that the NSW Police Force knew it had wronged involved fundamental questions of policy, with strategic significance for the NSW Police Force as an agency. The Commission has not received any evidence to suggest that the OGC solicitor or the Manager in the OGC consulted with more senior staff in the OGC, or senior officers in

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<sup>238</sup> Letter from Commissioner of Police, NSW Police Force, to Chief Commissioner, Law Enforcement Conduct Commission, 30 September 2019 (Annexure C – Requests for Corrections to the Final Draft Report).



the NSW Police Force hierarchy (for example, in the Office of the Commissioner of Police), prior to giving the advice regarding the content of the letters.

As noted above, General Counsel stated to the Commission that she was not involved in the development of the letters, and was not aware of the advice given by the two lawyers in her office about the content of the letters. She stated that the letters should have been provided by her staff to the chain of command for approval, which would have included herself, the Assistant Commissioner for the State Crime Command and relevant Deputy Commissioners. She stated that this is 'the usual process for significant matters' in the NSW Police Force.

General Counsel stated that although she was not aware in 2016 of the contents of the emails from her staff and the letters, she took responsibility for the advice provided by her staff and the quality review processes within the OGC. She informed the Commission that she had 'provided additional direction to my direct reports to ensure that there is a shared understanding of the nature of the advice that must be provided to Directors by their direct reports for approval and advice that must be provided to me for approval'.<sup>239</sup>

The Commission acknowledges that the NSW Police Force did act to correct the criminal records of persons who it realised had been wrongly convicted under the CPOR Act, by applying to the courts or the Department of Justice for annulments. But the initiation of those annulment processes did not satisfy the ethical and public policy obligation on the NSW Police Force to inform those persons candidly about the errors that had been made in their cases, once it had identified those errors.

The Commission has reviewed documents in the court files of Mr DD, Mr NN and Mr KK. There was no evidence in those files that those persons were notified through the annulment processes that the reason for their convictions being annulled was because the NSW Police Force had made an error in determining that they were a registrable person (in the cases of Mr DD and Mr NN) or in calculating the length of their reporting period (in the case of Mr KK). The Commission also notes that in the case of Mr DD, almost a year passed between the NSW Police Force sending him a (misleading) letter on 27 July 2016 and seeking an annulment on his wrongful convictions in June 2017.<sup>240</sup>

## 4.7 FINDINGS

As the NSW Police Force properly acknowledges, the letters it wrote to Mr DD (dated 27 July 2016) and Mr NN (dated 23 May 2017) are misleading. The letters stated that those persons were 'no longer required to comply with your reporting obligations', when the NSW Police Force was aware that those persons had never had any reporting obligations under the CPOR Act.

The letter the NSW Police Force wrote to Mr KK on 16 March 2017 is also misleading, as the NSW Police Force was aware, when writing that he was 'no longer' required to

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<sup>239</sup> Letter from General Counsel, NSW Police Force, to Law Enforcement Conduct Commission, 19 August 2019.

<sup>240</sup> Letter from the Sex Crimes Squad, NSW Police Force, to Department of Justice and Attorney General, 16 June 2017, NSW Police Force response to item 2(e) of Law Enforcement Conduct Commission Notice 929 of 2018.

report in March 2017, that his reporting obligations had ceased more than three years prior to that date.

We draw no conclusion as to whether the intention behind the use of this language was to mislead these persons. However, the facts are that when those letters were written the NSW Police Force was aware it had subjected those persons to unlawful reporting requirements, and that they had been wrongly charged and convicted as a result. The effect of these letters was that recipients were given the impression that the CPOR Act had been properly applied to them, when this was not the case.

The Commission finds that the decisions made by the NSW Police Force to write letters to Mr DD, Mr NN and Mr KK which were in effect misleading, constitutes conduct on the part of the agency that, although not unlawful, was unreasonable or unjust in its effect.<sup>241</sup>

As explained in Chapter 3 section 3.8.2, the total number of people who have been subjected to unlawful reporting requirements by the NSW Police Force is not known because the CPR case review did not make note of this information when reviewing Register case files that contained errors. We therefore do not know how many of those persons were sent letters similar to those sent to Mr DD, Mr NN and Mr KK, or indeed were sent no letter. In section 4.10 of this chapter we recommend that the NSW Police Force write to all 277 persons who may have been subjected to unlawful or unjust actions as a result of the incorrect information in the Register, and notify them of this fact. This would include writing to Mr DD, Mr NN and Mr KK.

**FINDING 4:** The NSW Police Force made decisions to write letters to Mr DD, Mr NN and Mr KK about their obligations under the CPOR Act, which were in effect misleading. These decisions, although not unlawful, were unreasonable or unjust in their effects.

## 4.8 REMEDIAL ACTION FOR THOSE SUBJECTED TO UNLAWFUL OR UNJUST ACTIONS

In the Commission's confidential interim report on Operation Tuskett, which was provided to the NSW Commissioner of Police in August 2018, we requested that the NSW Police Force advise whether it had notified those persons who had been subjected to any form of unlawful or unjust action due to errors in the Register, or proposed to do so. We also recommended that the NSW Police Force inform us of any remedial action that it had taken, or proposed to take, in relation to those persons (beyond applying for annulments).

In October 2018 the NSW Commissioner of Police stated that the OGC 'is currently considering the best approach to taking remedial action'.<sup>242</sup>

On 13 December 2018, the Commission indicated to the NSW Police Force that we considered this was an inadequate response, particularly as the NSW Police Force had been aware of these issues since 2016. The evidence before the Commission establishes that by 18 October 2016 General Counsel to the NSW Police Force was

<sup>241</sup> Cf. *Law Enforcement Conduct Commission Act 2016* (NSW) s 11(1)(b)(i).

<sup>242</sup> *NSW Police Force response to the interim report of Operation Tuskett*, 23 October 2018, F/2018/94374; D/2018/851613, p 5.

aware that persons had been wrongly convicted and even imprisoned as a result of errors the NSW Police Force had made in applying the CPOR Act.<sup>243</sup>

In a meeting with the NSW Police Force Deputy Commissioner (Investigations and Counter Terrorism), General Counsel, and others held on 20 December 2018, the Deputy Commissioner acknowledged that the NSW Police Force needed to develop an appropriate framework for decision-making in relation to remediation, including admissions and litigation issues, connected to the errors in the Register.

The Commission is aware that one person, Mr CC, initiated civil proceedings after being wrongly convicted and imprisoned for more than 540 days for CPOR Act offences as a result of the NSW Police Force incorrectly calculating his reporting period. The error that was made, and the consequences that followed in Mr CC's case are detailed in Case Study 6 in Chapter 3 (in section 3.5.4). In Case Study 8 in this chapter we examine the way the NSW Police Force responded after learning of these errors.

### **CASE STUDY 8: Registrable person sued State of New South Wales for wrongful imprisonment**

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On 17 June 2016 legal representatives for Mr CC<sup>244</sup> wrote to the NSW Police Force requesting it confirm the date his reporting obligations under the CPOR Act had ceased, and provide the reason his reporting obligations had been recorded by the NSW Police Force as extending beyond that date (if indeed they had been). The legal representatives mentioned their concern that Mr CC had been charged with failing to comply with reporting obligations when in fact he was no longer required to make reports under the CPOR Act.

On 27 July 2016 the NSW Police Force responded to this letter, stating:

Your client's reporting period should have ceased after 7 years and 6 months; on 15 August 2008...

Your client was, in error, sentenced to a good behaviour bond pursuant to section 9 of the *Crimes (Sentencing Procedure) Act 1999*; which meant he was regarded as an adult for the purposes of determining the length of his reporting period as a registrable person pursuant to the Act.

The NSW Police Force did not make any reference to the fact that Mr CC's multiple charges (and therefore convictions and sentences, including imprisonment) for CPOR Act offences after 2008 had been wrongful. The NSW Police Force was aware of his wrongful convictions and imprisonment at that time the letter was written.<sup>245</sup>

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<sup>243</sup> Comments dated 18 October 2016 on Office of the General Counsel, NSW Police Force, [Advice in response to request D/2016/438915], 26 August 2016, NSW Police Force response to Law Enforcement Conduct Commission Notice 977 of 2018.

<sup>244</sup> The CPR case file of Mr CC was produced by the NSW Police Force in response to item 2(p) of Law Enforcement Conduct Commission Notice 929 of 2018.

<sup>245</sup> See for example email from Child Protection Registry, NSW Police Force, to Office of the Director of Public Prosecutions (NSW), 25 May 2016, NSW Police Force response to Law Enforcement Conduct Commission Notice 977 of 2018.

In around March 2017 an application was listed with the Local Court for annulments of Mr CC's convictions for CPOR Act offences after August 2008. The NSW Police Force appeared in that application. These annulments were granted in April 2017.

In 2018 representatives for Mr CC filed a Statement of Claim in the Supreme Court. They alleged that the Commissioner of Police was negligent in not ensuring that the NSW Police Force limited Mr CC's reporting period to that provided under the CPOR Act. It was alleged that as a result of this negligence, Mr CC was wrongfully convicted of seven offences under the CPOR Act, and imprisoned for a total of 545 days.

In its Defence the State of New South Wales admitted that an error had been made in calculating Mr CC's reporting period, but denied any liability. Also, the State of New South Wales did not admit that Mr CC's imprisonment for each of the seven offences was unlawful. This was inconsistent with the fact that the State (through the NSW Police Force) had applied for annulments of these sentences, which had been granted in 2017. The annulments of the sentences of imprisonment could only have been sought by the State if it believed that they were without lawful basis.

In its Defence the State of New South Wales also asserted that Mr CC (or his legal representatives) should have realised in 2008 that his reporting obligations under the CPOR Act ended in that year. This was asserted despite the fact the NSW Police Force itself did not realise until 2016 that his reporting obligations had ended in 2008, and only after Mr CC's legal representatives raised a query.

It appears that in December 2018 the matter was settled.<sup>246</sup> The Commission does not know the terms of the settlement.

## 4.9 NSW POLICE FORCE RESPONSE TO THE DRAFT FINAL REPORT

In the draft of this report provided to the NSW Police Force, the Commission proposed a recommendation that the NSW Police Force undertake a process to identify all those persons who had been subjected to unlawful or unjust actions as a result of errors in the Register. We also included a draft recommendation that the NSW Police Force should notify all those persons of the error that was made in their case, acknowledge the unlawful or unjust actions that were taken against the person as a result of this error, and advise what, if any, actions the NSW Police Force had taken or would take to address these wrongs.

The NSW Police Force responded:

The NSWPF will write to approximately 185 people who were incorrectly determined to be a registrable person or whose reporting period was calculated as being too long. The letter will notify those people that an error has been made in their case, identify types of actions that may have been taken, apologise for the error and suggest that they may wish to obtain independent legal advice. In this way, affected persons can make informed decisions about how to respond to the consequences of having been on the

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<sup>246</sup> Law Enforcement Conduct Commission review of JusticeLink.

register for too long or when they shouldn't have been on at all. This is the right and fair thing for the NSWPF to do.<sup>247</sup>

## 4.10 COMMISSION'S ANALYSIS AND RECOMMENDATION

The Commission welcomes the above commitment from the NSW Police Force. The Commission agrees with the approach suggested by the NSW Police Force, of notifying all persons who **may** have been subjected to unlawful or unjust actions, and providing them with sufficient information to self-identify whether they have in fact been subjected to any unlawful or unjust action, and to seek legal advice accordingly. This is an efficient way of using NSW Police Force resources while ensuring that affected persons are sufficiently informed about the actions taken by the NSW Police Force.

However, based on the results of the CPR case review, there are 277 people, rather than 185, who may have been subjected to unlawful or unjust action by the NSW Police Force because of incorrect information about reporting obligations in the Register. This number includes:

- the 45 people who the CPR case review identified should not have been placed on the Register, minus the one person in this category who the Commission concluded in fact had been correctly placed on the Register (see Chapter 3 section 3.5.3);
- the 144 people who the CPR case review identified had been recorded by the NSW Police Force as having reporting obligations for longer than was permitted under the CPOR Act, and
- 89 'corresponding registrable persons' who had originally been registered in Queensland, but who had moved to New South Wales and whose reporting periods had been reduced in 2014.<sup>248</sup>

The reporting periods of the people in the latter category had been reduced as a result of an amendment to Queensland's *Child Protection (Offender Reporting) Act 2004*, but due to a mistake the NSW Police Force was not notified by the Queensland Police Service that those persons' reporting periods were affected.<sup>249</sup>

The Commission acknowledges that the NSW Police Force was relying on the Queensland Police Service to inform it of any corresponding registrable persons from Queensland whose reporting periods needed to be updated following the amendment in 2014. This reliance was reasonable, given the difficulty involved in keeping up to date with all the amendments to offender registration laws in other jurisdictions. Unfortunately, due to the legislative amendment in Queensland, and the mistake of the Queensland Police Service in not notifying the NSW Police Force that it affected these 89 persons in New South Wales, the NSW Police Force records regarding their reporting periods became incorrect.

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<sup>247</sup> Letter from Commissioner of Police, NSW Police Force, to Chief Commissioner, Law Enforcement Conduct Commission, 30 September 2019 (Annexure C – Requests for Corrections to the Final Draft Report) p 3.

<sup>248</sup> See that table of CPR case review results in Appendix 1.

<sup>249</sup> See the discussion of this issue in Chapter 6 section 6.3.6.



The NSW Police Force itself identified that at least two people in this group of 89 were, as a result of this chain of events, subjected to unlawful reporting requirements by the NSW Police Force, and were wrongly convicted and sentenced for offences under the CPOR Act.<sup>250</sup>

One of these persons, Mr HH, was sent a letter by the NSW Police Force which was misleading, in a similar way to those mentioned in Finding 4. Mr HH's letter was dated 12 December 2016 and stated 'from the above date you are no longer required to report', and that his reporting obligations 'have now ceased', when in fact his reporting obligations had ceased in September 2014.<sup>251</sup> However, it was submitted, and the Commission accepts, that the content of that letter was copied from a template drafted by the Queensland Police Service.<sup>252</sup> It appears from the template letter that the Queensland Police Service adopted a similar view to that adopted by the NSW Police Force in 2016, namely that there was no obligation to inform persons that they had been subjected to unlawful reporting requirements due to inaccurate police records as to their reporting periods under offender registration laws.

As it has been established that at least two of the people in the group of 89 had in fact been subjected to unlawful reporting requirements, and indeed been wrongly convicted as a result, the Commission considers that the NSW Police Force should also write to all the 89 people in this group, as they may have been subjected to unlawful or unjust actions in New South Wales.

Accordingly, the NSW Police Force should write to each of the 277 people identified by the CPR case review who may have been subjected to unlawful or unjust actions by the NSW Police Force as a result of errors in the Register. The Commission emphasises the importance of the NSW Police Force providing sufficient detail in the letters to enable each recipient to identify if in fact they were subjected to an unlawful or unjust action by police. Each letter should therefore:

- explain the specific error that was made in their case (ie they were incorrectly determined to be a registrable person under the CPOR Act; the NSW Police Force incorrectly calculated their reporting period under the CPOR Act, or their reporting period was changed by the amendments to the Child Protection (Offender Reporting) Act 2004 (Qld)), and
  - in the case of each of the 144 persons whose reporting periods were inaccurate because the NSW Police Force incorrectly calculated them,

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<sup>250</sup> Mr HH – see Child Protection Registry, *Application to the Local Court*, 12 December 2016, NSW Police Force response to item 2(j) of Law Enforcement Conduct Commission Notice 929 of 2017; Mr JJ – see CPR case file produced by NSW Police Force in response to item 2(k) of Law Enforcement Conduct Commission Notice 929 of 2018, and see Child Protection Registry, NSW Police Force, *Application to the Local Court* [re Mr JJ], NSW Police Force response to item 6 of Law Enforcement Conduct Commission Notice 929 of 2017.

<sup>251</sup> Letter from the NSW Police Force to Mr HH, 12 December 2016, Email from Child Protection Registry, NSW Police Force, to officers, NSW Police Force, 16 August 2016 (11:23), Email from Child Protection Registry, NSW Police Force, to Commander, Sex Crimes Squad, undated, and Child Protection Registry, NSW Police Force, *Application to the Local Court*, 12 December 2016, all in NSW Police Force response to item 2(j) of Law Enforcement Conduct Commission Notice 929 of 2018.

<sup>252</sup> Response provided to the Law Enforcement Conduct Commission, 8 July 2019 (including copy of draft template letter from Queensland Police Service Child Protection Offender Registry).

and the 89 people whose reporting periods were changed in 2014 due to the amendments to the *Child Protection (Offender Reporting) Act 2004* (Qld) specify on what date the person's reporting obligations under the CPOR Act had in fact ended;

- advise the person that, as a result of the error in their case, any of the following actions may have been taken against them during a period when they did not have reporting obligations under the CPOR Act:
  - they may have been required by the NSW Police Force to report their information to police when there was no legal basis for this requirement in the CPOR Act;
  - they may have been subjected to unannounced home inspections by the NSW Police Force in purported reliance on s 16C of the CPOR Act, when that section did not in fact authorise the inspection;
  - they may have been arrested for, or otherwise charged with offences relating to reporting obligations under the CPOR Act, when those obligations did not apply to them at the relevant time, and if so,
  - they may have been convicted and sentenced for offences under the CPOR Act that they were not guilty of, as they had no reporting obligations under the CPOR Act at the relevant time, and
- apologise for these errors, and suggest the person may wish to obtain independent legal advice.

**RECOMMENDATION 1:** Notify persons who may have been subjected to unlawful or unjust actions by the NSW Police Force. The NSW Police Force write to each of the 277 people identified by the CPR case review who may have been subjected to unlawful or unjust actions by the NSW Police Force as a result of errors in the Child Protection Register. Each letter should:

- explain the specific error that was made in their case;
- identify each of the types of actions that the NSW Police Force may have mistakenly subjected the person to as a result of that error, and
- apologise for these errors, and suggest the person may wish to obtain independent legal advice.

The Commission intends to review the letters the NSW Police Force sends to persons who may have been subjected to unlawful or unjust actions as a result of the errors in the Register. This will be done as part of the Commission's review of the implementation of its recommendations six months after the publication of this report.



# 5.

## WORKLOAD OF THE NSW POLICE FORCE CHILD PROTECTION REGISTRY

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*‘Since its inception in 2001...[the Registry] has experienced continual and substantial increase in both volume and scope of workload...the increasing imbalance between workload and workforce...is having a direct impact on the Registry’s ability to sustain a satisfactory level of service in maintaining and managing the Child Protection Register and undertaking related functions. This is already manifesting as increasing risks to public safety, staff and NSWPF, including the risk of child sex offenders remaining unmonitored in the community due to errors in the Child Protection Register.’*

– Workforce Intelligence Unit, Human Resources Command, NSW Police Force, July 2017<sup>253</sup>

## 5.1 INTRODUCTION

In Chapter 3 we set out the nature, extent, and impact of the errors that have occurred in the administration of the Child Protection Register (the Register).

In this chapter and the following three chapters we look at the systemic problems which explain how and why so many errors have occurred.

There has been a steady increase in the demand, complexity and scope of the work of the NSW Police Force Child Protection Registry (the Registry) since it commenced operation in 2001. The number of persons on the Register has increased significantly over time, as has the complexity of the Registry’s work in applying the statutory framework in the CPOR Act.

However, the NSW Police Force did not increase the Registry’s resources proportionate to its increasing workload. This led to the Registry being understaffed, with consequences for the accuracy of its work, its ability to engage in proactive investigative activities, and the welfare of its staff.

In July 2017 a unit within the Human Resources Command of the NSW Police Force completed a comprehensive review of the Registry’s workload and staffing, and recommended an additional 14 officers be allocated to the Registry, including a dedicated legal officer. Over the last two years, in response to those recommendations, and recommendations the Commission made in its interim report on Operation Tuskett, the NSW Police Force has added a total of 14 officers to the Registry, doubling its size.

Our recommendation at the end of this chapter is intended to ensure that the Registry is adequately resourced to maintain the Register both now and as the Registry’s workload increases in the future.

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<sup>253</sup> Workforce Intelligence Unit, Human Resources Command, NSW Police Force, *HR Analysis: Child Protection Register Staffing Review*, 20 July 2017, D/2017/630614, NSW Police Force response to item 1 of Law Enforcement Conduct Commission Notice 929 of 2017, p 5.

## 5.2 INCREASE IN DEMAND, COMPLEXITY AND SCOPE OF REGISTRY'S WORK

### 5.2.1 NUMBER OF PERSONS ON THE REGISTER IS CONTINUALLY INCREASING

In October 2003, two years into the operation of the Register, there were 916 persons on the Register, with a further 360 persons eligible for registration pending custodial release.<sup>254</sup> Since then, the number of registrable persons in New South Wales has steadily grown. On 31 August 2019 there were 4,344 persons recorded as 'currently registered', meaning those persons were on the Register and were required to make regular reports to the NSW Police Force. A further 1,585 persons were due to be put on the Register once released from custody.<sup>255</sup>

The NSW Police Force estimates that the number of registrable persons in New South Wales increases on average by 6.5 – 7 per cent every year; approximately 30-40 new registrable persons per month.<sup>256</sup>

Graph 1 shows the growth in the number of 'currently registered' persons in New South Wales between 2009 and August 2019. It shows that in the last decade the number of registered persons has increased from 2,376 to 4,344; an increase of 83 per cent.

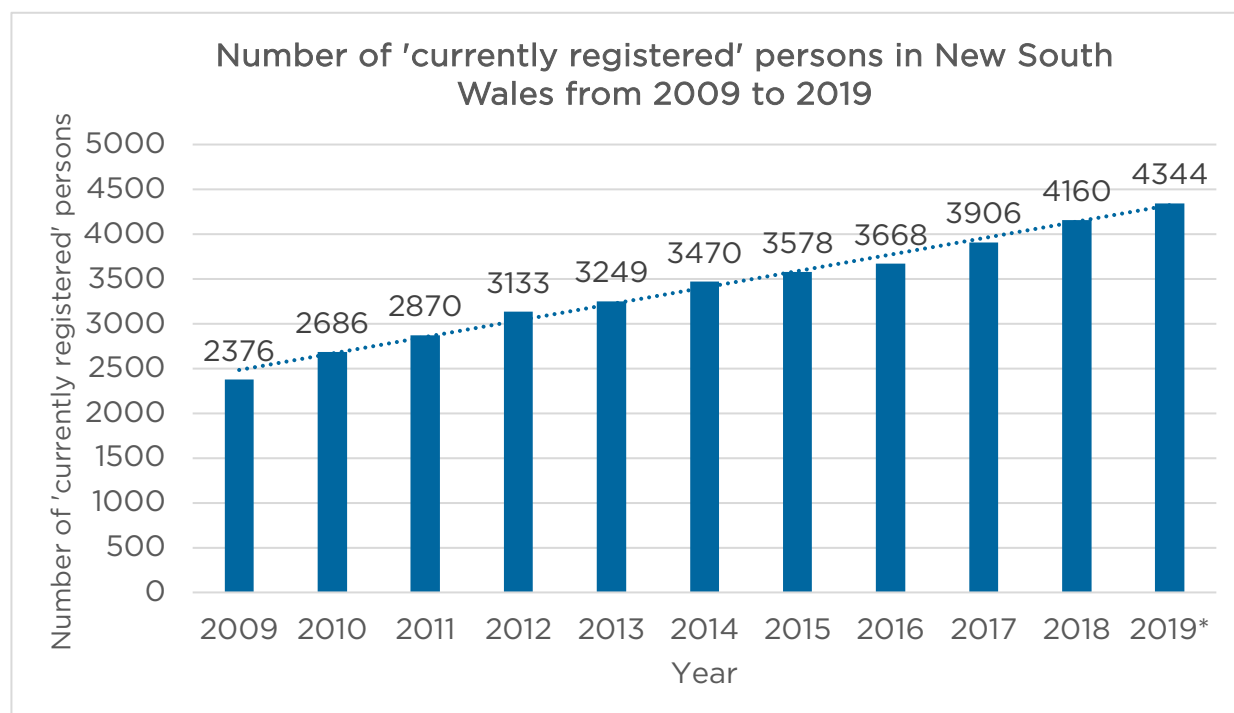
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<sup>254</sup> New South Wales Ombudsman, *Review of the Child Protection Register: Report under s 25(1) of the Child Protection (Offenders Registration) Act 2000* (2005) p iv.

<sup>255</sup> Letter from Commissioner of Police, NSW Police Force, to Chief Commissioner, Law Enforcement Conduct Commission, 30 September 2019 (Annexure D: Updated Statistics from the CPR Monthly Report and about Travel Requests).

<sup>256</sup> Workforce Intelligence Unit, Human Resources Command, NSW Police Force, *HR Analysis: Child Protection Register Staffing Review*, 20 July 2017, D/2017/630614, NSW Police Force response to item 1 of Law Enforcement Conduct Commission Notice 929 of 2017, p 21; Manager, Child Protection Registry, NSW Police Force, *Management of the Child Protection Register in New South Wales: Michael O'Brien Scholarship 2017* (2018), NSW Police Force response to item 1 of Law Enforcement Conduct Commission Notice 929 of 2018, p 18.

Graph 1: Number of 'currently registered' persons in New South Wales from 2009 to 2019<sup>257</sup>



\*The number of 'currently registered' persons for 2019 was as at 31 August 2019.

There are two key drivers of the net increase in the number of registered persons. One is that over the years there has been a general increase in the number of persons convicted for child sex offences (and this trend is expected to continue). The other is that the statutory framework for the Register has been amended multiple times since 2001 to expand the list of offences and sentences that will result in a person becoming registrable (essentially 'widening the net' of the Register).

#### 5.2.1.1 INCREASE IN PERSONS CONVICTED OF CHILD SEX OFFENCES

Data provided to the Commission by the NSW Bureau of Crime Statistics and Research (BOCSAR) reveals that from 2001 to 2018, the number of people convicted of child sex offences per year has more than doubled.<sup>258</sup> As a sub-set, the number of

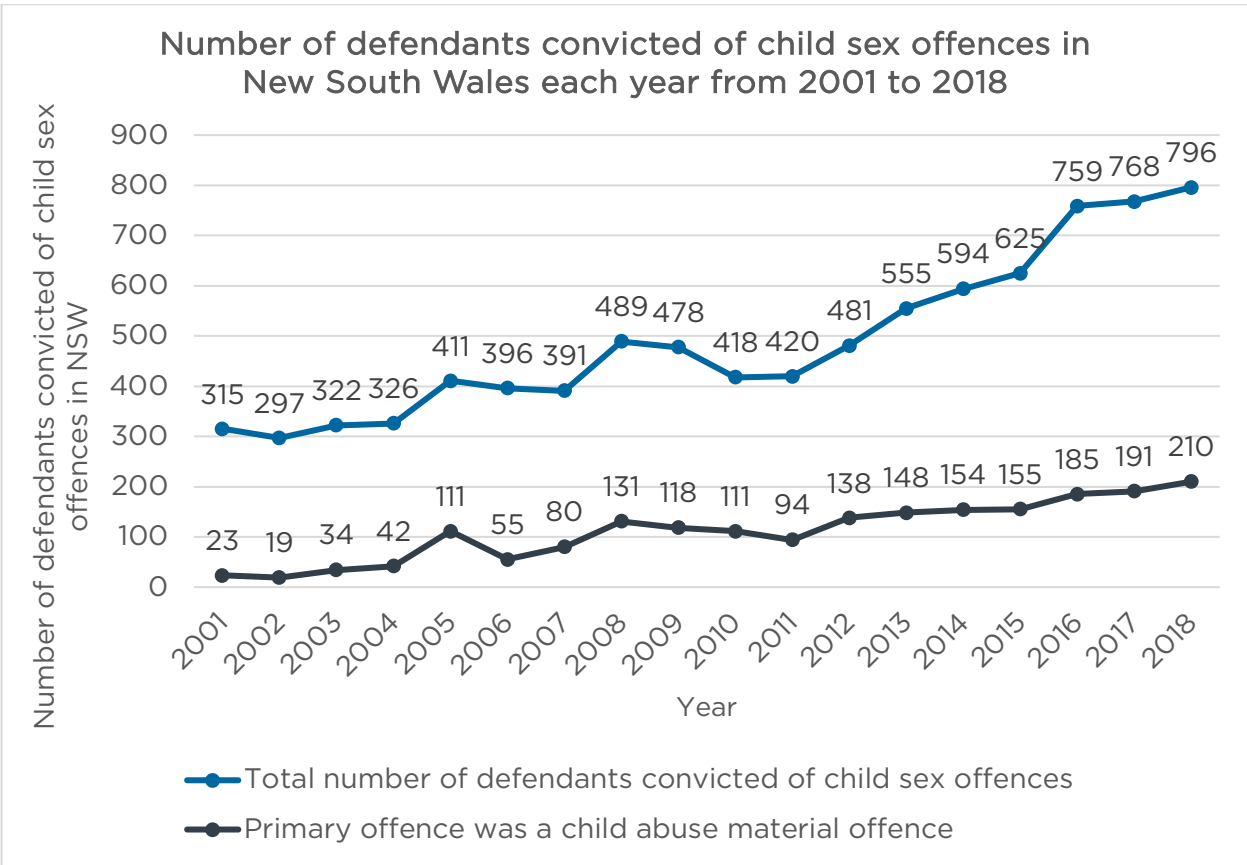
<sup>257</sup> Data drawn from Workforce Intelligence Unit, Human Resources Command, NSW Police Force, *HR Analysis: Child Protection Register Staffing Review*, 20 July 2017, D/2017/630614, NSW Police Force response to item 1 of Law Enforcement Conduct Commission Notice 929 of 2017, p 21; Manager, Child Protection Registry, *Management of the Child Protection Register in New South Wales: Michael O'Brien Scholarship 2017* (2018), NSW Police Force response to item 1 of Law Enforcement Conduct Commission Notice 929 of 2018, p 18; State Intelligence Command, NSW Police Force, *Child Protection Register Monthly Report*, December 2018, NSW Police Force response to item 3 of Law Enforcement Conduct Commission Notice 988 of 2018, p 1; Letter from Commissioner of Police, NSW Police Force, to Chief Commissioner, Law Enforcement Conduct Commission, 30 September 2019 (Annexure D: Updated Statistics from the CPR Monthly Report and about Travel Requests).

<sup>258</sup> Email from NSW Bureau of Crime Statistics and Research to Law Enforcement Conduct Commission, 23 September 2019 (BOCSAR Ref. 19-18087).

people convicted of child abuse material offences each year has increased more than nine-fold in the same period.<sup>259</sup>

Graph 2 shows the number of persons convicted of child sex offences in New South Wales each year from 2001 to 2018. It should be noted that this graph does not capture convictions for all possible registrable offences, and therefore the total number of defendants convicted of registrable offences for those years may be higher than indicated.<sup>260</sup>

**Graph 2: Number of defendants convicted of child sex offences in New South Wales each year from 2001 to 2018<sup>261</sup>**



<sup>259</sup> Email from NSW Bureau of Crime Statistics and Research to Law Enforcement Conduct Commission, 23 September 2019 (BOCSAR Ref. 19-18087). These are referred to as child pornography offences in the BOCSAR data.

<sup>260</sup> For example, these graphs do not include data on violent offences such as murder or manslaughter that can be registrable offences if committed against children: *Child Protection (Offenders Registration) Act 2000* (NSW) s 3 (definitions of ‘Class 1 offence’ and ‘Class 2 offence’).

<sup>261</sup> Data from NSW Bureau of Crime Statistics and Research, ‘NSW Higher, Local and Children’s Criminal Courts January 2001 to March 2019: Charges and defendants charged in finalised court appearances for selected sexual offences by jurisdiction’ (BOCSAR Ref. 19-18087): Email from NSW Bureau of Crime Statistics and Research to Law Enforcement Conduct Commission, 23 September 2019.

### 5.2.1.2 FACTORS CONTRIBUTING TO INCREASE IN PERSONS CONVICTED

In recent years the NSW Police Force has allocated additional investigators and resources to the squad responsible for investigating child sex offences. As a result, the number of persons arrested for these type of offences has significantly increased.<sup>262</sup> For example, the number of arrests by investigators in the Child Abuse Squad doubled between 2011 and 2016.<sup>263</sup> This can in turn increase the number of persons convicted of registrable offences, who need to be put on the Register.<sup>264</sup>

The Commonwealth Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission) is also likely to have significantly contributed to the increase in reporting and investigation of child sex offences in recent years. The Royal Commission was announced in November 2012 and completed in December 2017. It heard from 7,981 survivors of child sexual abuse, and referred 2,562 matters to police for investigation.<sup>265</sup> The NSW Ombudsman has reported a 'notable increase in the number of historical child sexual abuse incidents reported to Police since the start of the Royal Commission', with research suggesting the level of reporting of child sexual assault by adult survivors increased by 55 per cent from 2012 to 2014.<sup>266</sup>

In addition to a general increase in the level of awareness and understanding of the crime of child sexual abuse, the Royal Commission led to changes to criminal laws in NSW that are designed to 'improve the chances of successful prosecution of child sexual offences'.<sup>267</sup>

The upward trend in the number of persons convicted of child sex offences is therefore expected to continue. As a result, the number of persons required to be placed on the Register will also continue to increase.

### 5.2.2 EXPANSION OF THE LIST OF OFFENCES AND SENTENCES THAT WILL RESULT IN A PERSON BECOMING REGISTRABLE

The number of offences that can result in a person being placed on the Register has increased significantly since the CPOR Act commenced in 2001. At the time of

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<sup>262</sup> New South Wales Ombudsman, *The JIRT Partnership – 20 years on: NSW Ombudsman inquiry into the operation of the JIRT Program* (2017) pp 105-107.

<sup>263</sup> Workforce Intelligence Unit, Human Resources Command, NSW Police Force, *HR Analysis: Child Protection Register Staffing Review*, 20 July 2017, D/2017/630614, NSW Police Force response to item 1 of Law Enforcement Conduct Commission Notice 929 of 2017, p 24. In December 2018 the State Crime Command's Child Abuse Squad was merged with the Sex Crimes Squad to form the Child Abuse and Sex Crimes Squad.

<sup>264</sup> Manager, Child Protection Registry, *Management of the Child Protection Register in New South Wales: Michael O'Brien Scholarship 2017* (2018), NSW Police Force response to item 1 of Law Enforcement Conduct Commission Notice 929 of 2018, p 23.

<sup>265</sup> Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report: Volume 1, Our Inquiry* (2017) p 13; Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Information update*, December 2017.

<sup>266</sup> New South Wales Ombudsman, *The JIRT Partnership – 20 years on: NSW Ombudsman inquiry into the operation of the JIRT Program* (2017) p 128.

<sup>267</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 6 June 2018, p 3 (Mark Speakman, Attorney-General); See generally *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* (NSW).

writing there are over 800 different charges for 'Class 1' or 'Class 2' offences that may result in a person being convicted of a 'registrable offence'.<sup>268</sup>

Expansions of the list of registrable offences have included:

- in 2005 Commonwealth child trafficking offences and offences of using carriage services to procure or groom a person under 16 for sexual activity were added as Class 2 offences;<sup>269</sup>
- in 2010 Commonwealth offences relating to child sex tourism (child sex offences committed overseas) were added as Class 1 and Class 2 offences,<sup>270</sup> and
- in 2014 the following offences were added as Class 2 offences (with certain qualifications):
  - manslaughter of a child;
  - wounding or causing grievous bodily harm to a child under 10 years old with intent, and
  - child abduction.<sup>271</sup>

In addition to the increase in the number of offences that are registrable, the threshold for the type of sentence that will result in a person becoming registrable has also been lowered. For example, in 2007 the CPOR Act was amended to make registrable those persons who had received suspended sentences of imprisonment for committing registrable offences.<sup>272</sup> In 2008 the CPOR Act was amended to make all adults convicted of a Class 2 offence registrable, even when their sentence did not include any period of imprisonment or supervision.<sup>273</sup> These changes have resulted in a 'widening of the net' in terms of who is caught by the CPOR Act.

Increases in the number of persons required to be registered under the CPOR Act necessarily increase the workload of the Registry.

### 5.2.3 INCREASE IN REPORTING OBLIGATIONS

The work involved in administering the Register has also increased as Parliament has extended the reporting obligations of those persons who are registrable.

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<sup>268</sup> NSW Police Force response to item 3 of Law Enforcement Conduct Commission Notice 929 of 2017. This number does not include offences that persons commit in other jurisdictions that are effectively picked up as registrable offences by the CPOR Act through the 'corresponding registrable persons' provisions in Part 3, Division 10 of the Act.

<sup>269</sup> *Child Protection (Offenders Registration) Amendment Regulation 2005* (NSW) sch 1 cl 3.

<sup>270</sup> *Courts and Crimes Legislation Amendment Act 2010* (NSW) sch 1 cl 1 and cl 2.

<sup>271</sup> *Child Protection (Offenders Registration) Amendment (Statutory Review) Act 2014* (NSW) sch 1 cls 3-5.

<sup>272</sup> *Child Protection (Offenders Registration) Amendment (Suspended Sentences) Act 2007* (NSW).

<sup>273</sup> *Child Protection (Offenders Registration) Amendment Act 2007* (NSW) sch 1 cls 3-4; New South Wales, *Parliamentary Debates*, Legislative Assembly, 30 November 2007, p 4801 (Tanya Gadiel).



In 2005 the formulas for calculating registrable persons' reporting periods were amended to increase the period for a single Class 1 offence, and multiple Class 2 offences prior to registration, to 15 years. Those amendments also increased the number of registrable persons who would be required to report to police for the rest of their natural lives.<sup>274</sup> In 2005 the NSW Ombudsman warned that 'the introduction of 15 years or lifetime reporting periods for the majority of registered persons may substantially increase the workload of police in managing the Register'.<sup>275</sup>

At the same time as extending the reporting periods, Parliament also inserted the requirement that all registrable persons be required to report annually to police, in person, regardless of whether their details had changed.<sup>276</sup>

Parliament has also progressively increased the amount of personal information that registrable persons are required to report to the NSW Police Force, which has increased the burden for the NSW Police Force of monitoring to ensure compliance with each of these new requirements.<sup>277</sup> For example, in 2008 requirements were introduced that all registrable persons report details of any carriage service, internet service provider, internet connection, email addresses, internet user names, instant messaging user names or chat room user names they use, within 14 days.<sup>278</sup> In 2014 the personal information to be reported was amended to include the details of each child with whom the registrable person has had contact, including by phone, if the person was supervising or caring for the child, visiting or staying at a household where the child was present, exchanging contact details with or attempting to befriend the child.<sup>279</sup>

Life-time reporters under the CPOR Act create a long-term workload for the Registry officers. As of January 2018, 201 persons on the Register had life-time reporting obligations.<sup>280</sup> Some of these persons frequently go in and out of custody, which generates a 'constant stream of work' for Registry staff to suspend and 'reopen' their reporting obligations, and ensure the case is transferred to the appropriate local command.<sup>281</sup>

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<sup>274</sup> *Child Protection (Offenders Registration) Amendment Act 2004 No 85* (NSW) sch 1 cl 30.

<sup>275</sup> New South Wales Ombudsman, *Review of the Child Protection Register: Report under s 25(1) of the Child Protection (Offenders Registration) Act 2000* (2005) p 111.

<sup>276</sup> *Child Protection (Offenders Registration) Amendment Act 2004 No 85* (NSW) sch 1 cl 22; New South Wales, *Parliamentary Debates*, Legislative Assembly, 23 June 2004, p 1 (John Watkins, Minister for Police).

<sup>277</sup> See *Child Protection (Offenders Registration) Amendment Act 2004 No 85* (NSW) sch 1 cl 22; *Child Protection (Offenders Registration) Amendment Act 2007* (NSW) sch 1 cl 13; *Child Protection Legislation (Registrable Persons) Amendment Act 2009* (NSW) sch 1 cl 3; *Child Protection (Offenders Registration) Amendment (Statutory Review) Act 2014* (NSW) sch 1 cl 27.

<sup>278</sup> *Child Protection (Offenders Registration) Amendment Act 2007* (NSW) sch 1 cl 13.

<sup>279</sup> *Child Protection (Offenders Registration) Amendment (Statutory Review) Act 2014* (NSW) sch 1 cl 27.

<sup>280</sup> Manager, Child Protection Registry, *Management of the Child Protection Register in New South Wales: Michael O'Brien Scholarship 2017* (2018), NSW Police Force response to item 1 of Law Enforcement Conduct Commission Notice 929 of 2018, p 18.

<sup>281</sup> Workforce Intelligence Unit, Human Resources Command, NSW Police Force, *HR Analysis: Child Protection Register Staffing Review*, 20 July 2017, D/2017/630614, NSW Police Force response to item 1 of Law Enforcement Conduct Commission Notice 929 of 2017, p 22.

## 5.2.4 INCREASING COMPLEXITY OF THE REGISTRY'S WORK

In addition to the increasing volume of the Registry's work, the responsibilities of the Registry have become increasingly complex.

The CPOR Act can be a difficult piece of legislation to implement in practice. It is complex, and a number of its provisions contain ambiguities. It is also regularly amended; at the time of writing, the CPOR Act had been amended a total of 41 times since its passage in 2000. The problems with the statutory framework are discussed in Chapter 6, and Appendix 2.

A number of the amendments to the CPOR Act that have effectively 'widened the net' of the Register were given retrospective application by Parliament.<sup>282</sup> These amendments created additional work for the Registry, requiring it to 'back-capture' offenders who they had already assessed under the previous framework.

For example, the amendment in 2007 to make persons who had received suspended sentences registrable was given retrospective effect.<sup>283</sup> The Registry was therefore required to identify all those persons who had been given suspended sentences for registrable offences prior to 2007, including those who had been sentenced prior to the commencement of the CPOR Act in 2001 but were serving their suspended sentence at the time of commencement.<sup>284</sup>

Further complexity arises from the intersection between the New South Wales scheme and offender registration schemes in other jurisdictions (including international jurisdictions). As discussed in Chapter 2, the 'corresponding registrable person' provisions in the CPOR Act essentially pick up the reporting periods from other jurisdictions when offenders who were registered in those jurisdictions move to New South Wales. Legislative amendments in other jurisdictions can therefore change the reporting obligations of corresponding registrable persons living in New South Wales. This requires Registry staff to monitor and consider changes to relevant statutory frameworks in other jurisdictions.

For example, in 2014 the Queensland Parliament amended the *Child Protection (Offender Reporting) Act 2004* (Qld) to significantly reduce the reporting periods under that Act for certain offenders on the Queensland register. The amendments were made retrospective, and applied to all persons who had originally been registered under the Queensland Act, including those who had since moved to New South Wales.<sup>285</sup> As a result of these legislative changes, there were 250 persons living in New South Wales who had been registered in Queensland and needed to

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<sup>282</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) sch 2 pt 3 cls 5-6, pt 4 cl 10, pt 5 cl 13, and pt 8 cl 20.

<sup>283</sup> *Child Protection (Offenders Registration) Amendment (Suspended Sentences) Act 2007* (NSW).

<sup>284</sup> *Child Protection (Offenders Registration) Amendment (Suspended Sentences) Act 2007* (NSW) sch 1 cl 4.

<sup>285</sup> Explanatory Notes, *Child Protection (Offender Reporting) and Other Legislation Amendment Bill 2014* (Qld) p 13.

have their case files reviewed and updated. This created a backlog of cases for the Registry to review, update, and notify the offenders.<sup>286</sup>

### 5.3 ADDITIONAL RESPONSIBILITIES GIVEN TO THE REGISTRY

The Registry has also been required by the NSW Police Force to assume additional responsibilities to its primary workload.

As noted in Chapter 2, generally once the Registry has created a case and calculated the reporting period for a registrable person, responsibility for managing that person and monitoring their reporting passes to the Police Area Command or Police District (local command) in which the person resides. However, since about 2013, the Registry has been required to manage all registrable persons who are detained in the Villawood Immigration Detention Centre (VIDC), as these persons cannot leave the VIDC to make their reports at a local police station.<sup>287</sup> In 2017 the NSW Police Force Workforce Intelligence Unit reported that in order to facilitate the registration and reporting of these persons, a Registry officer was visiting the VIDC on average once a week, with an initial report taking up to two hours.<sup>288</sup>

The Registry has similarly been required to assume responsibility for managing the registration and reporting of registrable persons who are held in facilities under the *Mental Health (Forensic Provisions) Act 1900* (NSW).<sup>289</sup> There are particular difficulties involved in properly applying the CPOR Act to these persons. These are discussed in Chapter 6 (section 6.3.6) and Chapter 7 (section 7.3.2).

As a result, on 31 December 2018 the Registry was directly responsible for the management of 41 persons (including 11 persons assessed as 'extreme risk'). The Registry was managing more registrable persons than a number of the local commands.<sup>290</sup>

Further, following the Commonwealth Parliament's passage of the *Passports Legislation Amendment (Overseas Travel by Child Sex Offenders) Act 2017*, from 13 December 2017 it became an offence for a registrable person who has reporting obligations in any Australian jurisdiction to travel overseas without permission from a

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<sup>286</sup> Workforce Intelligence Unit, Human Resources Command, NSW Police Force, *HR Analysis: Child Protection Register Staffing Review*, 20 July 2017, D/2017/630614, NSW Police Force response to item 1 of Law Enforcement Conduct Commission Notice 929 of 2017, p 25.

<sup>287</sup> *Staffing Submission: Child Protection Registry*, p 13, attachment to Child Protection Registry, NSW Police Force, *Submission of staffing report requesting 5 (5) additional sworn positions ...*, 16 June 2015, D/2015/294868, NSW Police Force response to item 2 of Law Enforcement Conduct Commission Notice 914 of 2017.

<sup>288</sup> Workforce Intelligence Unit, Human Resources Command, NSW Police Force, *HR Analysis: Child Protection Register Staffing Review*, 20 July 2017, D/2017/630614, NSW Police Force response to item 1 of Law Enforcement Conduct Commission Notice 929 of 2017, pp 79-80.

<sup>289</sup> *Staffing Submission: Child Protection Registry*, p 13, attachment to Child Protection Registry, *Submission of staffing report requesting 5 (5) additional sworn positions ...*, 16 June 2015, D/2015/294868, NSW Police Force response to item 2 of Law Enforcement Conduct Commission Notice 914 of 2017.

<sup>290</sup> State Intelligence Command, NSW Police Force, *Child Protection Register Monthly Report*, December 2018, NSW Police Force response to item 3 of Law Enforcement Conduct Commission Notice 988 of 2018, pp 3-8.

‘competent authority’.<sup>291</sup> In New South Wales the NSW Police Force is the relevant competent authority. The Registry has been given responsibility for processing these applications, which are considered at a weekly panel chaired by the Commander of the Child Abuse and Sex Crimes Squad. Between 13 December 2017 and 30 September 2019 the Registry dealt with 288 applications for international travel by registrable persons.<sup>292</sup> The Registry was not allocated any additional resources for this work. In contrast, the Commission was informed that the Queensland Police Service and Victoria Police have allocated one and two full time staff respectively to cover this additional workload.<sup>293</sup>

## 5.4 REGISTER WORKLOAD OVERTOOK THE RESOURCES OF THE REGISTRY

*‘The reality is that the current structure and staffing level have not kept pace with a growing and evolving Child Protection Register’*

- Officer, Child Protection Registry, NSW Police Force, May 2016<sup>294</sup>

Over the years the number of staff the NSW Police Force has allocated to the Registry has not increased proportionate to the demand of its expanding workload and responsibilities.

The number of staff in the Registry has fluctuated since the start of the Register. From a low of just two officers in 2003, the Registry increased to 17 officers in 2012. However, there was no increase in the number of officers in the Registry between 2012 and 2015, and in 2016 the number of staff decreased to 14 officers.<sup>295</sup> This was still the size of the Registry when the Commission commenced Operation Tuskett in September 2017.<sup>296</sup>

### 5.4.1 INTERNAL REPORTS WARNING OF NEED FOR ADDITIONAL STAFF, AND LACK OF QUALITY CONTROL

Starting in 2014, Registry staff made a series of internal reports which highlighted concerns about systemic issues affecting the accuracy of the Register.<sup>297</sup> These reports included warnings that the Registry was under-resourced. Between February

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<sup>291</sup> *Criminal Code Act 1995* (Cth) s 271A.1

<sup>292</sup> Letter from Commissioner of Police, NSW Police Force, to Chief Commissioner, Law Enforcement Conduct Commission, 30 September 2019 (Annexure D –Updated Statistics from the CPR Monthly Report and about Travel Requests).

<sup>293</sup> Law Enforcement Conduct Commission phone consultation with Manager, Child Protection Registry, NSW Police Force, 28 May 2018.

<sup>294</sup> Child Protection Registry, NSW Police Force, *Serious concerns raised regarding the Child Protection Register (CPR) reporting period timeframes and lack of review of matters prior to case finalisation*, 26 May 2016, D/2016/277899, NSW Police Force response to item 7 of Law Enforcement Conduct Commission Notice 914 of 2017, p 6.

<sup>295</sup> Workforce Intelligence Unit, Human Resources Command, NSW Police Force, *HR Analysis: Child Protection Register Staffing Review*, 20 July 2017, D/2017/630614, NSW Police Force response to item 1 of Law Enforcement Conduct Commission Notice 929 of 2017, p 19.

<sup>296</sup> *Ibid* p 13.

<sup>297</sup> See Chapter 3 section 3.2.

2015 and June 2016 Registry staff submitted seven internal requests for additional personnel, including two 'Requests for Budget Variations' for the 2016-2017 and 2017-2018 financial years to fund an additional 11 and 12 positions respectively.<sup>298</sup> These reports and requests noted the increase in the number of persons on the Register, and the increased workload of the Registry as a result.

In a report in October 2015, the Registry Manager stated that due to the growth in the Register the Registry only had capacity for 'minimal supervisory and quality control checks', which had led to registrable persons 'not being registered correctly (if at all) and issues identified with reporting periods and obligations'.<sup>299</sup> The Manager stated that the Registry needed 'proper staffing and resourcing of the unit, to enable staff to effectively perform their duties and minimise risks to the organisation and the community as a whole'.<sup>300</sup> He requested an independent assessment of the workload of the Registry.

In a report in May 2016 an officer in the Registry confirmed that due to the Registry's workload 'there is very little in the way of quality assurance'.<sup>301</sup>

In another report in June 2016 the Registry Manager noted that while there were different human and systems errors that had affected the accuracy of the Register, some for over 15 years, the 'general concept' underpinning the problems was 'a lack of quality control and assurance'.<sup>302</sup> He noted that checks and balances had been put in place to try to address the quality control issues, but noted that 'these issues will have the capacity to exist today if not addressed appropriately'.<sup>303</sup> The Registry Manager stated that '[w]hilst Registry staff members are currently "coping" with the quantity of workload and other demands of the Registry... the quality and consistent application of the legislation and associated processes is what is placed at risk'.<sup>304</sup>

The Registry Manager stated that:

The current workload and structure at the Registry presents a risk to the organisation...Resource allocation has not been adequate to meet increases in demand...The growth in registered sex offenders will continue to outstrip the NSWPF capacity to perform monitoring according to standards mandated in legislation. The current increase in numbers of Registrable Persons (3636 as at 31 May 2016) has outstripped the capability and capacity of the NSWPF Child Protection Registry to

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<sup>298</sup> Reports and requests produced by the NSW Police Force in response to Law Enforcement Conduct Commission Notice 914 of 2017 (items 1-2 and 4-7) and Law Enforcement Conduct Commission Notice 929 of 2017 (item 12).

<sup>299</sup> Child Protection Registry, NSW Police Force, *Further issues and risks identified within the Child Protection Registry*, 16 October 2015, D/2015/527743, NSW Police Force response to item 5 of Law Enforcement Conduct Commission Notice 914 of 2017, p 9.

<sup>300</sup> Ibid.

<sup>301</sup> Child Protection Registry, NSW Police Force, *Serious concerns raised regarding the Child Protection Register (CPR) reporting period timeframes and lack of review of matters prior to case finalisation*, 26 May 2016, D/2016/277899, NSW Police Force response to item 7 of Law Enforcement Conduct Commission Notice 914 of 2017, p 6.

<sup>302</sup> Child Protection Registry, NSW Police Force, *Information regarding Staffing Submission for the Child Protection Registry*, 10 June 2016, D/2016/278015, NSW Police Force response to item 6 of Law Enforcement Conduct Commission Notice 914 of 2017, pp 1-2.

<sup>303</sup> Ibid.

<sup>304</sup> Ibid pp 2-3.



ensure consistent standards of compliance and offender monitoring, resulting in children and the community being placed at risk of offending by sexual predators.<sup>305</sup>

## 5.4.2 WORKFORCE INTELLIGENCE UNIT'S REGISTER STAFFING REVIEW

In July 2016 the NSW Police Force initiated a review of the Registry's staffing by the Workforce Intelligence Unit within the Human Resources Command. That Unit conducted a comprehensive review of the Registry's workload and submitted its report *HR Analysis: Child Protection Register Staffing Review* (Register Staffing Review) in July 2017.<sup>306</sup>

The Workforce Intelligence Unit concluded that '[t]he current Registry workforce cannot effectively manage the volume of work required to administer the register.'<sup>307</sup> It acknowledged that the Registry had 'implemented a range of strategies to reduce risks and manage its staffing issues, but these have had minimal impact on the unit's workforce capacity, systems issues, or level of risk'. The Workforce Intelligence Unit emphasised that the Registry 'cannot address these issues internally, and will require external assistance and resources.'<sup>308</sup>

The Workforce Intelligence Unit concluded that there had been a lack of quality assurance processes in relation to the Register prior to the initiation of the CPR case review (in 2016).<sup>309</sup> It noted that the Registry had since improved its quality assurance processes, by ensuring that all new Register cases were checked when they were created, and all Register cases were reviewed prior to being manually finalised.<sup>310</sup> However, these quality assurance processes added to the workload of the Registry officers.<sup>311</sup>

The Workforce Intelligence Unit made 22 recommendations to address the issues facing the Registry. Its primary recommendation was that 14 additional authorised positions be added to the Registry, 11 sworn and three unsworn officers, which would bring the total number of officers in the Registry to 28.<sup>312</sup>

The Workforce Intelligence Unit stated that:

Additional staffing for the Registry will improve the unit's capacity to address current and future workload, improve quality of work, and help minimise errors, which will lead to a decrease in overall risks. The degree to which additional resources can reduce risks varies depending on how many staff are provided, and in what roles.<sup>313</sup>

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<sup>305</sup> Ibid p 2.

<sup>306</sup> Workforce Intelligence Unit, Human Resources Command, NSW Police Force, *HR Analysis: Child Protection Register Staffing Review*, 20 July 2017, D/2017/630614, NSW Police Force response to item 1 of Law Enforcement Conduct Commission Notice 929 of 2017.

<sup>307</sup> Ibid p 5.

<sup>308</sup> Ibid.

<sup>309</sup> Ibid p 82.

<sup>310</sup> Ibid p 71 and p 82.

<sup>311</sup> Ibid p 82.

<sup>312</sup> Ibid p 9 and p 42.

<sup>313</sup> Ibid p 8.



Another key recommendation in the Register Staffing Review was that '[a]t least one legal officer position dedicated to providing legal support to the Registry' should be established in the Registry.<sup>314</sup> The Workforce Intelligence Unit noted that this dedicated legal officer would 'substantially improve' the quality of the Registry's work by breaking down the complexity of interpreting the CPOR Act,<sup>315</sup> and reduce the risks and likelihood of errors by assisting with quality assurance in initial registration, case creation and finalisation processes.<sup>316</sup>

The Workforce Intelligence Unit also suggested that if its recommendations were adopted, 'a further review of the Registry after 12 months should be undertaken to assess the effectiveness of the recommendations and consider whether further action is required'.<sup>317</sup>

### 5.4.3 CONSEQUENCES OF INADEQUATE RESOURCES BEING ALLOCATED TO THE REGISTER

The inadequate number of staff in the Registry has contributed to the significant error rate in Register case files. The fact that the Registry staff did not have sufficient capacity to conduct adequate quality assurance meant that errors were not identified and corrected. The understaffing of the Registry has also had other consequences.

#### 5.4.3.1 LIMITED CAPACITY TO PERFORM AND SUPPORT POLICING STRATEGIES TO ASSIST WITH MANAGEMENT OF OFFENDERS

The limited resources of the Registry has reduced its ability to undertake and assist local commands with 'proactive' policing strategies and other tasks relating to the management and monitoring of child sex offenders living in the community. The Registry has for a number of years had limited capacity to:

- Focus on tracking down registrable persons for whom the NSW Police Force does not have a current residential address (referred to as 'Whereabouts Unknown' persons). The Register Staffing Review noted that there could be up to 20 'Whereabouts Unknown' cases held by the Registry at any one time.<sup>318</sup>
- Respond to requests from officers in local commands to support and attend home inspections under s 16C of the CPOR Act.<sup>319</sup> These inspections enable police to confirm information reported by registrable persons, and detect breaches of reporting obligations. The potential for these powers to be exercised is an incentive for registrable persons to comply with their reporting obligations and provide accurate information.

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<sup>314</sup> Ibid p 50.

<sup>315</sup> For discussion of the complexity of the CPOR Act see Chapter 6 and Appendix 2.

<sup>316</sup> Workforce Intelligence Unit, Human Resources Command, NSW Police Force, *HR Analysis: Child Protection Register Staffing Review*, 20 July 2017, D/2017/630614, NSW Police Force response to item 1 of Law Enforcement Conduct Commission Notice 929 of 2017, p 50.

<sup>317</sup> Ibid p 8.

<sup>318</sup> Ibid p 83.

<sup>319</sup> *Business Risk Committee - Child Protection Register*, 12 April 2016, NSW Police Force response to item 11 of Law Enforcement Conduct Commission Notice 929 of 2017.

- Educate and support officers in local commands to collect the DNA of registrable persons.<sup>320</sup> The NSW Police Force has the power to take buccal swabs and other, non-intimate forensic DNA samples from registrable persons who have reporting obligations under the CPOR Act, if their DNA is not already in the database.<sup>321</sup> NSW Police Force policy requires that for all registrable persons, a DNA sample should be collected.<sup>322</sup> As of 31 December 2018 there were 71 ‘untested registrable persons’ across New South Wales.<sup>323</sup>
- Educate and support officers in local commands to successfully apply for child protection prohibition orders for high risk registrable persons under the *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW). Child protection prohibition orders can prohibit a registrable person from associating with or contacting certain persons, being in certain locations, or engaging in specified behaviour.<sup>324</sup> The Register Staffing Review noted that prohibition orders were ‘effective but severely underutilised’.<sup>325</sup> In June 2018 there were 865 extreme or high risk registrable offenders in NSW, but only 138 registrable persons were subject to child protection prohibition orders.<sup>326</sup>
- Support and participate in Child Protection Watch Teams (CPWTs). CPWTs are multi-agency teams which meet to develop interagency case management plans to minimise the risk that extreme or high risk registrable persons pose to the community.<sup>327</sup> The three main agencies in the CPWTs are the NSW Police Force, Corrective Services NSW, and Family and Community Services NSW.<sup>328</sup> Historically, Registry officers were the key point of contact for the other

<sup>320</sup> *Staffing Submission: Child Protection Registry*, p 17, attachment to Child Protection Registry, NSW Police Force, *Submission of staffing report requesting five (5) additional sworn positions ...*, 16 June 2015, D/2015/294868, NSW Police Force response to item 2 of Law Enforcement Conduct Commission Notice 914 of 2017.

<sup>321</sup> *Crimes (Forensic Procedures) Act 2000* (NSW) pt 7B.

<sup>322</sup> NSW Police Force, *Child Protection Register Standard Operating Procedures*, 2016, NSW Police Force response to item 7 of Law Enforcement Conduct Commission Notice 929 of 2017, p 37.

<sup>323</sup> State Intelligence Command, NSW Police Force, *Child Protection Register Monthly Report*, December 2018, NSW Police Force response to item 3 of Law Enforcement Conduct Commission Notice 988 of 2018, p 9.

<sup>324</sup> *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW) s 8.

<sup>325</sup> Workforce Intelligence Unit, Human Resources Command, NSW Police Force, *HR Analysis: Child Protection Register Staffing Review*, 20 July 2017, D/2017/630614, NSW Police Force response to item 1 of Law Enforcement Conduct Commission Notice 929 of 2017, p 69.

<sup>326</sup> Email from Child Protection Registry, NSW Police Force, to Law Enforcement Conduct Commission, 19 June 2018 (the number of persons subject to child protection prohibition orders was accurate as at 18 June 2018).

<sup>327</sup> *Staffing Submission: Child Protection Registry*, p 10, attachment to Child Protection Registry, NSW Police Force, *Submission of staffing report requesting five (5) additional sworn positions ...*, 16 June 2015, D/2015/294868, NSW Police Force response to item 2 of Law Enforcement Conduct Commission Notice 914 of 2017.

<sup>328</sup> New South Wales Ombudsman, *Responding to Child Sexual Assault in Aboriginal Communities: A report under Part 6A of the Community Services (Complaints, Reviews and Monitoring) Act 1993* (2012) p 234.

agencies and led the administration of the CPWTs.<sup>329</sup> However, in 2016 Registry officers reported that they were unable to devote the time needed to properly support the CPWTs due to increasing workload.<sup>330</sup> In December 2016 approval was given for the Registry to suspend its involvement with the CPWTs so it could focus on more critical functions.<sup>331</sup> In December 2018 the NSW Police Force informed the Commission that the 'full capabilities' of the CPWTs were still not enabled, and would not be until the Registry received 'full staff allocations' and dedicated positions were allocated to the local commands across New South Wales.<sup>332</sup>

#### 5.4.3.2 INABILITY TO MEET THE DEMAND BY POLICE OFFICERS FOR TRAINING ABOUT THE REGISTER

Provision of training on the CPOR Act is another important function that the Registry has not had adequate capacity to perform until very recently.

The NSW Ombudsman in its review of the CPOR Act in 2005 emphasised the importance of the NSW Police Force giving officers training about the Register, and recommended that the NSW Police Force 'ensure adequate training and information is available to all police officers about the Register'.<sup>333</sup> However, due to workload issues, the Registry has struggled to provide the training needed.

The Workforce Intelligence Unit in its Register Staffing Review in 2017 noted that 'officers are operating without sufficient training', and that the Registry was unable to meet the high demand for training due to lack of capacity.<sup>334</sup> This was despite the fact that the Registry had developed two training courses, and provided training to 1,982 people between 2014 and 2017.<sup>335</sup> The Register Staffing Review also noted that being able to provide training on the CPOR Act to external agencies is 'critical to the Registry', given how heavily the Registry relies on the processes of others to

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<sup>329</sup> NSW Police Force, *Child Protection Register Standard Operating Procedures*, 2016, NSW Police Force response to item 7 of Law Enforcement Conduct Commission Notice 929 of 2017, p 46.

<sup>330</sup> *Business Risk Committee – Child Protection Register*, 12 April 2016, NSW Police Force response to item 11 of Law Enforcement Conduct Commission Notice 929 of 2017.

<sup>331</sup> Email from Sex Crimes Squad, NSW Police Force, *Subject: Fw: Business risk report – Sex Crimes December 2016*, 5 December 2016, NSW Police Force response to item 19 of Law Enforcement Conduct Commission Notice 929 of 2017; Workforce Intelligence Unit, Human Resources Command, NSW Police Force, *HR Analysis: Child Protection Register Staffing Review*, 20 July 2017, D/2017/630614, NSW Police Force response to item 1 of Law Enforcement Conduct Commission Notice 929 of 2017, p 7.

<sup>332</sup> Governance, Risk & Compliance, NSW Police Force, *Child Protection Register – Governance and Accountability Arrangements for the NSW Police Force*, 12 December 2018, D/2018/1013232, NSW Police Force response to Law Enforcement Conduct Commission Notice 978 of 2018, p 8.

<sup>333</sup> New South Wales Ombudsman, *Review of the Child Protection Register: Report under s 25(1) of the Child Protection (Offenders Registration) Act 2000* (2005), pp 73-74, 111-112, 168-169.

<sup>334</sup> Workforce Intelligence Unit, Human Resources Command, NSW Police Force, *HR Analysis: Child Protection Register Staffing Review*, 20 July 2017, D/2017/630614, NSW Police Force response to item 1 of Law Enforcement Conduct Commission Notice 929 of 2017, p 75.

<sup>335</sup> *Ibid* pp 75-76.

implement the Act (this is discussed further in Chapter 7).<sup>336</sup> In July 2017 the Workforce Intelligence Unit recommended that a full-time training officer at the level of Sergeant should be added to the Registry.<sup>337</sup>

#### 5.4.3.3 IMPACT ON THE WELFARE OF REGISTRY OFFICERS

The fact that the workload of the Registry has grown considerably over time without a proportionate increase in staff has had a negative impact on the wellbeing of Registry staff.

In June 2016 the Registry Manager reported concerns that ‘whilst Registry staff members are currently “coping” with the quantity of workload and other demands of the Registry, the current workload and structure are beginning to take its toll on staff members.’<sup>338</sup> Concerns about declining staff welfare were also raised in three internal reports in 2016.<sup>339</sup>

In 2017 the Commander of the (then) Sex Crimes Squad submitted a number of internal reports requesting that ‘urgent consideration’ be given to recommendations in the Register Staffing Review ‘at the first available opportunity’. The Commander quoted a report from the ‘Chief Police Psychologist’ that:

Police psychologists who see [Registry] personnel on a quarterly basis have raised this high workload and the impact on staff with me. The general feedback from the CPR staff over many months has been that people are not coping with the demand, and that stress levels are unhealthily high.<sup>340</sup>

The Workforce Intelligence Unit noted that one of the risks for the NSW Police Force identified in its Register Staffing Review was the risk to the health of Registry staff.<sup>341</sup> Registry staff reported that the volume of work was having a greater negative impact on their welfare, including the development of psychological injuries, than the nature of their work.<sup>342</sup> The Register Staffing Review highlighted that the Registry

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<sup>336</sup> Ibid p 51.

<sup>337</sup> Ibid p 42.

<sup>338</sup> Child Protection Registry, NSW Police Force, *Information regarding Staffing Submission for the Child Protection Registry, Sex Crimes Squad*, 10 June 2016, D/2016/278015, NSW Police Force response to item 6 of Law Enforcement Conduct Commission Notice 914 of 2017, pp 2-3.

<sup>339</sup> *Business Risk Committee – August 2016; Business Risk Committee – September 2016*, and Sex Crimes Squad, NSW Police Force, *Business Risk Committee*, 24 October 2017, NSW Police Force response to item 19 of Law Enforcement Conduct Commission Notice 929 of 2017.

<sup>340</sup> Sex Crimes Squad, NSW Police Force, *Workload issues impacting upon the Child Protection Register (CPR), Sex Crimes Squad*, 18 July 2017; Sex Crimes Squad, NSW Police Force, *Workload issues impacting upon the Child Protection Register (CPR), Sex Crimes Squad*, 10 August 2017; Sex Crimes Squad, NSW Police Force, *Workload issues impacting upon the Child Protection Register (CPR), Sex Crimes Squad*, 12 September 2017, and Sex Crimes Squad, NSW Police Force, *Workload issues impacting upon the Child Protection Register (CPR), Sex Crimes Squad*, 24 October 2017, all produced by the NSW Police Force in response to item 19 of Law Enforcement Conduct Commission Notice 929 of 2017.

<sup>341</sup> Workforce Intelligence Unit, Human Resources Command, NSW Police Force, *HR Analysis: Child Protection Register Staffing Review*, 20 July 2017, D/2017/630614, NSW Police Force response to item 1 of Law Enforcement Conduct Commission Notice 929 of 2017, p 35.

<sup>342</sup> Ibid p 36.

had lost two sergeants in two years due to workers compensation claims, both of whom cited workload as a reason.<sup>343</sup> The Register Staffing Review warned that:

With an increasing volume of work, it is reasonable to expect there will be more staff with psychological injuries and on Worker's Compensation leave, which will impact on the Registry's ability to function, as well as impacting the welfare of its staff.<sup>344</sup>

The Workforce Intelligence Unit also recognised that the nature of the Registry's work can have an impact on the wellbeing of staff over time. The Unit noted that dealing with child sex offenders and 'constant exposure to disturbing materials' forces Registry officers to develop coping mechanisms.<sup>345</sup> Some staff reported that their psychological issues were manifesting in physical symptoms.<sup>346</sup>

The commentary and recommendations in the Register Staffing Review regarding the risks to staff wellbeing are consistent with comments from the Commonwealth Royal Commission into Institutional Responses to Child Sexual Abuse. The Royal Commission emphasised that exposure to personal accounts of child sexual abuse, and particularly over long periods of time, can have a significant impact on staff, including the risk of vicarious trauma.<sup>347</sup> The Royal Commission viewed the risk of its own staff suffering vicarious trauma as a significant risk to its ability to complete its work, and therefore put in place a 'comprehensive staff support framework'.<sup>348</sup>

The Workforce Intelligence Unit noted that the welfare of Registry staff is monitored through welfare checks with a psychologist every three months, and psychological testing.<sup>349</sup> It recommended that to further reduce the risks to staff welfare, Registry staff be given a break from the confronting nature of their work, through the NSW Police Force adopting a similar rotation and tenure policy for the Registry as for the (then) Child Abuse Squad.<sup>350</sup> It stated this would reduce the risk of negative impacts on the mental health of Registry staff caused by repeated exposure to confronting material about child sexual abuse.<sup>351</sup>

## 5.5 ADDITIONAL RESOURCES GIVEN TO THE REGISTRY SINCE REGISTER STAFFING REVIEW AND COMMENCEMENT OF OPERATION TUSKET

In December 2017, the NSW Police Force restructured the State Crime Command as part of a broader re-engineering of the NSW Police Force. Through that process

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<sup>343</sup> Ibid p 35.

<sup>344</sup> Ibid.

<sup>345</sup> Ibid p 36.

<sup>346</sup> Ibid.

<sup>347</sup> Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report: Volume 1, Our Inquiry* (2017) p 57.

<sup>348</sup> Ibid p 57 and Appendix G.

<sup>349</sup> Workforce Intelligence Unit, Human Resources Command, NSW Police Force, *HR Analysis: Child Protection Register Staffing Review*, 20 July 2017, D/2017/630614, NSW Police Force response to item 1 of Law Enforcement Conduct Commission Notice 929 of 2017, p 37.

<sup>350</sup> Ibid.

<sup>351</sup> Ibid.



eight sworn officer positions were added to the Registry (out of 11 sworn positions recommended in the Register Staffing Review).<sup>352</sup>

The Commission provided an interim report on Operation Tuskett to the NSW Police Force in August 2018. In that report the Commission recommended that, as a minimum, the NSW Police Force should urgently allocate to the Registry the remaining positions recommended in the Register Staffing Review, including a dedicated legal officer position. We suggested that the NSW Police Force should also consider the feasibility of adding more officers than recommended by the Workforce Intelligence Unit, given its findings and the fact that the Registry's functions had been expanded since its review had been completed.

In its response to our interim report, in October 2018 the NSW Police Force informed the Commission that:

- seven of the eight sworn positions that had been added to the Registry had been filled;
- two unsworn (administrative) officers had been added to the Registry, as recommended by the Workforce Intelligence Unit, and
- an arrangement has been made with the NSW Police Force Prosecutions Command to 'loan' a full-time legal officer to the Registry.<sup>353</sup>

In December 2018 the NSW Police Force advised that, due to the eight new sworn positions, the Registry has been able to create a dedicated Training Officer role, and an Internal Quality Assurance Officer position.<sup>354</sup> It also advised that a forensic psychologist had been allocated to the Registry in October 2018 for a three month trial.<sup>355</sup>

In its response to the draft of this final report, the NSW Police Force informed the Commission that the remaining three sworn positions recommended by the Workforce Intelligence Unit had been added to the Registry in July 2019.<sup>356</sup> Two of

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<sup>352</sup> *NSW Police Force response to the interim report of Operation Tuskett*, 23 October 2018, F/2018/94374; D/2018/851613, p 4; Governance, Risk & Compliance, NSW Police Force, *Child Protection Register – Governance and Accountability Arrangements for the NSW Police Force*, 12 December 2018, D/2018/1013232, NSW Police Force response to Law Enforcement Conduct Commission Notice 978 of 2018, p 7.

<sup>353</sup> *NSW Police Force response to the interim report of Operation Tuskett*, 23 October 2018, F/2018/94374; D/2018/851613, p 4.

<sup>354</sup> Governance, Risk & Compliance, NSW Police Force, *Child Protection Register – Governance and Accountability Arrangements for the NSW Police Force*, 12 December 2018, D/2018/1013232, NSW Police Force response to Law Enforcement Conduct Commission Notice 978 of 2018, p 7, Law Enforcement Conduct Commission consultation with NSW Police Force, Sydney, 20 December 2018.

<sup>355</sup> Governance, Risk & Compliance, NSW Police Force, *Child Protection Register – Governance and Accountability Arrangements for the NSW Police Force*, 12 December 2018, D/2018/1013232, NSW Police Force response to Law Enforcement Conduct Commission Notice 978 of 2018, p 8.

<sup>356</sup> Letter from Commissioner of Police, NSW Police Force, to Chief Commissioner, Law Enforcement Conduct Commission, 30 September 2019 (Annexure B – Submissions on Proposed Recommendations).



the three positions had been filled by September 2019, and it was expected the remaining position would be filled in November 2019.<sup>357</sup>

Since the start of Operation Tuskett the NSW Police Force has therefore added a total of 14 officers to the Registry, doubling its size to 28 officers.

The NSW Police Force also informed the Commission that although it did not support the recommendation made in the Register Staffing Review to adopt a rotation and tenure policy for Registry staff, it would 'continue to support the wellbeing of Registry staff through its well-check framework, the Employee Assistance Program, Peer Support Officers, ensuring annual leave is taken and rotations considered on a case by case basis.'<sup>358</sup>

## 5.6 INTRODUCTION OF AUTHORISED DEDICATED OFFICERS TO MANAGE REGISTRABLE PERSONS

In January 2018 the Registry Manager reported that the NSW Police Force had no 'corporately-endorsed model' for how local commands should manage registrable persons.<sup>359</sup> In particular, there were no positions in authorised police numbers for dedicated officers in local commands to manage registrable persons (for example, like Crime Prevention Officers or Domestic Violence Liaison Officers).<sup>360</sup> The Registry Manager noted that, as a result, there are 'many and varied approaches utilised by [local commands] to manage the Register and monitor Registrable Persons'.<sup>361</sup>

The establishment of dedicated positions in local commands to manage registrable persons was recommended by two separate NSW Police Force Working Parties, in 2010 and in 2016.<sup>362</sup> It was supported by the Workforce Intelligence Unit in its Register Staffing Review, on the basis it would 'improve quality of offender management and relieve pressure on the helpdesk function of the Registry'.<sup>363</sup>

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<sup>357</sup> Letter from Commissioner of Police, NSW Police Force, to Chief Commissioner, Law Enforcement Conduct Commission, 30 September 2019 (Annexure B – Submissions on Proposed Recommendations).

<sup>358</sup> Letter from Commissioner of Police, NSW Police Force, to Chief Commissioner, Law Enforcement Conduct Commission, 30 September 2019 (Annexure B – Submissions on Proposed Recommendations).

<sup>359</sup> Manager, Child Protection Registry, NSW Police Force, *Management of the Child Protection Register in New South Wales: Michael O'Brien Scholarship 2017* (2018) NSW Police Force response to item 1 of Law Enforcement Conduct Commission Notice 929 of 2018, p 27.

<sup>360</sup> Ibid.

<sup>361</sup> Ibid.

<sup>362</sup> Child Protection Registry, NSW Police Force, *Recommendations of the Child Protection Registry Working Party regarding creation of dedicated SAP positions to manage registrable persons at Local Area Commands*, 18 February 2010, D/2010/26013, NSW Police Force response to item 13(c) of Law Enforcement Conduct Commission Notice 929 of 2017; *Child Protection Register: Dedicated positions in CPR Management*, pp 28-29, attachment to Child Protection Registry, NSW Police Force, *Submission of report to address the prospect of Dedicated Positions at Local Area Commands (LAC) to manage the Child Protection Register*, 29 January 2016, D/2016/46805, NSW Police Force response to item 13(d) of Law Enforcement Conduct Commission Notice 929 of 2017.

<sup>363</sup> Workforce Intelligence Unit, Human Resources Command, NSW Police Force, *HR Analysis: Child Protection Register Staffing Review*, 20 July 2017, D/2017/630614, NSW Police Force response to item 1 of Law Enforcement Conduct Commission Notice 929 of 2017, p 8.

Dedicated positions were also recommended by the Registry Manager in his 2018 scholarship report on the management of the Register.<sup>364</sup>

On 20 November 2018 the Premier of New South Wales announced that the NSW Government would provide funding for an additional 1,500 police officers over four years.<sup>365</sup> The (then) Minister for Police announced that part of this funding would be used to provide an additional officer to each of the 58 police commands across the state for the specific purpose of monitoring offenders on the Register.<sup>366</sup>

On 30 September 2019 the NSW Commissioner of Police advised the Commission that the first allocation of 15 additional officers had been deployed to local commands to monitor registrable persons, and that another 33 positions would be allocated in the coming years.<sup>367</sup>

The Commission welcomes the allocation of dedicated Register officers to local commands. The fact that in many local commands the officers monitoring registrable persons do not specialise in the area, and therefore do not develop expertise in applying the CPOR Act, increases the likelihood of errors being made in the registration of offenders. It also adds significantly to Registry officers' workload, as they are frequently required to respond to requests for assistance from officers at the local level.<sup>368</sup> Those local commands currently without a dedicated officer also have limited capacity to undertake proactive activities to investigate whether registrable persons are complying with their obligations under the CPOR Act.<sup>369</sup> Reduced ability to undertake these kind of activities impacts on the accuracy of the personal information on the Register.

The introduction of dedicated positions in local commands will improve the management of registrable persons in the community. The creation of these positions may, however, increase the workload of the Registry in the longer term. The Register Staffing Review noted that having dedicated Register officers in the local commands would reduce basic enquiries to the Registry and the need for follow up to rectify basic errors.<sup>370</sup> However, it also noted that it may increase the Registry's

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<sup>364</sup> Manager, Child Protection Registry, NSW Police Force, *Management of the Child Protection Register in New South Wales: Michael O'Brien Scholarship 2017* (2018) NSW Police Force response to item 1 of Law Enforcement Conduct Commission Notice 929 of 2018, p 47.

<sup>365</sup> Premier of New South Wales, '1500 new police to keep the community safe' (Media Release, 20 November 2018) <<https://www.nsw.gov.au/your-government/the-premier/media-releases-from-the-premier/1500-new-police-to-keep-the-community-safe/>>.

<sup>366</sup> Ibid.

<sup>367</sup> Letter from Commissioner of Police, NSW Police Force, to Chief Commissioner, Law Enforcement Conduct Commission, 30 September 2019, p 2.

<sup>368</sup> Workforce Intelligence Unit, Human Resources Command, NSW Police Force, *HR Analysis: Child Protection Register Staffing Review*, 20 July 2017, D/2017/630614, NSW Police Force response to item 1 of Law Enforcement Conduct Commission Notice 929 of 2017, p 74.

<sup>369</sup> *Child Protection Register: Dedicated positions in CPR Management*, p 17, attachment to Child Protection Registry, NSW Police Force, *Submission of report to address the prospect of Dedicated Positions at Local Area Commands (LAC) to manage the Child Protection Register*, 29 January 2016, D/2016/46805, NSW Police Force response to item 13(d) of Law Enforcement Conduct Commission Notice 929 of 2017.

<sup>370</sup> Workforce Intelligence Unit, Human Resources Command, NSW Police Force, *HR Analysis: Child Protection Register Staffing Review*, 20 July 2017, D/2017/630614, NSW Police Force response to item 1 of Law Enforcement Conduct Commission Notice 929 of 2017, p 27.

workload, as local commands would undertake more proactive investigation activities, leading to an increase in prosecutions for failure to comply with CPOR Act reporting obligations and in applications for child protection prohibition orders.<sup>371</sup>

The Commission therefore considers it important that the NSW Police Force review the staffing requirements of the Registry following the implementation of dedicated Register positions in the local commands.

The Commission also notes that the number of registrable persons managed by local commands can vary greatly, as it depends on how many registrable persons choose to reside within each command's area. As at 31 December 2018, there were 14 commands that were responsible for managing 100 or more registrable persons each, and 21 commands managing less than 50 registrable persons (one command was only managing nine).<sup>372</sup>

There is also significant variation in the risk ratings for registrable persons between commands. It follows that the allocation of dedicated officers to local commands should be based on an evaluation of the specific need of each command. A blanket approach of one officer per command is unlikely to ensure that the dedicated resources are deployed where they are most needed. The Registry Manager in his 2018 report recommended the NSW Police Force authorise one dedicated officer for every 50 registered offenders (based on a model adopted in the UK).<sup>373</sup>

## 5.7 CONCLUSION AND RECOMMENDATION

The Commission welcomes the additional resources the NSW Police Force has allocated to the Registry during the course of Operation Tuskett, and the first allocation of dedicated positions to local commands. These improvements will help to significantly reduce the risk of errors in the Register, increase the Registry's capacity to engage in and support proactive investigation activities, and reduce the risks to the wellbeing of Registry staff.

The NSW Police Force has not, however, created a dedicated legal officer position within the Registry, despite this being recommended by the Workforce Intelligence Unit, by the Registry Manager in his 2018 report, and by the Commission in its interim report on the investigation.<sup>374</sup> The Commission does not consider that the loan of a

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<sup>371</sup> Ibid p 27 and p 59. These predictions are supported by the findings of the 2016 Working Party regarding increased proactive investigation activities being reported in those local commands that had (unauthorised) dedicated officers: *Child Protection Register: Dedicated positions in CPR Management*, p 20, attachment to Child Protection Registry, NSW Police Force, *Submission of report to address the prospect of Dedicated Positions at Local Area Commands (LAC) to manage the Child Protection Register*, 29 January 2016, D/2016/46805, NSW Police Force response to item 13(d) of Law Enforcement Conduct Commission Notice 929 of 2017.

<sup>372</sup> State Intelligence Command, NSW Police Force, *Child Protection Register Monthly Report*, December 2018, NSW Police Force response to item 3 of Law Enforcement Conduct Commission Notice 988 of 2018, pp 4-8.

<sup>373</sup> Manager, Child Protection Registry, NSW Police Force, *Management of the Child Protection Register in New South Wales: Michael O'Brien Scholarship 2017* (2018) NSW Police Force response to item 1 of Law Enforcement Conduct Commission Notice 929 of 2018, p 47.

<sup>374</sup> Workforce Intelligence Unit, Human Resources Command, NSW Police Force, *HR Analysis: Child Protection Register Staffing Review*, 20 July 2017, D/2017/630614, NSW Police Force response to item 1 of Law Enforcement Conduct Commission Notice 929 of 2017, p 50; NSW

legal officer from the Prosecutions Command is adequate to ensure that Registry staff have continual access to expert legal advice on an ongoing basis. In Chapter 6 we recommend the NSW Police Force establish at least one legal officer position within the Registry that is dedicated solely to supporting Registry staff, and fill that position as a matter of priority.<sup>375</sup>

The Commission also emphasises that the recommendations made by the Workforce Intelligence Unit in its Register Staffing Review were the minimum staff required to address the error and risk associated with the Register in July 2017. Those recommendations are now outdated. The minimum of 14 officers recommended by the Workforce Intelligence Unit was based on the size of the Register two and a half years ago, in April 2017.<sup>376</sup> Since that time, the Register has grown from 3,775 currently registered persons to 4,344 as at 31 August 2019.<sup>377</sup> In addition, the Registry has been given a significant new workload in relation to the processing of applications for registrable persons who wish to travel overseas.<sup>378</sup>

Also, the Workforce Intelligence Unit stated that the addition of the 14 staff in July 2017 was expected to make a 'minimal' impact on the Registry's capacity to undertake proactive policing strategies (such as those discussed in section 5.4.3.1).<sup>379</sup>

Given the increase in the number of persons on the Register and the functions of the Registry since the Register Staffing Review, the NSW Police Force should consider allocation of additional positions to the Registry. The Register Staffing Review included an 'Option B' staffing model that would allocate, on top of the (recommended) 14 officers, an additional sworn officer and six additional unsworn officers.<sup>380</sup> The Commission suggests this option should be considered by the NSW Police Force. The Workforce Intelligence Unit stated that '[i]f the organisation wishes to respond to the risks outlined in this report, as well as providing the Registry more capacity to be proactive in mitigating risks, then Option B would be recommended for consideration.'<sup>381</sup>

The Workforce Intelligence Unit also noted that the Registry in 2017 had 'the lowest number of staff compared to every other state, but with a similar number of

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*Police Force response to the interim report of Operation Tuskett*, 23 October 2018, F/2018/94374; D/2018/851674, p 7; Manager, Child Protection Registry, NSW Police Force, *Management of the Child Protection Register in New South Wales: Michael O'Brien Scholarship 2017* (2018) NSW Police Force response to item 1 of Law Enforcement Conduct Commission Notice 929 of 2018, p 114.

<sup>375</sup> See Recommendation 5 in Chapter 6 section 6.5.

<sup>376</sup> Workforce Intelligence Unit, Human Resources Command, NSW Police Force, *HR Analysis: Child Protection Register Staffing Review*, 20 July 2017, D/2017/630614, NSW Police Force response to item 1 of Law Enforcement Conduct Commission Notice 929 of 2017, p 5.

<sup>377</sup> Letter from Commissioner of Police, NSW Police Force, to Chief Commissioner, Law Enforcement Conduct Commission, 30 September 2019 (Annexure D – Updated Statistics from the CPR Monthly Report and about Travel Requests).

<sup>378</sup> *Passports Legislation Amendment (Overseas Travel by Child Sex Offenders) Act 2017; Criminal Code Act 1995* (Cth) s 271A.1.

<sup>379</sup> Workforce Intelligence Unit, Human Resources Command, NSW Police Force, *HR Analysis: Child Protection Register Staffing Review*, 20 July 2017, D/2017/630614, NSW Police Force response to item 1 of Law Enforcement Conduct Commission Notice 929 of 2017, p 44.

<sup>380</sup> *Ibid* pp 42-46.

<sup>381</sup> *Ibid* p 43.

offenders on the Register'.<sup>382</sup> In 2017 the Sex Offenders Registry unit within Victoria Police had 45 positions, but only around 8 per cent more persons on their register than New South Wales.<sup>383</sup> The Registry in New South Wales currently has 28 positions.

The workload of the Registry will continue to increase as the number of persons convicted of registrable offences each year continues to trend upwards. The establishment of authorised dedicated Register positions in the local commands will also have an impact on the Registry's workload. The Registry's workload may also be significantly affected in the future by factors beyond the control of the NSW Police Force, such as changes in the statutory framework which 'widen the net' of the Register, amendments to statutory offender registration schemes in other jurisdictions, or the creation of additional statutory functions.

For these reasons, the Commission recommends that the NSW Police Force adopt a responsive resourcing model for the Registry, which ensures that the resourcing of the Registry keeps pace with increases in the volume and complexity of its workload.

**RECOMMENDATION 2: Adopt a responsive model of resourcing for the Child Protection Registry.** The NSW Police Force ensure that the resourcing of the Registry is reviewed at least every two years, and that staffing is maintained at a level sufficient to perform statutory functions under the CPOR Act efficiently and accurately.

**NSW Police Force response to Recommendation 2:** The NSW Police Force has stated that it supports this recommendation 'to the extent that the NSWPF agrees to conduct a review of the resourcing of the Registry every two years in order to consider the optimal staffing level based on its responsibilities and risks.'<sup>384</sup>

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<sup>382</sup> Ibid p 17.

<sup>383</sup> Ibid.

<sup>384</sup> Letter from Commissioner of Police, NSW Police Force, to Chief Commissioner, Law Enforcement Conduct Commission, 30 September 2019 (Annexure B – Submissions on Proposed Recommendations).

# 6. PROBLEMS WITH THE *CHILD PROTECTION (OFFENDERS REGISTRATION) ACT 2000 (NSW)*

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*'[The] complex and ambiguous legislative framework...creates a degree of risk that cannot be entirely mitigated. The current legislation does not permit an easy administrative solution that can reliably remove the inherent risk.'*

- NSW Commissioner of Police, October 2018<sup>385</sup>

## 6.1 INTRODUCTION

The NSW Police Force and the Commission agree that the CPOR Act as currently drafted is so complex and ambiguous in important respects that it creates an inherent risk of errors in the Child Protection Register (the Register) that the NSW Police Force cannot mitigate.<sup>386</sup>

The *Child Protection (Offenders Registration) Act 2000* (NSW) (the CPOR Act) is the oldest statutory scheme for the mandatory registration of child sex offenders in Australia.<sup>387</sup> It commenced in October 2001, and has been amended 41 times.

The NSW Commissioner of Police has stated that the CPOR Act 'has been enormously challenging for the NSWPF to administer'.<sup>388</sup> As part of Operation Tuskett, the Commission analysed the provisions of the CPOR Act, and identified a number of significant problems with the way the Act is drafted which make it difficult to apply. We provided a technical analysis of these problems to the NSW Police Force in August 2018, and conducted a consultation with relevant officers in October 2018. The Commission's final analysis of the problems with the CPOR Act, incorporating feedback from the NSW Police Force, is contained in Appendix 2. In that Appendix we identify more than 20 problems with the Act. This chapter contains a summary of the type of problems identified.

The NSW Commissioner of Police has stated that it is 'critically important' that the Commission's analysis of the problems with the CPOR Act is considered in any public debate about the appropriate response to this report.<sup>389</sup> The long list of problems with the legal framework which the NSW Police Force Child Protection Registry (the Registry) must apply 'provides significant context and explains many of the issues experienced within the Registry on a day to day basis'.<sup>390</sup>

The way the CPOR Act is drafted creates such difficulties for those responsible for applying the Act that it undermines the Act's object of ensuring that registrable persons are monitored and comply with their obligations. Without substantial reform of the framework of the CPOR Act, the risk of the types of errors and consequences outlined in Chapter 3 of this report will continue.

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<sup>385</sup> *NSW Police Force response to the interim report of Operation Tuskett*, 23 October 2018, F/2018/94374; D/2018/851613, p 1

<sup>386</sup> *Ibid* pp 1-2.

<sup>387</sup> Victorian Law Reform Commission, *Sex Offenders Registration* (2012) para 1.10.

<sup>388</sup> Letter from Commissioner of Police, NSW Police Force, to Chief Commissioner, Law Enforcement Conduct Commission, 30 September 2019, p 1.

<sup>389</sup> *NSW Police Force response to the interim report of Operation Tuskett*, 23 October 2018, F/2018/94374; D/2018/851613, p 2.

<sup>390</sup> *Ibid*.

The Commission and the NSW Police Force agree that there is an urgent need for comprehensive reform of the CPOR Act.

The Commission recommends that the Attorney-General urgently refer the CPOR Act to the NSW Law Reform Commission for comprehensive review, to be completed within six months.

In this chapter we also make recommendations for a statutory review mechanism, and that the NSW Police Force provides individuals with the basis for decisions made under the CPOR Act, to improve accountability. We also recommend that the NSW Police Force urgently establish at least one dedicated legal officer within the Registry.

## 6.2 COMMISSION'S ANALYSIS OF THE CPOR ACT

In Operation Tuskett the Commission identified a number of problems with the way key provisions in the CPOR Act were drafted, which made it difficult in certain cases to determine how those provisions should be applied. The difficulty of interpreting and applying the CPOR Act appeared to the Commission to be a significant contributing factor to the incorrect decisions the NSW Police Force made in its administration of the Register.

The Commission therefore decided to undertake a comprehensive analysis of the CPOR Act, informed by our consultations with officers in the Registry and our review of Register case files in which errors had been made.

The Commission's final analysis of the CPOR Act is set out in full in Appendix 2. That appendix includes the Commission's conclusions about the provisions which must be redrafted if errors in the Register are to be avoided.

## 6.3 OVERVIEW OF PROBLEMS WITH THE CPOR ACT

The key elements of the CPOR Act are set out in Chapter 2. In summary, in order to implement the CPOR Act, the NSW Police Force must be able to:

- 1) identify when a person has been convicted of a 'registrable offence' (including in a different jurisdiction);
- 2) determine if the offender is a 'registrable person' in the particular circumstances, or whether an exception to registration applies;
- 3) calculate how long the registrable person is required to make reports of their personal information to the NSW Police Force (ie their 'reporting period');
- 4) identify the different timeframes within which the registrable person is required to report changes to their personal information, and therefore when they will be liable to prosecution for failure to comply, and
- 5) identify when, and for how long, the registrable person's reporting obligations need to be suspended and/or extended for periods during which the person was in government custody, travelling, or in breach of their reporting obligations.

The Commission identified more than 20 specific problems with the current provisions in the CPOR Act. These problems can affect each of the five levels of

decision-making listed above. Given the current provisions in the CPOR Act, it is inevitable that the NSW Police Force will make errors in administering the Register.

The discussion below summarises some of the main problems the Commission has identified. Appendix 2 includes detailed legal analysis of each of these problems, as well as practical examples.

### 6.3.1 DIFFICULTY OF IDENTIFYING ALL 'REGISTRABLE OFFENCES'

The NSW Police Force and the Commission agree that it is very difficult to identify all the offences that may result in a person becoming registrable under the CPOR Act.<sup>391</sup>

The CPOR Act does not specifically list each 'registrable offence'. The definitions of the two 'Classes' of offence that are registrable include descriptions of offences by categories. This requires the NSW Police Force to make a judgement about whether an offence falls within that category. For example, the CPOR Act states that any offence 'an element of which is an intention to commit an offence of a kind listed' in either of the Classes will itself be a registrable offence under that Class.<sup>392</sup>

In December 2017 the NSW Police Force provided the Commission with a list of over 800 charges it had identified as potentially relating to registrable offences.<sup>393</sup> After extensive review of the *Crimes Act 1900* (NSW) and *Criminal Code Act 1995* (Cth) the Commission identified:

- 58 charges that were missing from the NSW Police Force list;
- 56 charges which were on the list but with the incorrect 'CPR flag' (which indicates whether the offence would be classified as Class 1 or Class 2), and
- six charges that were listed as registrable offences by the NSW Police Force, but in fact did not fall within the definition of a Class 1 or Class 2 offence.<sup>394</sup>

The Commission provided details of these charges to the NSW Police Force in 2018 and the NSW Police Force updated its list.

### 6.3.2 DETAILED INFORMATION REQUIRED TO DETERMINE WHETHER AN EXCEPTION TO REGISTRATION APPLIES

In s 3A(2) of the CPOR Act there are exceptions to registration for certain persons who were under the age of 18 at the time they committed the registrable offence.

In order to determine whether one of the exceptions to registration in s 3A(2) applies, the Registry needs specific details about the timing of a person's offending.

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<sup>391</sup> NSW Police Force response to the interim report of Operation Tuskett, 23 October 2018, F/2018/94374; D/2018/851613, p 6.

<sup>392</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) s 3(1) (definitions of 'Class 1 offence', para (g) and 'Class 2 offence', para (l)).

<sup>393</sup> NSW Police Force response to item 3 of Law Enforcement Conduct Commission Notice 929 of 2017. This number does not include offences that persons commit in other jurisdictions that are picked up by the CPOR Act through the 'corresponding registrable offender provisions' in Part 3, Division 10 of the Act.

<sup>394</sup> Emails from Law Enforcement Conduct Commission to Child Protection Registry, NSW Police Force, 16 March 2018 and 22 May 2018; Email from Child Protection Registry, NSW Police Force, to Law Enforcement Conduct Commission, 19 June 2018.

This is because the test for when multiple offences may be treated as a 'single offence', and therefore fall within the exception, requires the NSW Police Force to identify whether the offences were 'committed against the same person' and 'within a single period of 24 hours' (the 'single offence' test).<sup>395</sup>

However, prosecutors have a well-established practice of avoiding the need to specify a precise date on which alleged child sex offences occurred, by prosecuting persons for offences which are alleged to have occurred between a set of dates ('between dates' charges). The use of 'between dates' charges means that the specific date an offence occurred may not be established during criminal proceedings, and may not be known by the arresting officer, the prosecutor, or the court when passing sentence.

The 'single offence' test is particularly difficult to apply in the case of persons convicted of offences relating to child abuse material. For example, the offence of possessing child abuse material is not defined as being 'committed against' any person.<sup>396</sup> There is also the potential for different interpretations of when an offence of possession will be 'committed within' 24 hours, because a person may obtain child abuse material in a matter of seconds, but may retain that material for months or years.

### 6.3.3 DETAILED INFORMATION AND COMPLEX ANALYSIS REQUIRED TO CALCULATE REPORTING PERIODS

To determine for how many years a registrable person is required to make reports of their personal information to police (their reporting period), the NSW Police Force must apply one of the formulas in s 14A of the CPOR Act. To do this, the NSW Police Force needs to identify what 'Class' of offence the person was sentenced for, how many other registrable offences the person had been sentenced for previously, and whether the person was 18 years or older at the time of the offending.

Determining which of the formulas in s 14A applies to a particular offender is a complex task. As the NSW Police Force Workforce Intelligence Unit has noted:

In many cases it is not possible to either flowchart the calculation process, or use matrices, to consistently evaluate reporting periods. It requires an in-depth understanding of the *Child Protection (Offenders Registration) Act*, other legislation, and the circumstances surrounding the case.<sup>397</sup>

To correctly apply the formulas in s 14A, the NSW Police Force is required to:

- review the entire criminal history of the offender, including offences prior to the commencement of the Register, to identify potentially registrable offences;
- tally up how many registrable offences the offender has been convicted of in their life, in any jurisdiction (including determining whether multiple offences of the same kind should be counted as a 'single offence');

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<sup>395</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) s 3(3) and s 3A(2)(c) and (5).

<sup>396</sup> *Crimes Act 1900* (NSW) s 91H.

<sup>397</sup> Workforce Intelligence Unit, Human Resources Command, NSW Police Force, *HR Analysis: Child Protection Register Staffing Review*, 20 July 2017, D/2017/630614, NSW Police Force response to item 1 of Law Enforcement Conduct Commission Notice 929 of 2017, p 50.

- classify whether each of those offences is a Class 1 or Class 2 offence;
- determine whether the person was a child when they committed each registrable offence, and
- identify whether the offender committed further registrable offences while on the Register (as offending subsequent to registration may increase the person's reporting period to life).<sup>398</sup>

The Registry officers therefore require a significant amount of detail about a person's history of offending to correctly determine their reporting period. The Registry officers need access to the person's criminal record, custodial history, police fact sheets, agreed fact sheets, judicial sentencing remarks and details of any plea arrangements.<sup>399</sup>

The difficulties mentioned in sections 6.3.1 and 6.3.2 associated with identifying all registrable offences, and applying the 'single offence' test to determine when multiple offences should be grouped, also affect the calculation of reporting periods.

The complexity involved in calculating reporting periods is illustrated by the following:

- a 'Reporting Matrix' which the NSW Police Force had developed and used for several years to calculate reporting periods 'to assist in reducing the subjectivity of individual interpretation' was in 2016 'found to be in error itself'.<sup>400</sup>
- The NSW Police Force CPR case review identified 629 CPR files in which errors has been made in calculating the reporting period.<sup>401</sup>
- In the case of Mr AA (Case Study 2 in Chapter 3), the CPR case review team had identified that two errors had been made in the initial calculation of his reporting period in 2006, and updated his reporting period. However, when the Commission reviewed Mr AA's file, it identified that the review team had itself made an error in calculating his reporting period.

Calculating the reporting periods of registrable persons who have been convicted of multiple child abuse material (CAM) offences can be particularly difficult. This is because the NSW Police Force is required to apply the 'single offence' test in s 3(3) to CAM offences when calculating reporting periods under s 14A.<sup>402</sup> As mentioned (in section 6.3.2), it is unclear how the requirement in s 3(3) that the offences be 'committed against the same person' is intended to be applied to CAM offences,

<sup>398</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) s 14A(1)(c) and (2).

<sup>399</sup> Workforce Intelligence Unit, Human Resources Command, NSW Police Force, *HR Analysis: Child Protection Register Staffing Review*, 20 July 2017, D/2017/630614, NSW Police Force response to item 1 of Law Enforcement Conduct Commission Notice 929 of 2017, p 64.

<sup>400</sup> Ibid p 52; Child Protection Registry, NSW Police Force, *Serious concerns raised regarding the Child Protection Register (CPR) reporting period timeframes and the lack of review of matters prior to case finalisation*, 26 May 2016, D/2016/277899, NSW Police Force response to item 7 of Law Enforcement Conduct Commission Notice 914 of 2017, p 2.

<sup>401</sup> *Grand totals year to date 2018*, NSW Police Force response to item 1 of Law Enforcement Conduct Commission Notice 988 of 2018.

<sup>402</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) s 14A(4).

which are not defined in the *Crimes Act 1900* (NSW) as being offences that are 'committed against' any person.<sup>403</sup>

The language in s 3(3), which has been in the CPOR Act since 2001,<sup>404</sup> has therefore created significant problems for the NSW Police Force. There are multiple ways of interpreting how s 3(3) should operate in relation to CAM offences. As demonstrated by Example 6 in Appendix 2 (in part 5.3), involving Mr WW, different members of the NSW Police Force have adopted different interpretations over time, which has led to inconsistent outcomes.

The Commission notes that in December 2017, the CPR case review found 41 persons on the Register for CAM offences whose reporting periods had been incorrectly calculated as eight years (for a single Class 2 offence), when they should have been 15 years (for multiple Class 2 offences).<sup>405</sup> These cases had to be reopened, updated, and the persons notified.<sup>406</sup> As noted in Chapter 5, convictions for CAM offences are increasing each year. These types of offences will continue to create problems for those officers in the NSW Police Force who are responsible for calculating reporting periods under the CPOR Act.

#### 6.3.4 DIFFICULTY OF INTERPRETING (AND THEREFORE ENFORCING) REPORTING OBLIGATIONS

The CPOR Act requires registrable offenders to report their personal information, and changes to that information, to the NSW Police Force within certain timeframes. The penalty for failing to comply with any of the reporting obligations is up to five years' imprisonment.<sup>407</sup> However, there are a number of reporting obligations which have unclear deadlines. In certain circumstances it will be difficult for the NSW Police Force to identify when these obligations have been breached, giving rise to criminal liability for failure to report.

For example, the CPOR Act requires that a registrable person to report a change to the premises where he or she 'generally works' within seven days.<sup>408</sup> However, The CPOR Act states that a registrable person is only 'generally employed' at a particular premises if he or she is employed there for 'at least 14 days (whether consecutive or not) in any period of 12 months'.<sup>409</sup> It is unclear whether a person only meets the definition of being 'generally employed' after completing 14 actual days of work with that employer, or whether this definition is satisfied once 14 days have elapsed since the person commenced employment (no matter how many of those days the person actually worked).

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<sup>403</sup> *Crimes Act 1900* (NSW) s 91H.

<sup>404</sup> *Child Protection (Offenders Registration) Amendment Act 2001* (NSW) sch 1 cl 8.

<sup>405</sup> *Child Protection Register - Business Risk Committee - December 2017*, NSW Police Force response to item 19(a) of Law Enforcement Conduct Commission Notice 929 of 2017, p 3.

<sup>406</sup> *Child Protection Register - Business Risk Committee - December 2017*, NSW Police Force response to item 19(a) of Law Enforcement Conduct Commission Notice 929 of 2017, p 3.

<sup>407</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) s 17.

<sup>408</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) s 9(1)(f) and s 11(1).

<sup>409</sup> The phrase 'generally employed' should have been updated to 'generally works' when other amendments were made to the CPOR Act in 2013: see *Child Protection Legislation Amendment (Children's Guardian) Act 2013* (NSW).



### 6.3.5 CHALLENGE OF IDENTIFYING WHEN PERSONS WHO HAVE OFFENDED IN OTHER JURISDICTIONS NEED TO REPORT UNDER THE CPOR ACT

The provisions in the CPOR Act relating to persons who have committed registrable offences in other jurisdictions and move to NSW can be particularly challenging to apply.

Under the CPOR Act there are two different ways a person who commits an offence outside New South Wales and then moves to New South Wales can be classified as a 'registrable person' who is required to make reports. These are:

- through the definitions of Class 1 and Class 2 offences including 'offences under a law of foreign jurisdiction' which would be registrable offences if committed in New South Wales (foreign jurisdiction offence provisions),<sup>410</sup> and
- through the 'corresponding registrable persons' provisions in Part 3, Division 10, if they were placed on an offender register in the other jurisdiction before coming to New South Wales.

There is overlap between the 'foreign jurisdiction offence' provisions and the 'corresponding registrable person' provisions. The CPOR Act defines 'foreign jurisdiction' as including jurisdictions in Australia other than New South Wales.<sup>411</sup> The CPOR Act does not make clear which provisions should be preferred if both would apply to the person. This creates difficulties for the NSW Police Force as there can be different outcomes as to whether the person is registrable, and/or for how long, depending on which set of provisions are relied upon.

The difficulty of trying to determine the obligations under New South Wales law that apply to a person who is caught in the overlap between these two sets of provisions, is demonstrated by the particularly complex case of Mr GG (his case is summarised below in section 6.3.6 of this chapter).

Further difficulties created by the corresponding registrable person provisions are also discussed below.

### 6.3.6 INTERACTION BETWEEN THE CPOR ACT, OTHER NEW SOUTH WALES LAWS AND LAWS IN OTHER JURISDICTIONS

To apply the CPOR Act, the NSW Police Force is required to determine how to interpret other legislation in New South Wales, or legislation in other jurisdictions. This creates further difficulties for the Registry.

For example, if a person who has been charged with a registrable offence is found to be affected by mental illness or impairment, they may be dealt with under the processes set out in the *Mental Health (Forensic Provisions) Act 1990* (NSW) (the Mental Health (FP) Act). The processes under that Act involve multiple points of interaction between a court and the Mental Health Review Tribunal. There are unique

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<sup>410</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) s 3 (para (e) of the definition of 'Class 1 offence' and para (j) of the definition of 'Class 2 offence').

<sup>411</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) s 3 (definition of 'foreign jurisdiction').

types of orders under the Mental Health (FP) Act that may be imposed on the person, at different points in those processes. Only certain types of these orders will result in a person becoming registrable under the CPOR Act.<sup>412</sup>

Registry officers therefore require a detailed knowledge of the procedures under the Mental Health (FP) Act to determine if an order has been made which makes the person registrable under the CPOR Act. The practical difficulties the Registry experiences in identifying whether such an order has been made are discussed in Chapter 7, section 7.3.2.

The 'corresponding registrable person' provisions in Part 3, Division 10 of the CPOR Act require Registry officers to also have an understanding of offender registration laws in other jurisdictions. When an offender who has reporting obligations under an offender registration law in another jurisdiction enters New South Wales, the corresponding registrable person provisions in the CPOR Act effectively 'pick up' the person's reporting period from that other jurisdictions and apply it in New South Wales.<sup>413</sup>

The Registry therefore needs to have a good understanding of the register laws in other jurisdictions to ensure that it correctly identifies:

- 1) which persons who enter New South Wales from other jurisdictions are required to make reports under the CPOR Act, and therefore need to be put on the NSW Register, and
- 2) for how long their reporting obligations in New South Wales will continue.

These tasks are complicated by the fact that there is a lack of consistency across the offender registration laws in Australia in terms of which offences are registrable, and the reporting periods which apply.<sup>414</sup>

Also, in order to correctly manage corresponding registrable persons, the NSW Police Force must keep up to date with changes not only to the CPOR Act, but also to the offender registration laws in other jurisdictions. Legislative changes to reporting periods in a different jurisdiction can affect the obligations of a corresponding registrable person under New South Wales law.

For example, in September 2014 amendments were made to the *Child Protection (Offender Reporting) Act 2004* (Qld) which reduced the reporting periods under that

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<sup>412</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) s 3 (definition of 'sentence').

<sup>413</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) s 19BB and 19BC.

<sup>414</sup> For example, manslaughter of a child (other than as a result of a motor vehicle accident) is a registrable offence in New South Wales, but not in the Australian Capital Territory (unless a specific child sex offender registration order is made): *Child Protection (Offenders Registration) Act 2000* (NSW) s 3 (para (a) of the definition of 'Class 2 offence') and *Crimes (Child Sex Offenders) Act 2005* (ACT) s 10 and schs 1 and 2. Also, in the Australian Capital Territory an 'act of indecency in the first degree' is a Class 1 offence which results in a 15 year reporting period, but in New South Wales, under the CPOR Act that same offence would be a Class 2 offence resulting in only eight years of reporting: *Crimes (Child Sex Offenders) Act 2005* (ACT) s 84 and sch 1; *Crimes Act 1900* (ACT) s 57; *Child Protection (Offenders Registration) Act 2000* (NSW) s 3 (paras (a2) or (l) and (a1) of the definition of a 'Class 2 offence').

Act for everyone on the Queensland register on that date.<sup>415</sup> These applied to persons who had left Queensland and were reporting in New South Wales. While a number of corresponding registrable persons' cases were updated by the NSW Police Force in 2014 following notification by the Queensland Police Service, in 2016 it was discovered that a number of cases had been missed in Queensland.<sup>416</sup>

As a result the NSW Police Force identified persons who were still on the Register in 2016 whose reporting obligations had ceased in 2014.<sup>417</sup> The CPR case review identified 89 persons whose reporting periods were incorrect because the NSW Police Force had not been notified in 2014 that the amendments to the law in Queensland applied to their cases.<sup>418</sup> The NSW Police Force discovered at least two persons who had been wrongly convicted and sentenced for failing to comply with reporting obligations under the CPOR Act when in fact, due to the Queensland amendments, the reporting obligations has not applied to them at the time they were charged.<sup>419</sup>

A case that demonstrates just how complex determining a person's registrable status and reporting period under the CPOR Act can become is that of Mr GG.<sup>420</sup> Mr GG was convicted of registrable offences in Tasmania in 2008 and then moved to New South Wales. What occurred in his case is set out in full as Example 8 in Appendix 2 (in part 6.3). The ultimate correct assessment of Mr GG's case in 2019 involved:

- knowledge of two different Tasmanian Acts;
- application of a historical version of the CPOR Act from 2008;
- awareness and application of amendments which were made to the corresponding registrable person provisions in the CPOR Act in October 2008, which applied retrospectively to Mr GG, and
- analysis of the overlap between the corresponding registrable person provisions and the 'foreign jurisdiction offence' provisions in the definitions of Class 1 and Class 2 offences.

Due to the complexity of applying the CPOR Act provisions to Mr GG, the lawyer reviewing his case in 2016 during the CPR case review made an error in determining whether he was a registrable person. The Commission itself made a (different) error

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<sup>415</sup> *Child Protection (Offender Reporting) and Other Legislation Amendment Act 2014* (Qld); Explanatory Notes, *Child Protection (Offender Reporting) and Other Legislation Amendment Bill 2014* (Qld) p 13.

<sup>416</sup> *Business Risk Committee – August 2016: CPR Case Review*, NSW Police Force response to item 19(a) of Law Enforcement Conduct Commission Notice 929 of 2017.

<sup>417</sup> *Ibid.*

<sup>418</sup> See the category 'Interstate (QLD) Error in reporting period notification' in the table in Appendix 1.

<sup>419</sup> Mr HH – see Child Protection Registry, *Application to the Local Court*, 12 December 2016, NSW Police Force response to item 2(j) of Law Enforcement Conduct Commission Notice 929 of 2017; Mr JJ – see CPR case file produced by NSW Police Force in response to item 2(k) of Law Enforcement Conduct Commission Notice 929 of 2018, and see Child Protection Registry, NSW Police Force, *Application to the Local Court* [re Mr JJ], NSW Police Force response to item 6 of Law Enforcement Conduct Commission Notice 929 of 2017.

<sup>420</sup> The CPR case file of Mr GG was produced by the NSW Police Force in response to item 2(6) of Law Enforcement Conduct Commission Notice 929 of 2018.

in its initial review of his case in 2018. The Commission only identified this error upon a re-review of Mr GG's case in 2019.

The practical consequences of the difficulty of arriving at a correct analysis of Mr GG's case were that, although the NSW Police Force had initially (correctly) registered him and given him a reporting period of 7.5 years, upon review in 2016 it incorrectly concluded he was not a registrable person, and removed him from the Register. Further, courts in 2017 had, at the request of the NSW Police Force, granted annulments of Mr GG's seven convictions for failure to report offences under the CPOR Act between 2010 and 2016.<sup>421</sup> However, on the Commission's interpretation, these convictions had in fact been valid.

## 6.4 RECOMMENDATIONS TO NSW GOVERNMENT

### 6.4.1 COMPREHENSIVE REFORM OF THE CPOR ACT

As the NSW Police Force has stated, the statutory framework provided by the CPOR Act 'is complex, ambiguous, and provides for uncertainty', and until that statutory framework is simplified 'there exists a level of risk that cannot be mitigated'.<sup>422</sup> The Commission agrees that given the current provisions in the CPOR Act, it is inevitable that the NSW Police Force will make errors in administering the Register.

The Commission and the NSW Police Force therefore agree that there is an urgent need for wholesale reform of the CPOR Act. The NSW Police Force and the Commission agree that:

- **The statutory framework for the Register must be fixed to address the fundamental problems identified by the Commission and the NSW Police Force, set out in Appendix 2 of this report.** Appendix 2 contains our detailed analysis of the specific problems which arise from the way the CPOR Act is drafted. The conclusions in that appendix have been informed by the State Crime Command's experience in applying the CPOR Act. Any law reform process should consider the details in Appendix 2 regarding the specific provisions which need to be redrafted to reduce the risk of error in the Register. We expect that there may be more problems with the Act than those we identified.
- **The structure of the Act must be reconsidered as a whole.** The problems with the current framework cannot be addressed simply by further amendments to certain provisions; the history of amendments to isolated provisions, including several retrospective amendments, has added to the complexity and ambiguity in the CPOR Act.
- **The reform process must include consultation with other agencies.** As we discuss in Chapter 7 of this report, the CPOR Act places obligations on other authorities to assist in the maintenance of the Register. However there have been problems with the performance of some of these obligations almost

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<sup>421</sup> Child Protection Registry, NSW Police Force, *Application to the Local Court*, 10 January 2017, NSW Police Force response to item 2(g) of Law Enforcement Conduct Commission Notice 929 of 2018; Law Enforcement Conduct Commission review of JusticeLink.

<sup>422</sup> *NSW Police Force response to the interim report of Operation Tuskett*, 23 October 2018, F/2018/94374; D/2018/851613, pp 2 and 3.

since the Register commenced. It is therefore crucial that these authorities, in particular sentencing courts, Department of Family and Community Services and Justice, Corrective Services NSW and NSW Health, are given the opportunity to give considered input into any legislative changes. Also, given the complexity of the CPOR Act, the Commission suggests that any law reform process should consider whether judicial officers should be given statutory responsibility for determining whether a person meets the definition of a registrable person, and calculating their initial reporting period.<sup>423</sup>

- **The reform process must be expeditious.** Some of the problems with the CPOR Act relate to provisions which are fundamental to the operation of the Act, such as the definitions of which offences and which persons are registrable, and the calculation of reporting periods. Until these provisions are reformed, there is a daily risk of errors being made in the application of the Act, which the NSW Police Force cannot mitigate. As the Commission's case studies in Chapter 3 illustrate, the consequences of these errors can be significant.

The Commission's view is that the NSW Law Reform Commission is best placed to conduct a comprehensive, consultative review of the CPOR Act, and make detailed recommendations for new legislative provisions.

The NSW Police Force has stated to the Commission that it 'supports legislative reform as a matter of urgency but does not support referral to the NSW Law Reform Commission', due to concerns about the length of time it will take for the Law Reform Commission to complete its review, and then for consideration and implementation of its recommendations.<sup>424</sup>

The NSW Police Force advised the Commission on 30 September 2019 that it had prepared a proposal for a 'wholesale redraft of the CPOR Act', drawing on the Commission's analysis. The NSW Police Force stated that it intended to consult with 'key Government stakeholders (NSW Health and Communities and Justice)' about that proposal, and then submit it to the NSW Government on an urgent basis. The NSW Police Force stated that 'given LECC's extensive review, it is appropriate to approach Government to seek legislative reform', rather than a referral to the Law Reform Commission.<sup>425</sup>

The Commission shares the concern raised by the NSW Police Force about the need for law reform as soon as possible. However, this must be balanced against the need to carefully consider any proposed reforms to the statutory framework for the Register, as well as feedback from all authorities who have been or would be involved in its implementation. Such careful consideration is crucial to avoid the kind of drafting issues that affect the current statute. The Commission accepts that this

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<sup>423</sup> See Chapter 7, in particular section 7.7.

<sup>424</sup> Letter from Commissioner of Police, NSW Police Force, to Chief Commissioner, Law Enforcement Conduct Commission, 30 September 2019, p 2 and Annexure B – Submissions on Proposed Recommendations.

<sup>425</sup> Letter from Commissioner of Police, NSW Police Force, to Chief Commissioner, Law Enforcement Conduct Commission, 30 September 2019, pp 1-2 and Annexure B – Submissions on Proposed Recommendations.

could potentially be achieved without the involvement of the Law Reform Commission.

The NSW Police Force provided a draft of its proposal for reform of the CPOR Act to the Commission on 11 October 2019, at which point this report was being finalised. The Commission will review this proposal and provide its views to the Commissioner of Police and the Minister for Police and Emergency Services (as the minister responsible for the CPOR Act) separate to this report.

Whichever law reform process is ultimately followed, the Commission strongly urges the NSW Government to release an exposure draft of any proposed new bill for consultation prior to finalising it for introduction in Parliament. This may assist in the detection of problems before the bill becomes law.

**RECOMMENDATION 3: Refer the CPOR Act to the NSW Law Reform Commission for review.** The Attorney-General urgently refer the *Child Protection (Offenders Registration) Act 2000* (NSW) to the NSW Law Reform Commission for comprehensive review, to be completed within six months.

#### 6.4.2 STATUTORY REVIEW MECHANISM FOR REGISTRABLE STATUS AND REPORTING PERIOD DETERMINATIONS

The CPOR Act does not contain any provision that gives a person the right to ask the NSW Police Force to review its decision that he or she meets the definition of a registrable person under s 3A, or the calculation of their reporting period under s 14A.<sup>426</sup>

Given the complexity and potential for varying interpretations of provisions in the CPOR Act, and the history of errors in the Register, it would be beneficial if the Act (or any statute that replaces it) contained such a provision. Such a mechanism would:

- allow for the initiation of another level of quality assurance;
- provide the NSW Police Force with an early opportunity to rectify errors made at the case creation stage, avoiding unlawful consequences later, and
- help protect the rights of persons who may otherwise be subjected to unlawful actions by the NSW Police Force.

The NSW Police Force officers who the Commission consulted about the CPOR Act supported the idea of a review mechanism in the Act. They stated that in practice people can, and do, request that the Registry review the decision that they are

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<sup>426</sup> Under s 19B a registrable person can request a copy of their reportable information that is on the Register, and ask the Commissioner of Police to amend any information they state is incorrect. If the Commissioner is satisfied the information is incorrect, he or she must amend it. However, only 'reportable information' can be corrected under this section, and the NSW Police Force decision that a person is registrable, and its determination of the person's reporting period is not 'reportable information': *Child Protection (Offenders Registration) Act 2000* s 19B(5).



registrable, or the initial calculation of their reporting period, and the Registry conducts these reviews.<sup>427</sup>

Providing for a statutory right to an internal review would therefore formalise the current NSW Police Force practice. It would also help ensure that individuals are aware of their right to seek a review, and enable statutory controls to be put in place around the process, such as timeframes.

The *Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004* in Queensland contains a possible model for a review mechanism. Section 74 of that Act permits a person who believes that they have been placed on the register in error, or an error has been made in working out their reporting period, to apply to the police commissioner for review of those decisions.<sup>428</sup> The person must make the application within 28 days after the person is given notice of his or her reporting obligations.<sup>429</sup> The police commissioner is required to review the decision and give written notice of his or her decision to either confirm or change it.<sup>430</sup>

New Zealand has adopted a review mechanism in its *Child Protection (Child Sex Offender Government Agency Registration) Act 2016* that is very closely modelled on the Queensland provision.<sup>431</sup> However, the New Zealand Act also provides that if the Commissioner on review confirms the relevant decision, the offender has a right to appeal that decision in the District Court.<sup>432</sup>

The officers in the NSW Police Force we consulted supported the idea of persons having a right of appeal from the NSW Police Force review to a tribunal or court, given some of the difficult questions of statutory interpretation which arise from the operation of the CPOR Act. They agreed this would create opportunities to obtain judicial determinations about how the CPOR Act is to be interpreted, which would assist the NSW Police Force in implementing the Act.

**RECOMMENDATION 4: Introduce a statutory review mechanism.** A provision should be included in the *Child Protection (Offenders Registration) Act 2000* (NSW) (or any Act which replaces it) which gives a person the right to seek review by the NSW Police Force of the decision that they meet the definition of a registrable person under the Act, and/or the decision as to which reporting period applies to the

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<sup>427</sup> The 'Form 3' that is given to a registrable person invites them to write to the Registry 'if you believe there has been a mistake in identifying you as a registrable person or in calculating your reporting period, or you have successfully appealed a conviction for a registrable offence': *Form 3: Child Protection (Offenders Registration) Act 2000: Notice Issued to Registrable Person*, April 2016, NSW Police Force response to item 22 of Law Enforcement Conduct Commission Notice 929 of 2017.

<sup>428</sup> *Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004* (Qld) s 74(1) and (2).

<sup>429</sup> *Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004* (Qld) s 74(3).

<sup>430</sup> *Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004* (Qld) s 74(5).

<sup>431</sup> *Child Protection (Child Sex Offender Government Agency Registration) Act 2016* (NZ) s 49.

<sup>432</sup> *Child Protection (Child Sex Offender Government Agency Registration) Act 2016* (NZ) s 50.

person. Consideration should be given to providing a right of appeal from the NSW Police Force review to a tribunal or court.

**NSW Police Force response to Recommendation 4:** The NSW Police Force has stated that it supports this recommendation.<sup>433</sup>

### 6.4.3 STATUTORY REQUIREMENT FOR INDEPENDENT AUDITING OF THE REGISTER

In Chapter 9 we discuss the gaps in the governance and accountability arrangements regarding the administration of the Register by the NSW Police Force. We note that in Victoria, a statutory requirement was introduced for the Independent Broad-based Anti-corruption Commission (IBAC) to monitor the maintenance of the Sex Offender Register by Victoria Police. We recommend in that chapter that similar provisions for independent auditing of the implementation of the statutory framework for the Register be inserted into the CPOR Act (or its successor).<sup>434</sup> The NSW Police Force has stated that it supports that recommendation.<sup>435</sup>

## 6.5 RECOMMENDATIONS TO THE NSW POLICE FORCE

### 6.5.1 NEED FOR AT LEAST ONE DEDICATED LEGAL OFFICER IN THE REGISTRY

The NSW Police Force has not created a dedicated legal officer position within the Registry, despite this being recommended by the NSW Police Force Workforce Intelligence Unit in 2017, by the Registry Manager in his 2018 report on the management of the Register, and by the Commission in its interim report on Operation Tusk.<sup>436</sup>

The Workforce Intelligence Unit emphasised in its Register Staffing Review that:

The level of complexity and ambiguity with some CPR cases is often beyond the [Registry officer's] expertise. It is impossible to have a matrix that encompasses the numerous variables and exceptions that cover every CPR case. Each CPR case has to be treated on its own merits and circumstances. This highlights the importance of legal

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<sup>433</sup> Letter from Commissioner of Police, NSW Police Force, to Chief Commissioner, Law Enforcement Conduct Commission, 30 September 2019 (Annexure B – Submissions on Proposed Recommendations).

<sup>434</sup> See Recommendation 11 in Chapter 9 section 9.4.

<sup>435</sup> Letter from Commissioner of Police, NSW Police Force, to Chief Commissioner, Law Enforcement Conduct Commission, 30 September 2019 (Annexure B – Submissions on Proposed Recommendations).

<sup>436</sup> Workforce Intelligence Unit, Human Resources Command, NSW Police Force, *HR Analysis: Child Protection Register Staffing Review*, 20 July 2017, D/2017/630614, NSW Police Force response to item 1 of Law Enforcement Conduct Commission Notice 929 of 2017, p 50; NSW Police Force, *response to the interim report of Operation Tusk*, 23 October 2018, F/2018/94374; D/2018/851674, p 7; Manager, Child Protection Registry, NSW Police Force, *Management of the Child Protection Register in New South Wales: Michael O'Brien Scholarship 2017* (2018) NSW Police Force response to item 1 of Law Enforcement Conduct Commission Notice 929 of 2018, p 114.

advice on these matters, and emphasises the benefits of legal expertise in making an accurate determination of their registration and reporting periods.<sup>437</sup>

The analysis in this chapter and Appendix 2 of the difficulty of applying the CPOR Act in certain cases, and the risk of errors this creates, makes plain the need for Registry staff to have ready access to expert legal advice. Errors in the application of the CPOR Act can have very serious consequences, including child sex offenders being unmonitored, and other persons being wrongly convicted, as demonstrated by the case studies in Chapter 3.

The Workforce Intelligence Unit recommended that at least one legal officer position dedicated to providing legal support to the Registry should be established.<sup>438</sup> This was one of the Unit's key recommendations, which it identified as being 'critical' to addressing the issues facing the Registry.<sup>439</sup> The Workforce Intelligence Unit did not consider the legal support provided to the Registry by two legal officers in the State Crime Command to be sufficient, as both those officers also supported other squads. This led to delays in advice being provided, and reluctance on the part of Registry officers to overload those legal officers with requests for assistance.<sup>440</sup> The Workforce Intelligence Unit reported that:

Most [Registry] staff interviewed strongly advocated for the provision of dedicated legal support within the structure of the Registry. A dedicated legal officer...whose only functions were to support the activities of the Registry, would improve the time it takes to respond to enquiries and provide better and more consistent quality assessments of reporting periods and registrable offences.<sup>441</sup>

The Workforce Intelligence Unit emphasised the significant amount of legal support needed by Registry officers to interpret and apply the CPOR Act. It stated that due to a lack of capacity, legal officers were not involved in the quality assurance process for creating Register cases, even though this would 'greatly assist in lowering risks and errors'.<sup>442</sup> It stated that even once a dedicated legal officer position was established in the Registry, the Registry would still require support from the legal officers in the State Crime Command to manage the volume of legal work.<sup>443</sup>

While a full-time legal officer is currently 'on loan' to the Registry from the Prosecutions Command, the Commission does not consider this to be adequate to ensure that Registry staff have timely access to expert legal advice on an ongoing basis. This legal officer is also responsible for providing legal support to the Homicide Squad,<sup>444</sup> and the fact that the officer is 'on loan' means that the needs of other

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<sup>437</sup> Workforce Intelligence Unit, Human Resources Command, NSW Police Force, *HR Analysis: Child Protection Register Staffing Review*, 20 July 2017, D/2017/630614, NSW Police Force response to item 1 of Law Enforcement Conduct Commission Notice 929 of 2017, p 27.

<sup>438</sup> Ibid p 50.

<sup>439</sup> Ibid p 9.

<sup>440</sup> Ibid p 15.

<sup>441</sup> Ibid p 50.

<sup>442</sup> Ibid.

<sup>443</sup> Ibid.

<sup>444</sup> Governance, Risk & Compliance, NSW Police Force, *Child Protection Register – Governance and Accountability Arrangements for the NSW Police Force*, 12 December 2018, D/2018/1013232, NSW Police Force response to Law Enforcement Conduct Commission Notice 978 of 2018, p 7.

squads may in future cause that officer to be reallocated away from the Registry.

The NSW Police Force in its response to a draft of this final report stated that it 'agrees the Registry requires ongoing legal support' but 'does not want to restrict its legal services delivery model, noting that the Registry is supported by both the Police Prosecutions Command and the Office of the General Counsel'.<sup>445</sup>

The NSW Police Force has acknowledged that the statutory framework provided by the CPOR Act is 'complex, ambiguous, and provides for uncertainty',<sup>446</sup> and that the Registry faces 'significant challenges' in performing its functions under the current legislation.<sup>447</sup> To ensure that the Registry has guaranteed and ongoing access to the expert legal support it needs to apply such a difficult legal framework, a dedicated legal position, for the reasons given by the Workforce Intelligence Unit, is a necessity.

The Commission recommends that the NSW Police Force establish one (if not more) legal officer positions within the Registry, dedicated solely to supporting Registry staff, and ensure that position is filled as soon as possible.

**RECOMMENDATION 5: Establish a dedicated legal officer position in the Child Protection Registry.** The NSW Police Force establish at least one ongoing legal officer position within the Registry that is dedicated solely to supporting Registry staff, and fill that position as a matter of priority.

## 6.5.2 REGISTRABLE PERSONS SHOULD BE PROVIDED WITH THE BASIS FOR DECISIONS ABOUT THEIR STATUS AND REPORTING PERIOD

The Commission recommends that the NSW Police Force increase the transparency and accountability of its decision-making under the CPOR Act.

Once the NSW Police Force has determined that an offender is a registrable person under the CPOR Act, it would be beneficial for the NSW Police Force to provide that person with a letter setting out the factual and legal basis upon which it has concluded they are registrable. The letter should also inform the person of their reporting period, as at the date of the letter, and how that period had been calculated.<sup>448</sup>

This could be achieved by providing the registrable person with a document very similar to the 'Child Protection Registry Case Determination' form that the Registry currently completes for each new Register case. That form sets out the Registry's understanding of the details of the person's offending, and which sections of the CPOR Act apply to the person.

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<sup>445</sup> Letter from Commissioner of Police, NSW Police Force, to Chief Commissioner, Law Enforcement Conduct Commission, 30 September 2019 (Annexure B – Submissions on Proposed Recommendations).

<sup>446</sup> *NSW Police Force response to the interim report of Operation Tuskett*, 23 October 2018, F/2018/94374; D/2018/851613, pp 2 and 3.

<sup>447</sup> Letter from Commissioner of Police, NSW Police Force, to Chief Commissioner, Law Enforcement Conduct Commission, 23 October 2018, F/2018/94374, D/2018/851674.

<sup>448</sup> The letter would need to acknowledge that the person's reporting period would be subject to change if the person subsequently spent time in government custody, travelled overseas, or committed another registrable offence.

This information would enable registrable persons to alert the NSW Police Force to errors in details about their offending, or raise any legal questions regarding interpretation of the Act. It would therefore contribute towards quality assurance.

As a matter of principle and good administrative practice, when a decision is made that a person is required to comply with legal obligations which do not apply to other persons, that person should be given the reasons for that decision.

The NSW Ombudsman in its review of the first few years of the Register's operation noted there was support amongst those stakeholders who made submissions 'for an enhanced process to allow persons to question or better understand the calculation of their reporting period'.<sup>449</sup> The Ombudsman suggested that if, for example, the initial notification given to a person included information about how their reporting period had been calculated, this may reduce the requests for explanations or recalculations, and therefore have a positive impact on the Registry's workload.<sup>450</sup>

**RECOMMENDATION 6: Provide reasons for decisions under the CPOR Act.**

The NSW Police Force provide written notification to each person placed on the Register of the basis upon which their status as a registrable person and their reporting period has been determined, including the sections of the CPOR Act relied on. For persons already on the Register, this information is to be provided upon request.

**NSW Police Force response to Recommendation 6:** The NSW Police Force stated that it supports this recommendation.

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<sup>449</sup> New South Wales Ombudsman, *Review of the Child Protection Register: Report under s 25(1) of the Child Protection (Offenders Registration) Act 2000* (2005) p 92.

<sup>450</sup> Ibid p 111.

# 7.

## RESPONSIBILITIES OF COURTS AND OTHER AUTHORITIES IN RELATION TO THE REGISTER

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## 7.1 INTRODUCTION

The NSW Police Force is not the only organisation that has statutory obligations in relation to the Child Protection Register (the Register). The *Child Protection (Offenders Registration) Act 2000* (NSW) (the CPOR Act) and the *Child Protection (Offenders Registration) Regulation 2015* (NSW) (the CPOR Regulation) require courts and ‘supervising authorities’ to assist in the implementation of the Register. Supervising authorities include those agencies that supervise persons while they are serving their sentence, for example Corrective Services NSW or the Department of Justice.<sup>451</sup>

Under the CPOR Act courts are responsible for notifying the NSW Police Force and other authorities when they sentence a ‘registrable’ person. However, in practice, responsibility for determining that a person is registrable has fallen to the NSW Police Force. Courts and other authorities also have statutory obligations to notify persons about their reporting obligations under the CPOR Act.

Independent reviews of the CPOR Act have indicated that there have been problems with the performance of these interagency responsibilities for many years.<sup>452</sup> These problems and the impact they have had on the workload of the Child Protection Registry are discussed in this chapter.

Throughout Operation Tuskett we have worked with the NSW Police Force to facilitate interim solutions to some of the problems encountered by Registry staff created by the breakdown in performance of interagency responsibilities. These interim solutions are outlined in this chapter and we make recommendations regarding interagency governance arrangements in Chapter 9.

Ultimately, the respective roles of the courts, the NSW Police Force and supervising authorities in relation to the maintenance of the Register need to be reconsidered as part of the comprehensive legislative review of the CPOR Act that we recommend in Chapter 6.

## 7.2 COURTS’ OBLIGATIONS TO INFORM THE NSW POLICE FORCE AND OTHER AUTHORITIES THAT A REGISTRABLE PERSON HAS BEEN SENTENCED

The CPOR Act does not expressly give any agency or authority responsibility for determining whether a particular offender is a registrable person, or for deciding which reporting period applies to them under the CPOR Act.

However, s 4 of the CPOR Act requires the court that sentences a person for a registrable offence (the ‘sentencing court’) to notify the Commissioner of Police that it has done so, ‘as soon as practicable’ after the sentencing.<sup>453</sup> Section 4 also requires the sentencing court to notify the person’s ‘supervising authority’, and provide

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<sup>451</sup> *Child Protection (Offenders Registration) Regulation 2015* (NSW) reg 4.

<sup>452</sup> New South Wales Ombudsman, *Review of the Child Protection Register: Report under s 25(1) of the Child Protection (Offenders Registration) Act 2000* (2005); Ministry for Police and Emergency Services (NSW), *Report: Statutory review of the Child Protection (Offenders Registration) Act 2000* (2013).

<sup>453</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) s 4(2)(a).

written notification to the registrable person themselves of their reporting obligations under the CPOR Act.<sup>454</sup>

Parliament did not intend judicial officers to have a role in deciding whether or not a person was a 'registrable person' under the CPOR Act. In 2001, the Minister for Police stated during parliamentary debate about the CPOR Act (prior to the Act actually commencing):

The Act creates a system under which a person's registrable person status or registration period is not a matter for determination by the courts. Rather, these matters flow automatically from a finding of guilt, subject to very low sentencing thresholds being met, and the offender's overall registrable offence record. The role of the courts is simply to inform registrable persons of their obligations under the Act, with this being done by the administrative arm of the courts, rather than by the judiciary.<sup>455</sup>

Unfortunately it became clear early on that interpreting and applying the provisions of the CPOR Act to identify who was a registrable person was not a simple exercise. In many cases it required the consideration of a significant amount of information and the exercise of judgement, and could not merely 'flow automatically from a finding of guilt'.

In 2003 the NSW Ombudsman initiated a review of the first two years of operation of the Register.<sup>456</sup> The Director of Local Courts in her submission to the Ombudsman acknowledged there was 'a high incidence of written notification not being provided to registrable persons at the time a relevant sentence is imposed'.<sup>457</sup> She submitted that one of the main reasons for the courts' difficulties in notifying registrable persons of their obligations was the 'complex criterion applying to registrable persons'.<sup>458</sup> The Director further submitted that:

[court registry staff] must have regard to a variety of factors including the nature of the offence, the age of the victim, the existence of previous relevant convictions and the nature of the sentence imposed. The complexity of the interplay of these factors precludes any automatic electronic flag being created on case management systems to identify offenders as registrable persons.<sup>459</sup>

The Director of Local Courts raised the argument that:

... there is an 'inherent incongruity' in a situation that removes judicial officers from involvement in advising of registration obligations, but that retains the requirement for sentencing courts...this, combined with the complexity of the assessment process, creates an unreasonable burden for [court registry] staff.<sup>460</sup>

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<sup>454</sup> Under the CPOR Regulation this latter obligation, to notify the registrable person, has been removed from the sentencing courts in most cases and placed on supervising authorities and the NSW Police Force: see section 7.4 below.

<sup>455</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 20 June 2001, p 14854 (Paul Whelan, Minister for Police).

<sup>456</sup> New South Wales Ombudsman, *Review of the Child Protection Register: Report under s 25(1) of the Child Protection (Offenders Registration) Act 2000* (2005).

<sup>457</sup> Ibid p 54.

<sup>458</sup> Ibid.

<sup>459</sup> Ibid p 55.

<sup>460</sup> Ibid p 58.

The Director of Local Courts informed the NSW Ombudsman that given the difficulty court staff experienced in applying the CPOR Act, the NSW Police Force had agreed to assist those staff to identify registrable persons. The NSW Police Force would identify when a person had been charged with a registrable offence, and would notify the court staff by filing a particular form with the court papers, with the information necessary to apply the CPOR Act (except finding of guilt and sentence).<sup>461</sup> After sentencing, court staff would complete the form and send it to the NSW Police Force Registry.<sup>462</sup>

The difficulties court staff experienced in attempting to determine which offenders were ‘registrable persons’ under the CPOR Act resulted in that responsibility being shifted onto the NSW Police Force, specifically the Child Protection Registry (the Registry). In practice it is the Registry that makes the ultimate decision as to whether a person meets the definition of a registrable person under the CPOR Act, and creates a Register case for the person.<sup>463</sup>

The Registry also notifies the person’s supervising authority that it has a registrable person under its supervision, and calculates the person’s reporting period.<sup>464</sup>

## 7.3 REGISTRY’S RELIANCE ON INFORMATION FROM COURT PROCEEDINGS

The Registry requires the details of the offence or offences a person was sentenced for, the sentence they received, the offender’s age at the time, and the facts of any relevant previous convictions, in order to accurately determine whether that person is required to be placed on the Register, and if so, the length of their reporting period.

It is common for changes to charges and/or to facts (proven or agreed between the prosecution and defence) to occur during criminal proceedings. Such changes must be communicated to Registry staff in order for them to make correct decisions under the CPOR Act about a person’s ‘registrable’ status and their reporting period.

### 7.3.1 DIFFICULTIES WHICH ARISE WHEN CHARGES ARE AMENDED OR REPLACED

Registry staff advised us that problems can arise when prosecutors amend or withdraw charges involving registrable offences, and replace them with charges for non-registrable offences.<sup>465</sup> Registry staff stated this occurs on a weekly basis. If the

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<sup>461</sup> Ibid p 55 and p 198.

<sup>462</sup> Ibid p 198.

<sup>463</sup> NSW Police Force, *Child Protection Register Standard Operating Procedures* (2016) NSW Police Force response to item 7 of Law Enforcement Conduct Commission Notice 929 of 2017, pp 16-17.

<sup>464</sup> NSW Police Force, *Child Protection Register Standard Operating Procedures* (2016) NSW Police Force response to item 7 of Law Enforcement Conduct Commission Notice 929 of 2017, p 17.

<sup>465</sup> Law Enforcement Conduct Commission consultation with NSW Police Force, Parramatta, 18 October 2018.

Registry is not made aware of these changes, it can result in persons being incorrectly placed on the Register.

Difficulties also arise when, during sentencing for a non-registrable offence (the principal offence), the offender asks the court to take into account registrable offences for which he or she has been charged, but not convicted. This is a sentencing practice referred to as 'taking into account matters on a Form 1'.<sup>466</sup> An example is the case of Mr SS in Case Study 9 below.

#### **CASE STUDY 9: Person incorrectly placed on the Register after charges replaced at court**

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Mr SS<sup>467</sup> was charged by the NSW Police Force with multiple registrable offences in 1999. However, during the court proceedings it appears the decision was made to prosecute Mr SS for a different offence, which was not a registrable offence. He was convicted for that non-registrable offence in 2001. However, when the judge was calculating the sentence to impose on Mr SS for the non-registrable offence, Mr SS asked the judge to 'take into account' other charges he had not been convicted of, including the registrable offences from 1999.

It appears that after his conviction for the non-registrable offence, the NSW Police Force concluded Mr SS was a registrable person under the CPOR Act because his registrable offences from 1999 had been taken into account for the purposes of his sentencing. He was placed on the Register in August 2004.

However, if a person's registrable offences are only listed on a Form 1 and 'taken into account' during sentencing, the person will not be a registrable person under the CPOR Act.<sup>468</sup>

In October 2016 the NSW Police Force discovered what had occurred in Mr SS's case, and concluded that he should never have been placed on the Register.

The Registry staff also informed the Commission that they have experienced problems with accessing information about court outcomes when the Commonwealth Director of Public Prosecutions (CDPP) takes over the prosecution of a registrable offence.<sup>469</sup> They informed us that the CDPP will often withdraw the

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<sup>466</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 3 div 3; *Attorney General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002* [2002] NSWCCA 518 [2].

<sup>467</sup> Mr SS's case was referred to in an email produced by the NSW Police Force in response to Law Enforcement Conduct Commission Notice 977 of 2018: Email from Inspector, NSW Police Force, to Child Protection Registry, NSW Police Force, *Subject: re reporting period errors*, 25 October 2016. The Commission retrieved additional information about Mr SS's case from COPS and JusticeLink.

<sup>468</sup> An offender is only a registrable person if he or she has been 'sentenced in respect of a registrable offence': *Child Protection (Offenders Registration) Act 2000* (NSW) s 3A. The Court of Criminal Appeal has stated that when a court takes into account offences on a Form 1, it is not sentencing **for** those offences, only for the principal offence: *Attorney General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002* [2002] NSWCCA 518 [35]-[39].

<sup>469</sup> Law Enforcement Conduct Commission consultation with NSW Police Force, Parramatta, 11 April 2018, and Law Enforcement Conduct Commission consultation with NSW Police

charges for registrable offences initially laid by the NSW Police Force and replace them with other charges for (Commonwealth) registrable offences. These replacement charges do not get entered into the NSW Police Force Computerised Operational Policing System. Unless the CDPP manually notifies the Registry about the replacement charges, the Registry will not know if the person is convicted and sentenced for those replacement offences.

### 7.3.2 DIFFICULTIES WHEN PERSONS CHARGED WITH REGISTRABLE OFFENCES ARE FOUND TO BE SUFFERING FROM MENTAL IMPAIRMENT OR ILLNESS

On occasion persons charged with registrable offences are dealt with by courts under the *Mental Health (Forensic Provisions) Act 1990* (NSW) (Mental Health (FP) Act) due to their mental impairment or illness.

Under the CPOR Act, a person will become registrable if a sentencing court makes certain orders under the Mental Health (FP) Act which result in the person being held in custody or detained.<sup>470</sup> The Registry requires access to detailed information about the terms of the orders made under the Mental Health (FP) Act to apply the CPOR Act correctly.

Registry officers informed us that it is very difficult for them to get the information necessary to determine if a relevant order has been made under the Mental Health (FP) Act. They advised that it is challenging to get access to information about orders or other determinations that have been made in a person's case after their case has been referred to the Mental Health Review Tribunal.<sup>471</sup> There is no system which notifies the Registry when an order has been made under the Mental Health (FP) Act. An officer in the Registry must monitor the progress of a case over months or even years, and periodically call a contact person in NSW Health or the court to request information about the status of a person's case.<sup>472</sup>

Even if Registry officers are able to identify that a relevant order has been made under the Mental Health (FP) Act, and therefore that the person is a registrable person, the officers then need to determine whether the terms of the order made are such that the person should be considered to be in 'government custody'. If they meet the definition of government custody in the CPOR Act, their reporting obligations will be suspended.<sup>473</sup> If they do not, those persons are required to report their personal information to police, and will potentially be committing an offence if they fail to do so.

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Force, Parramatta, 18 October 2018. See *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017* (NSW).

<sup>470</sup> These include an order under s 24(1)(b) of the *Mental Health (Forensic Provisions) Act 1990* (NSW) that 'causes a person to be kept in custody', or any 'order of detention' under s 27 or s 39 of that Act: *Child Protection (Offenders Registration) Act 2000* (NSW) s 3 (definition of 'sentence').

<sup>471</sup> Law Enforcement Conduct Commission consultation with NSW Police Force, Parramatta, 11 April 2018.

<sup>472</sup> Law Enforcement Conduct Commission consultation with NSW Police Force, Parramatta, 11 April 2018.

<sup>473</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) s 15(1)(a).

Determining whether a person dealt with under the Mental Health (FP) Act meets the definition of being in government custody is itself a complex exercise in legal interpretation. It will depend on whether the person is permitted to leave the facility in which they are receiving treatment under the Mental Health (FP) Act on a regular basis, and if so on what conditions.<sup>474</sup> The statutory review of the CPOR Act conducted by the Ministry for Police and Emergency Services in 2013 noted that there were eight different types of leave that a forensic patient can be granted during their treatment.<sup>475</sup> Inaccurate or incomplete information about which type of leave a registrable person has been granted will impact on the accuracy of the information on the Register.

## 7.4 OBLIGATIONS ON COURTS AND SUPERVISING AUTHORITIES TO NOTIFY REGISTRABLE PERSONS ABOUT THEIR REPORTING OBLIGATIONS

The CPOR Act requires that a registrable person be given written notice of their reporting obligations, and the consequences if they fail to comply with those obligations, 'as soon as practicable' after the person is sentenced.<sup>476</sup> The NSW Police Force refers to this notification as a 'Form 3'. A Form 3 informs a registrable person that they are required to attend a police station within seven days to provide the personal information required under the CPOR Act.<sup>477</sup>

It is important that a Form 3 is signed by the registrable person and a copy provided to the Registry, as it may be necessary in a prosecution for the offence of failure to comply with reporting obligations under s 17 of the CPOR Act, to prove that the person was aware of their obligations.<sup>478</sup>

Under the CPOR Act and CPOR Regulation, which authority is responsible for serving the Form 3 on a registrable person depends upon the type of sentence the person receives. For example:

- If a registrable person is sentenced to imprisonment, it is the responsibility of the Department of Justice to serve a Form 3 on the person (in practice this is performed by staff at Corrective Services NSW just prior to the person's release from custody).<sup>479</sup> This situation applies to the majority of registrable persons, and therefore most Form 3s are required to be served by Corrective

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<sup>474</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) s 3 (definition of 'government custody' and 'strict government custody').

<sup>475</sup> Ministry for Police and Emergency Services (NSW), *Report: Statutory review of the Child Protection (Offenders Registration) Act 2000* (2013), p 43.

<sup>476</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) s 4(1).

<sup>477</sup> *Form 3: Child Protection (Offenders Registration) Act 2000 Notice Issued to Registrable Person*, NSW Police Force response to item 22 of Law Enforcement Conduct Commission Notice 929 of 2017.

<sup>478</sup> It is a defence to an offence under s 17 if the registrable person establishes that they did not receive notice of (or were otherwise unaware of) their reporting obligations: *Child Protection (Offenders Registration) Act 2000* (NSW) s 17(3).

<sup>479</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) s 4(1), s 6(2) and s 22(3); *Child Protection (Offenders Registration) Regulation 2015* (NSW) reg 8(c).



Services NSW.<sup>480</sup> The NSW Police Force has implemented a process through which it advises Corrective Services NSW that a person is to be served a Form 3.<sup>481</sup>

- If the person becomes a forensic patient, service of the Form 3 is the responsibility of the Ministry of Health.<sup>482</sup>
- Sentencing courts generally retain the responsibility for serving Form 3s on those registrable persons who are not sentenced to forms of government custody.<sup>483</sup>

The Commissioner of Police has the power under the CPOR Act to give written notice to a registrable person about their reporting obligations if the Commissioner suspects that the person may not have received such a notice.<sup>484</sup>

The NSW Ombudsman's report on the Register in 2005 noted that stakeholders had reported problems with notification of registrable persons, particularly 'where notification has remained the responsibility of the courts'.<sup>485</sup> As noted above, the Director of the Local Courts acknowledged there had been 'a high incidence of written notification not being provided to registrable persons' at the point of sentencing due to the difficulty of determining who was a registrable person under the CPOR Act and other practical issues.<sup>486</sup>

Problems with notifications were raised again during the statutory review of the CPOR Act in 2013. That statutory review reported that '[t]he majority of stakeholders were unanimous in their views that processes driving the system of written notification were not working effectively'.<sup>487</sup> The Department of Attorney General and Justice advised the statutory review that in the eight years since the Ombudsman's report, there had been 'minimal change' to the processes for notifying registrable persons of their reporting obligations.<sup>488</sup> The practical problems with notification that the Director of Local Courts raised in 2003 had continued.<sup>489</sup>

The statutory review in 2013 emphasised that:

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<sup>480</sup> Workforce Intelligence Unit, Human Resources Command, NSW Police Force, *HR Analysis: Child Protection Register Staffing Review*, 20 July 2017, D/2017/630614, NSW Police Force response to item 1 of Law Enforcement Conduct Commission Notice 929 of 2017, p 61.

<sup>481</sup> Letter from Commissioner of Police, NSW Police Force, to Chief Commissioner, Law Enforcement Conduct Commission, 30 September 2019 (Annexure C – Requests for Corrections to the Final Draft Report).

<sup>482</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) s 4(1) and s 22(3) and *Child Protection (Offenders Registration) Regulation 2015* (NSW) reg 8(b).

<sup>483</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) s 4(1) and s 22(3) and *Child Protection (Offenders Registration) Regulation 2015* (NSW) reg 8(b).

<sup>484</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) s 7(1).

<sup>485</sup> New South Wales Ombudsman, *Review of the Child Protection Register: Report under s 25(1) of the Child Protection (Offenders Registration) Act 2000* (2005) p 54.

<sup>486</sup> *Ibid* p 55.

<sup>487</sup> Ministry for Police and Emergency Services (NSW), *Report: Statutory review of the Child Protection (Offenders Registration) Act 2000* (2013) p 34.

<sup>488</sup> *Ibid* p 35.

<sup>489</sup> *Ibid*.

The approach to effective notification does not lie with one agency. Each of the agencies have responsibilities requiring them to work together to ensure registrable person notifications are undertaken with clarity and in a timely manner. From a public safety and child protection aspect, it is imperative that the system work.<sup>490</sup>

That statutory review recommended that the Ministry for Police and Emergency Services lead further consultation between the supervising authorities to determine ways in which the system of written notification could be improved.<sup>491</sup>

However, the information provided by the NSW Police Force during Operation Tuskett suggests that the problems with service of Form 3s have continued. The NSW Police Force Workplace Intelligence Unit, which conducted a review of the Registry's work in 2017 (the Register Staffing Review), reported that:

... in reality court staff do not always serve a Form 3 to [sic] the offender even though the responsibility to do so is clearly stated in Section 4 of the [CPOR Act]. At times where it has been served, it was found that the offender's signature was missing, which voids it ...

The Registry has attempted to work with the Attorney General Department to ensure correct practices are in place for [Child Protection Register] matters, but it still proves to be a perennial problem.<sup>492</sup>

The Workplace Intelligence Unit recommended that the Registry 'continue to offer their help in providing training and advice to court staff on best practices for child protection matters'.<sup>493</sup> In December 2018, the NSW Police Force advised us that there is a 'CPR notification Committee' which includes Corrective Services NSW and the courts, which 'was notified of the form 3 process'. However, despite the Registry offering training to court staff, no training had been undertaken.<sup>494</sup>

In 2018 the Registry Manager reported that due to courts in New South Wales 'very rarely' serving notices of reporting obligations on registrable persons, staff in the Registry were required to 'track down the whereabouts of offenders and have local police officers, or Probation and Parole officers serve notification documents on the offender, which at times can be a laborious process'.<sup>495</sup>

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<sup>490</sup> Ibid p 36.

<sup>491</sup> Ibid.

<sup>492</sup> Workforce Intelligence Unit, Human Resources Command, NSW Police Force, *HR Analysis: Child Protection Register Staffing Review*, 20 July 2017, D/2017/630614, NSW Police Force response to item 1 of Law Enforcement Conduct Commission Notice 929 of 2017, p 61.

<sup>493</sup> Ibid.

<sup>494</sup> Governance, Risk & Compliance, NSW Police Force, *Child Protection Register - Governance and Accountability Arrangements for the NSW Police Force*, 12 December 2018, D/2018/1013232, NSW Police Force response to Law Enforcement Conduct Commission Notice 978 of 2018, p 8.

<sup>495</sup> Manager, Child Protection Registry, NSW Police Force, *Management of the Child Protection Register in New South Wales: Michael O'Brien Scholarship 2017* (2018), NSW Police Force response to item 1 of Law Enforcement Conduct Commission Notice 929 of 2018, p 96.

## 7.5 SUPERVISING AUTHORITIES' OBLIGATIONS TO INFORM THE NSW POLICE FORCE WHEN REGISTRABLE PERSONS ARE RELEASED FROM GOVERNMENT CUSTODY

Under s 6 of the CPOR Act supervising authorities are required to notify the NSW Commissioner of Police in writing whenever a registrable person is released from government custody (for example because they are granted parole, or finish their sentence of imprisonment, or are discharged from a mental health facility). This notice must be given as soon as practicable before or after the person leaves their supervision.

The NSW Police Force relies on these notifications to ensure that the information in the Register about a person's reporting obligations is kept up to date. Once a registrable person's reporting obligations have started, the NSW Police Force is required to suspend their obligations any time they enter government custody, for example, if they are imprisoned for subsequent offending.<sup>496</sup> When the person is released from custody, the NSW Police Force must restart their reporting obligations. The NSW Police Force must also extend the end-date for the person's reporting obligations by the length of time they spent in government custody.<sup>497</sup> In practice this is all done within the NSW Police Force Computerised Operational Policing System (COPS).

When the Register was established in 2001 the NSW Police Force set up electronic systems which enabled the Corrective Services NSW Offender Integrated Management System to automatically notify COPS when a registrable person entered full-time custody, and again when the person was released.<sup>498</sup>

However, at some point prior to 2014 these systems started malfunctioning. This resulted in registrable persons being in the community without the knowledge of the NSW Police Force, because their COPS records showed them as still being in custody. At the time of writing these systems had not yet been fixed, although an IT project to fix those systems was underway. The issues with the electronic systems and the need for the IT project to be prioritised and completed are discussed further in Chapter 8.

Until these systems are fixed, Registry officers need to manually restart and extend registrable persons' reporting obligations as soon as they leave government custody. These officers rely on notifications from Corrective Services NSW.

The NSW Police Force similarly relies on notifications from mental health facilities where registrable persons are in custody as forensic patients but are granted regular, unsupervised leave from those facilities.<sup>499</sup>

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<sup>496</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) s 15(1)(a).

<sup>497</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) s 15(2).

<sup>498</sup> Comments on Child Protection Register, NSW Police Force, *Serious concerns raised regarding the Child Protection Register (CPR) reporting period timeframes and lack of review of matters prior to case finalisation*, 26 May 2016, D/2016/277899, NSW Police Force response to item 7 of Law Enforcement Conduct Commission Notice 914 of 2017, p 9.

<sup>499</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) s 3 (definition of 'government custody' para (a), and definition of 'strict government custody') and s 6(1).

The NSW Police Force informed us in October 2018 that:

The reporting periods must be recalculated on each occasion an offender enters or exists custody, or spends time in a mental health facility. Unfortunately, the Registry is not always advised when this occurs, despite section 6 of the [CPOR Act], which creates a risk of error.

The Registry is also not advised under s 6 of the Act when a person ceases to be in strict government custody at a mental health facility as a forensic patient.<sup>500</sup>

If the Registry is not notified when registered persons enter or leave custody, it is unable to update their reporting period end dates as required by the CPOR Act.

## 7.6 INTERIM SOLUTIONS TO PROBLEMS WITH INFORMATION AND NOTIFICATIONS FROM OTHER AUTHORITIES

### 7.6.1 ACCESS TO COURTS INFORMATION SYSTEM

As the NSW Police Force has assumed the responsibility of determining which offenders are registrable persons under the CPOR Act, it is dependent on other authorities to provide it with the detailed information it needs to make these decisions correctly. Primarily this is information from the court proceedings about the person's offending and their sentence.<sup>501</sup>

During a consultation in April 2018, Registry staff advised us that their most reliable source of information about court results is JusticeLink, an online system that contains information recorded by court staff about outcomes following criminal proceedings. However, only two officers in the Registry had access to that system, and could only access local court information.<sup>502</sup>

In the Commission's interim report on Operation Tuskett we recommended that the NSW Police Force secure read-only access for all Registry staff to information in JusticeLink across all courts. In its response to our interim report, in October 2018 the NSW Police Force stated that the Registry staff had been allocated access to JusticeLink, and '[f]ormal arrangements are currently being finalised'.<sup>503</sup>

The Commission welcomes this improvement. However access to JusticeLink is only a partial and interim solution to the problems the Registry experiences with timely access to detailed information which is crucial if it is to correctly apply the CPOR Act. JusticeLink only contains the court outcomes; it does not contain the 'Agreed Facts' which are contained in hard copy files at the court (or with the prosecutors). These Agreed Facts often contain relevant details about the offences committed. Also, JusticeLink does not have the functionality to notify the Registry that a person has been sentenced for a registrable offence.

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<sup>500</sup> NSW Police Force response to the interim report of Operation Tuskett, 23 October 2018, F/2018/94374; D/2018/851613, p 1.

<sup>501</sup> For discussion of the need for detailed information to determine who meets the definition of a registrable person under the CPOR Act, see Appendix 2 (parts 3 and 4).

<sup>502</sup> Law Enforcement Conduct Commission consultation with NSW Police Force, Parramatta, 11 April 2018.

<sup>503</sup> NSW Police Force response to the interim report of Operation Tuskett, 23 October 2018, F/2018/94374; D/2018/851613, p 4.

## 7.6.2 EXPLORING A ROLE FOR PROSECUTORS

In July 2017 the Workforce Intelligence Unit in its Register Staffing Review recommended that the Registry work with Police Prosecutors and the NSW Office of the Director of Public Prosecutions to improve court administrative processes, to ensure that documents such as the Agreed Fact Sheets are sent to the Registry.<sup>504</sup> We were advised by the NSW Police Force in December 2018 that there has been no change to these practices.<sup>505</sup>

In November 2018 the Commission facilitated a meeting with senior officers from the Child Abuse and Sex Crimes Squad, the Registry and the Prosecutions Command of the NSW Police Force to discuss the merits of a role for prosecutors in passing on factual information to the Registry in a subset of complex cases. There was general agreement about the importance of the Registry having access to detailed information about the sentencing of a person who is potentially registrable under the CPOR Act. There was also agreement that prosecutors are well placed to provide this information. However, the Acting Director from the Prosecutions Command ultimately favoured the development of an electronic system to automatically send this information from the courts to the Registry. Such a system would need to be implemented by the Department of Justice.<sup>506</sup>

In November 2018 the Commission wrote to the NSW Director of Public Prosecutions, informing him of our investigation, and the Registry's need for detailed information about the offences for which a person has been convicted in order to apply the CPOR Act. The Commission suggested that staff in the Office of the Director of Public Prosecutions may be best placed to directly provide this information to the Registry.

The Commission encourages the NSW Police Force to continue consultations between the Registry and Prosecutions Command, as well as with the NSW Office of the Director of Public Prosecutions, to explore ways of improving the flow of information to the Registry.

Ultimately, the issue of which authority should be responsible for identifying registrable persons must be considered as part of the review of the CPOR Act we recommend in Chapter 6.

## 7.6.3 ACCESS TO CORRECTIVE SERVICES NSW INFORMATION SYSTEM

The Registry requires information about a person's criminal history to correctly calculate a person's reporting period. The NSW Police Force must also adjust

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<sup>504</sup> Workforce Intelligence Unit, Human Resources Command, NSW Police Force, *HR Analysis: Child Protection Register Staffing Review*, 20 July 2017, D/2017/630614, NSW Police Force response to item 1 of Law Enforcement Conduct Commission Notice 929 of 2017, p 61 (rec 14).

<sup>505</sup> Governance, Risk & Compliance, NSW Police Force, *Child Protection Register - Governance and Accountability Arrangements for the NSW Police Force*, 12 December 2018, D/2018/1013232, NSW Police Force response to Law Enforcement Conduct Commission Notice 978 of 2018, p 8.

<sup>506</sup> Email from Police Prosecutions Command, NSW Police Force, to Law Enforcement Conduct Commission, 20 December 2018.



persons' reporting periods for times spent in government custody. The majority of this information is contained in custodial records maintained by Corrective Services NSW in its Offender Integrated Management System (OIMS).

In 2015 and in 2016 the Registry Manager contacted the Assistant Commissioner (Corrections and Strategy) at Corrective Services NSW, seeking access for Registry staff to OIMS, to make it easier for them to keep the information on the Register up to date.<sup>507</sup> Although the Assistant Commissioner was supportive of the idea, the Registry staff were not granted access.<sup>508</sup>

In early 2018 the Registry Manager in his report on the management of the Register noted that despite his requests the Registry still did not have access to OIMS. He recommended that the Registry be given read-only access, stating it would 'save Registry staff an inordinate amount of time' and would be 'an invaluable tool to ... ensure accuracy in the Registry case creation and allocation process'.<sup>509</sup>

In July 2018 the Commission facilitated a meeting between the Assistant Commissioner (Corrections Strategy and Policy) at Corrective Services NSW, the Commander of the Child Abuse and Sex Crimes Squad and the Manager of the Registry. At that meeting the Assistant Commissioner stated that he could grant the Registry staff read-only access to OIMS if appropriate information security protections were in place.<sup>510</sup>

In the Commission's interim report in August 2018 we recommended that the NSW Police Force develop a Memorandum of Understanding with Corrective Services NSW to secure read-only access to OIMS for the Registry staff. The NSW Police Force informed us in October 2018 that an agreement was being drafted between the NSW Police Force and Corrective Services NSW to enable access to OIMS for the Registry staff. In December 2018 the Registry Manager informed us that his staff had been given access to OIMS.<sup>511</sup>

The Registry's access to OIMS will increase efficiency and reduce the risk of errors in the maintenance of the Register. However, there remains an urgent need for the IT project to upgrade the interface between OIMS and COPS to be completed, so that the automated links between OIMS and COPS can be re-established (see further the discussion in Chapter 8).

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<sup>507</sup> Email from Child Protection Registry, NSW Police Force, to Corrections Strategy and Policy, Corrective Services NSW, 15 December 2015, NSW Police Force response to item 4 of Law Enforcement Conduct Commission Notice 929 of 2017; Email from Child Protection Registry, NSW Police Force, to Corrections Strategy and Policy, Corrective Services NSW, 23 May 2016, NSW Police Force response to item 4 of Law Enforcement Conduct Commission Notice 929 of 2017.

<sup>508</sup> Email from Corrections Strategy and Policy, Corrective Services NSW, to Child Protection Registry, NSW Police Force, 15 December 2015, NSW Police Force response to item 4 of Law Enforcement Conduct Commission Notice 929 of 2017.

<sup>509</sup> Manager, Child Protection Registry, NSW Police Force, *Management of the Child Protection Register in New South Wales: Michael O'Brien Scholarship 2017* (2018), NSW Police Force response to item 1 of Law Enforcement Conduct Commission Notice 929 of 2018, p 10 and p 50.

<sup>510</sup> Law Enforcement Conduct Commission consultation with NSW Police Force, Sydney, 26 July 2018.

<sup>511</sup> Law Enforcement Conduct Commission consultation with NSW Police Force, Sydney, 4 December 2018.



## 7.7 CONCLUSION

It is clear that the practice of how registrable persons are identified, and the flow of information between the various agencies and authorities with statutory obligations in relation to the Register, has departed significantly from that intended by Parliament when the CPOR Act commenced in 2001.

The CPOR Act provides for a system of notifications, between courts, supervising authorities, the NSW Police Force, and registrable persons. However according to the Ombudsman's report in 2005 and the statutory review of the CPOR Act in 2013, there have been problems with these notification processes more or less since the legislation commenced. The CPOR Act does not contemplate the NSW Police Force having primary responsibility for interpreting and applying its provisions to determine who is required to be included on the Register, but this is what is currently occurring.

In its response to the Commission's interim report on Operation Tuskett, the NSW Police Force emphasised that it 'is only one part of a multi-agency approach promoted by the legislation'.<sup>512</sup> It highlighted the need for an 'overarching governance structure' across the different agencies with responsibilities under the CPOR Act. We discuss this proposal and make relevant recommendations in Chapter 9.

Ultimately, the roles of the courts, the NSW Police Force, and supervising authorities in relation to the Register need to be reconsidered as part of the comprehensive review of the CPOR Act that we recommend in Chapter 6.

It is clear that sentencing courts are in possession of the greatest amount of information about a person's offending. This may make them best placed to identify who meets the definition of a registrable person.

The statutory review of the CPOR Act in 2013 noted:

The Review understands that at the time of the Ombudsman's Report the intention was that judicial officers have no role in the registration process. However, with the passage of time and the importance of notification, [Department of Attorney-General and Justice – Courts and Tribunals Services] has suggested it may be appropriate to revisit this.<sup>513</sup>

The Commission supports the proposal of judicial officers having a role in the application of the CPOR Act (or its successor). Given the complexity of the CPOR Act, the Commission agrees with the NSW Police Force that '[t]he error rate could be significantly reduced, if the sentencing court applies the provisions of the CPOR Act and issues [written notification] on sentence, that includes the correct reporting period as set out in the legislation'.<sup>514</sup> This is, however, a question for Parliament.

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<sup>512</sup> *NSW Police Force response to the interim report of Operation Tuskett*, 23 October 2018, F/2018/94374; D/2018/851613, p 2.

<sup>513</sup> Ministry for Police and Emergency Services (NSW), *Report: Statutory review of the Child Protection (Offenders Registration) Act 2000* (2013) p 35 (citations omitted).

<sup>514</sup> *NSW Police Force response to the interim report of Operation Tuskett*, 23 October 2018, F/2018/94374; D/2018/851613, p 6.

The Commission also agrees with the NSW Police Force that the ‘practical application of s 6 of the [CPOR] Act’, being the obligations on supervising authorities to notify the NSW Police Force whenever a person is released from custody, and the notification obligations more generally, should also form part of the legislative review.<sup>515</sup>

The law reform process that we recommend occur in Chapter 6 would create an opportunity to clarify where the responsibilities should lie for notifying registrable persons about their reporting obligations under the CPOR Act. This process should consider how the current statutory arrangements, include the notification obligations of sentencing courts and supervising authorities, have operated in practice.

To address the concerns outlined in this chapter the law reform process should include consideration of the proposal that judicial officers be required to determine whether a person meets the statutory definition of a registrable person, and make the initial determination as to their reporting period.

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<sup>515</sup> Ibid p 7.

# 8.

## ISSUES WITH ELECTRONIC SYSTEMS USED TO MAINTAIN THE REGISTER

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## 8.1 INTRODUCTION

The NSW Police Force uses its Computerised Operational Policing System (COPS) to help identify when a person has been sentenced for a registrable offence, and to record all the information on the Child Protection Register (the Register). The Register information is stored in a specific part of the system called 'CPR COPS'.

Once the Registry has determined that an offender is a registrable person under the *Child Protection (Offenders Registration) Act 2000* (NSW) (CPOR Act), it creates a 'CPR case' for the person in CPR COPS. The Registry enters the date that the person's reporting obligations under the CPOR Act are due to end.

The Registry is responsible for keeping the information in CPR COPS up to date. This includes recording when a person's reporting obligations are 'suspended' because the person is in government custody,<sup>516</sup> and recording that their obligations have restarted (referred to as their case being 'reopened') as soon as they are released.

Officers in the Police Area Commands and Police Districts (local commands) who are responsible for managing registrable persons rely on the accuracy of the information in CPR COPS. If a registrable person's reporting periods are recorded in CPR COPS as 'suspended', until their case is reopened by the Registry, officers in the local commands will not know that the person should be making reports to the police.

The NSW Police Force set up automatic functions in CPR COPS in 2001 to suspend or reopen a person's case whenever they entered or left custody.

However, in 2014 Registry officers began to notice issues with the reliability of some of the automatic functions in CPR COPS, and in 2015 it was reported that these problems had resulted in registered child sex offenders being released into the community without being monitored by the NSW Police under the CPOR Act.

The NSW Police Force approved an IT project in 2017 to fix the issues with the automatic functions in CPR COPS. However, at the time of writing, this project still had not been completed. We recommend that the NSW Police Force ensure that the project is completed as soon as possible.

## 8.2 CREATION OF 'AUTO-SUSPEND' AND 'AUTO-REOPEN' FUNCTIONS FOR REGISTER CASES

Whenever a registrable person enters government custody, the Registry is responsible for updating their CPR COPS case to indicate that their reporting obligations under the CPOR Act are suspended.<sup>517</sup> When the person is released from custody, the Registry is required to 'reopen' their case to show that the person's reporting obligations have restarted. The Registry also must extend the person's reporting period end date by the amount of time the person was in custody.<sup>518</sup>

When the Register was established in 2001, functions were set up in CPR COPS to automatically 'suspend' registrable persons' reporting obligations when they entered government custody (the auto-suspend function), and reopen their cases when they

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<sup>516</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) s 15(1)(a).

<sup>517</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) s 15(1)(a).

<sup>518</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) s 15(2).

were released (the auto-reopen function).<sup>519</sup> These automatic functions worked because of an interface between COPS and the Corrective Services NSW Offender Integrated Management System (OIMS), through which OIMS sent automatic notifications to COPS (the OIMS interface).<sup>520</sup>

In 2014 Registry officers began to notice that there were issues with the reliability of these automatic functions in CPR COPS and the OIMS interface.

### 8.3 PROBLEMS WITH THE AUTO-SUSPEND AND AUTO-REOPEN FUNCTIONS RESULTED IN REGISTERED SEX OFFENDERS BEING UNMONITORED

In December 2014 officers in the Registry requested assistance from NSW Police Force Business and Technology Services (BTS) to look into an apparent problem that OIMS and CPR COPS were not working together to flag movements of registrable persons who were going in and out of custody.<sup>521</sup>

In early March 2015, an officer working in a local command raised concerns that deficiencies in the way the NSW Police Force tracked registrable offenders who were in custody were ‘essentially enabling [registrable persons] to “drop off the radar” and avoid monitoring’.<sup>522</sup> The officer reported that two registrable persons within his command had been released from custody but their case had not been reopened on CPR COPS. These two men’s cases are discussed in Case Studies 10 and 11. As a result of his COPS Register case not reopening, the person in Case Study 10 had avoided reporting to the NSW Police Force under the CPOR Act for a period of almost two years.

#### **CASE STUDY 10: Registered person not reporting for two years due to systems malfunction**

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Mr BB<sup>523</sup> was placed on the Register in 2005 following his conviction and imprisonment for sexual intercourse with a child. His reporting period was 15 years.

Between 2008 and 2012 Mr BB was convicted of a number of offences and spent multiple periods in prison. In November 2012, he was charged with multiple counts of assault and was refused bail. On 8 January 2013, while Mr BB was being

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<sup>519</sup> Comments on Child Protection Registry, NSW Police Force, *Serious concerns raised regarding the Child Protection Register (CPR) reporting period timeframes and lack of review of matters prior to case finalisation*, 26 May 2016, D/2016/277899, NSW Police Force response to item 7 of Law Enforcement Conduct Commission Notice 914 of 2017, p 9.

<sup>520</sup> Ibid.

<sup>521</sup> Child Protection Registry, NSW Police Force, *BTS Work Request Application Form*, 8 December 2014, D/2014/444902, NSW Police Force response to item 11 of Law Enforcement Conduct Commission Notice 929 of 2017.

<sup>522</sup> Officer, NSW Police Force, *Request for the New South Wales Police Force Child Protection Register, State Crime Command, to rectify current deficiencies*, 18 March 2015, D/2015/154123, NSW Police Force response to item 17(a) of Law Enforcement Conduct Commission Notice 929 of 2017, p 1.

<sup>523</sup> Mr BB’s CPR case file was produced by the NSW Police Force in response to item 2(a) of Law Enforcement Conduct Commission Notice 929 of 2018.

held on remand, the Registry marked his reporting obligations as ‘suspended – in custody’ on CPR COPS.

When Mr BB was acquitted of the charges and released in January 2013, his case on CPR COPS did not automatically reopen. As a result, for almost two years after he was released, Mr BB was recorded in CPR COPS as still being in custody, until 5 December 2014 when a member of the public alerted the police to his location in the community and the Registry manually reopened his case.

During this almost two year period, the NSW Police Force did not take any action against Mr BB for failing to comply with his reporting obligations under the CPOR Act, despite the fact he was arrested and granted bail (for offences unrelated to the Register) in August 2013 and in May 2014.

In March 2015, the NSW Police Force charged Mr BB with failing to comply with his reporting obligations. He was subsequently convicted on two counts and sentenced to 12 months’ imprisonment, with a non-parole period of 9 months.

#### **CASE STUDY 11: System failed to show high risk registered person had been released**

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In October 2000 Mr RR<sup>524</sup> was convicted of sexual intercourse with a child and aggravated indecent assault of a child and was sentenced to four years’ imprisonment, with a non-parole period of two years.

Mr RR was released on parole in October 2002, and the NSW Police Force determined he was a registrable person with a reporting period of 15 years.

In June 2014 Mr RR was arrested and charged with two counts of possessing child abuse material and one count of failing to comply with reporting obligations under s 17 of the CPOR Act. He was refused bail and was held on remand. As he was in custody, in July 2014 Mr RR’s reporting obligations were recorded as ‘suspended’ in CPR COPS.

In January 2015 Mr RR was convicted of all three offences and was sentenced to a minimum of six months’ imprisonment, backdated to reflect his time on remand.

In February 2015 Corrective Services NSW notified Mr RR of his obligation to report to a police station by 6 March 2015, and he was released.

On 1 March 2015 Mr RR attended a police station to report his details. Officers at the station realised that Mr RR’s ‘CPR case’ on COPS had not reopened when he was released from prison. They contacted the Registry and the Registry manually reopened his case.

The NSW Police Force completed a threat assessment for Mr RR which classified him as high risk. His offending subsequent to being put on the Register classified him under the CPOR Act as a person who would have reporting obligations for the remainder of his life.

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<sup>524</sup> Mr RR’s CPR case file was produced by the NSW Police Force in response to item 2(b) of Law Enforcement Conduct Commission Notice 929 of 2018.



## 8.4 REPORTS FROM THE REGISTRY ABOUT NEED TO FIX THE AUTO-SUSPEND AND AUTO-REOPEN FUNCTIONS

On 28 September 2015 the Registry Manager sent a request for ‘urgent assistance’ from BTS regarding the problem with the ‘auto-reopen’ function not working reliably to reopen Register cases in CPR COPS when registrable persons were released from custody.<sup>525</sup>

He reported that the Registry had initiated an audit of the registrable persons listed on CPR COPS with a status of ‘Suspended in custody’ in August 2015. It identified six registrable persons who had been living in the community and had not reported to police. It also identified one registrable person who had been released from custody in July 2005, and should have been reporting under the CPOR Act for 10 years, but he had never made an initial report to police.<sup>526</sup> Due to the failure of the auto-reopen function, the Registry had not been aware that these registrable persons had been released from prison.<sup>527</sup>

The Registry Manager stated the failure of the ‘auto-reopen’ function also meant that the reporting period end dates for many registrable persons could be incorrect, as they had not been extended for time spent in custody.<sup>528</sup>

The Registry Manager concluded that ‘[i]t would also appear that this has been the case for years with COPS, and it is unknown how many other Registrable Persons this may have affected’. He recommended that BTS address the issue ‘without delay’.<sup>529</sup> The Acting Commander of the State Crime Command supported the Registry Manager’s recommendation and noted:

The issue requires urgent consideration. A high degree of risk to NSWPF exists in the circumstances outlined...it is not only a risk for NSWPF; the community is also in jeopardy.<sup>530</sup>

From October 2015 to May 2016 four further reports were submitted raising the issues with the auto-suspend and auto-reopen function in CPR COPS and the OIMS interface.<sup>531</sup>

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<sup>525</sup> Child Protection Registry, NSW Police Force, *Request for urgent assistance from Business and Technology Services*, 28 September 2015, D/2015/486821, NSW Police Force response to item 3 of Law Enforcement Conduct Commission Notice 914 of 2017.

<sup>526</sup> Ibid.

<sup>527</sup> Ibid.

<sup>528</sup> Ibid.

<sup>529</sup> Ibid.

<sup>530</sup> Comments on Child Protection Registry, NSW Police Force, *Request for urgent assistance from Business and Technology Services*, 28 September 2015, D/2015/486821, NSW Police Force response to item 3 of Law Enforcement Conduct Commission Notice 914 of 2017.

<sup>531</sup> Child Protection Registry, NSW Police Force, *Further issues and risks identified within the Child Protection Registry*, 16 October 2015, D/2015/527743, NSW Police Force response to item 5 of Law Enforcement Conduct Commission Notice 914 of 2017 p 7; Child Protection Registry, NSW Police Force, *Serious concerns raised regarding the Child Protection Register (CPR) reporting period timeframes and lack of review of matters prior to case finalisation*, 26 May 2016, D/2016/277899, NSW Police Force response to item 7 of Law Enforcement Conduct Commission Notice 914 of 2017; *Business Risk Committee – Child Protection Register*, 12 April 2016, and *Business Risk Committee – Child Protection Register*, 9 May 2016,

## 8.5 AUTO-SUSPEND AND AUTO-REOPEN FUNCTIONS TURNED OFF AND IT UPGRADE PROJECT APPROVED

In June 2016 a Business Analyst appointed by BTS to examine the issues with the OIMS interface concluded that a joint project between the NSW Police Force, Corrective Services NSW and the Department of Attorney-General and Justice would be required to address the failings of the interface.<sup>532</sup>

In April 2017 the Commander of the Sex Crimes Squad reported that her staff had appeared before the Senior Officers board, which was chaired by the Deputy Commissioner of Field Operations:

to highlight the case that the Child Protection Registry has an urgent priority within the NSWPF to have the Child Protection Register (CPR) COPS application enhanced and have its interfaces with external systems (NSW Correction OIMS) replaced due to data quality issues which are leading to poor management of Registrable Persons in the community.<sup>533</sup>

In around June 2017 NSW Police Force approved the project to upgrade CPR COPS and the OIMS interface (the CPR COPS upgrade project).<sup>534</sup>

At around the same time the NSW Police Force disabled the auto-suspend and auto-reopen functions in CPR COPS.<sup>535</sup> This increased the workload for the Registry officers as once these automatic functions had been turned off, the Registry officers were required to:

- ‘perpetually review’ the accuracy of Register cases, because as soon as a registrable person went into or was released from custody, their CPR case would become inaccurate, and
- manually request custody reports from Corrective Services NSW, reopen the cases and re-calculate the reporting periods when registrable persons were released from custody.<sup>536</sup>

The Workforce Intelligence Unit within the NSW Police Force Human Resources Command completed a review of the Registry’s workload in July 2017 (the Register Staffing Review). The Workforce Intelligence Unit recommended that ‘the project to

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both in NSW Police Force response to item 11 of Law Enforcement Conduct Commission Notice 929 of 2017.

<sup>532</sup> Comments on Child Protection Registry, NSW Police Force, *Serious concerns raised regarding the Child Protection Register (CPR) reporting period timeframes and lack of review of matters prior to case finalisation*, 26 May 2016, D/2016/277899, NSW Police Force response to item 7 of Law Enforcement Conduct Commission Notice 914 of 2017, p 10.

<sup>533</sup> Email from Sex Crimes Squad, NSW Police Force, *Subject: Business risk report – Sex Crimes March 2017*, 10 April 2017, NSW Police Force response to item 19(a) of Law Enforcement Conduct Commission Notice 929 of 2017.

<sup>534</sup> *Child Protection Register – Business Risk Committee* – June 2017, NSW Police Force response to item 19(a) of Law Enforcement Conduct Commission Notice 929 of 2017.

<sup>535</sup> Workforce Intelligence Unit, Human Resources Command, NSW Police Force, *HR Analysis: Child Protection Register Staffing Review*, 20 July 2017, D/2017/630614, NSW Police Force response to item 1 of Law Enforcement Conduct Commission Notice 929 of 2017, p 7 and p 33.

<sup>536</sup> *Ibid* p 6 and p 33.

fix the COPS interface with OIMS should be prioritised and begin as soon as possible'.<sup>537</sup>

The Workforce Intelligence Unit emphasised the Registry would need to continue to 'perpetually review' the Register cases '[u]ntil the issues with COPS have been fixed'.<sup>538</sup> The Unit warned that '[t]he longer it takes to fix the issues with COPS, the more out of date and incorrect the [results of the review of Register case files] will be'.<sup>539</sup>

In early 2018 the Registry Manager recommended in his scholarship report on the management of the Register that the NSW Police Force prioritise the CPR COPS upgrade project.<sup>540</sup>

However, in December 2018 the NSW Police Force informed us that the CPR COPS upgrade project was still in the 'recruitment process for commencement'.<sup>541</sup> Therefore, despite the project being approved in mid-2017, and the Workforce Intelligence Unit's recommendation that it 'be prioritised and begin as soon as possible', 18 months later the project had not started. In September 2019 the NSW Police Force advised the Commission that the project was underway.<sup>542</sup>

## 8.6 DELAYS IN THE CPR COPS UPGRADE PROJECT HAS ONGOING IMPACT ON ACCURACY OF THE REGISTER

The delays in the implementation of the CPR COPS upgrade project, and the fact that Registry staff need to manually update Register cases for every period of incarceration until it is finished, will continue to have an impact on the workload of the Registry and the accuracy of information in the Register.

When the NSW Police Force completed its review of 5,749 Register files in September 2018 (the CPR case review), it found 906 (15.7 per cent) of those files contained errors due to the person's time in custody not having been recorded correctly.<sup>543</sup> This was the most common type of error detected by the CPR case review team, comprising 35 per cent of all cases found to contain inaccuracies.<sup>544</sup>

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<sup>537</sup> Ibid p 62.

<sup>538</sup> Ibid p 29.

<sup>539</sup> Ibid p 32.

<sup>540</sup> Manager, Child Protection Registry, NSW Police Force, *Management of the Child Protection Register in New South Wales: Michael O'Brien Scholarship 2017* (2018), NSW Police Force response to item 1 of Law Enforcement Conduct Commission Notice 929 of 2018, p 63.

<sup>541</sup> Governance, Risk & Compliance, NSW Police Force, *Child Protection Register – Governance and Accountability Arrangements for the NSW Police Force*, 12 December 2018, D/2018/1013232, NSW Police Force response to Law Enforcement Conduct Commission Notice 978 of 2018, p 8.

<sup>542</sup> Letter from Commissioner of Police, NSW Police Force, to Chief Commissioner, Law Enforcement Conduct Commission, 30 September 2019 (Annexure B – Submissions on Proposed Recommendations).

<sup>543</sup> NSW Police Force response to item 1 of Law Enforcement Conduct Commission Notice 988 of 2018. For the results of the CPR case review, see the table in Appendix 1.

<sup>544</sup> NSW Police Force response to item 1 of Law Enforcement Conduct Commission Notice 988 of 2018.

As illustrated by the case studies in this chapter, the consequences of these type of errors are significant. If Register cases are not reopened when registrable persons exit prison, those offenders may end up living in the community without being monitored under the CPOR Act.

Some persons on the Register frequently go in and out of prison. If the Registry officers are not aware of these periods of incarceration, they will not know to extend these offenders' reporting obligations, as required by the CPOR Act. Case Study 12, concerning Mr LL, demonstrates the extent to which certain offenders' reporting period end dates can become inaccurate if they are not extended for periods in custody. The NSW Police Force needed to add 900 days onto Mr LL's reporting period end date, due to time he had spent in prison after he had been put on the Register.

### **CASE STUDY 12: Person's reporting period extended by 900 days for time in custody**

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In September 2003 Mr LL<sup>545</sup> was convicted of two counts of sexual intercourse against a victim under 18 years' old and was sentenced to five years' imprisonment. He was placed on the Register. He was released in February 2008, at which point his reporting obligations under the CPOR Act started.

After 2008 Mr LL committed and was convicted of multiple offences, including failing to report under the CPOR Act, resulting in several different periods of incarceration. In total he spent almost 900 days in custody between May 2009 and December 2012.

In 2016 the CPR case review team reviewed Mr LL's case and realised that his reporting obligations had not been suspended and extended for his periods in custody, as required by s 15(1) and (3) the CPOR Act.

The NSW Police Force updated the Register and informed Mr LL that his reporting obligations would continue until 2025.

On 31 August 2019 there were 1,585 registrable persons whose reporting obligations were suspended as they were in custody at that time.<sup>546</sup> This group represents a future workload for the Registry, because as soon as each person is released the Registry will need to manually reopen their case and update the end date of their reporting period.

As discussed in Chapter 7,<sup>547</sup> in 2018 the Commission facilitated a meeting between Corrective Services NSW and the Child Abuse and Sex Crimes Squad, which ultimately resulted in the Registry officers being granted read-only access to OIMS. As an interim measure, this will save the Registry time in being able to access a

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<sup>545</sup> Mr LL's CPR case file was produced by the NSW Police Force in response to item 2(m) of Law Enforcement Conduct Commission Notice 929 of 2018.

<sup>546</sup> Letter from Commissioner of Police, NSW Police Force, to Chief Commissioner, Law Enforcement Conduct Commission, 30 September 2019 (Annexure D – Updated Statistics from the CPR Monthly Report and about Travel Requests).

<sup>547</sup> See section 7.6.

registrable person's custodial status and history without needing to request it from Corrective Services NSW.

However, CPR COPS does not notify the Registry when a registrable person enters or leaves custody, so there is no prompt in the system for the Registry to check OIMS for a particular offender. The Registry relies on manual notification from Corrective Services. The NSW Police Force advised us this does not always occur.<sup>548</sup>

Until the CPR COPS upgrade project is completed and these auto-suspend and auto-reopen functions are turned back on, there is an ongoing risk that the Registry will not know when it needs to manually reopen a registrable person's CPR case on COPS. This may lead to more registrable persons being unmonitored in the community or their reporting period end dates becoming incorrect. To address this risk, Registry staff must continue to 'perpetually review' Register cases, as noted by the Workforce Intelligence Unit, which impacts on the workload of those staff.

The Commission recommends that the NSW Police Force ensure the CPR COPS upgrade project is completed as soon as possible so that the automatic functions can again be utilised.

**RECOMMENDATION 7: Prioritise the 'CPR COPS' upgrade project.** The NSW Police Force prioritise the recruitment for the CPR COPS upgrade project to ensure that the project is completed as soon as possible.

**NSW Police Force response to Recommendation 7:** The NSW Police Force stated that it supports this recommendation. It advised (in September 2019) that the CPR COPS upgrade project was 'underway' and that it was anticipated that the interface between CPR COPS and OIMS would be completed in October 2019, and the remainder of the project would be completed by March 2020.<sup>549</sup>

## 8.7 CPR COPS DOES NOT NOTIFY REGISTRY WHEN A REGISTRABLE PERSON HAS BEEN SENTENCED

The Registry relies on the information in COPS to identify when a person has been charged with a registrable offence and when a person may have been sentenced for a registrable offence.

As discussed in Chapter 2, persons who are charged with potentially registrable offences are automatically flagged in CPR COPS.

Registry staff cannot process the case further until the person is convicted and sentenced for the offence, at which point they must decide if the person falls within the definition of a 'registrable person' under the CPOR Act.

Registry officers informed the Commission that CPR COPS does not notify them when there is a court outcome for a person who has been flagged as a potential

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<sup>548</sup> See the discussion in Chapter 7 section 7.5.

<sup>549</sup> Letter from Commissioner of Police, NSW Police Force, to Chief Commissioner, Law Enforcement Conduct Commission, 30 September 2019 (Annexure B – Submissions on Proposed Recommendations).

registrable person.<sup>550</sup> In order to identify whether any new registrable persons have been sentenced, Registry officers must open up every matter listed in a particular screen in CPR COPS<sup>551</sup> to check if a court outcome for any of those matters has been recorded since the previous day. The Registry officers must check every record on the screen every day, until a court outcome appears and they can determine whether they need to create a CPR case for the person.

For example, on 7 March 2017 there were 124 records on CPR COPS which the Registry needed to review that day, to determine if any of those persons had been sentenced for a registrable offence and needed to be put on the Register. In 54 of those cases there was a court outcome which the Registry needed to review.<sup>552</sup> The only way for the Registry to identify which of the 124 records had such an outcome was to open up each one.

This inefficient system for identifying registrable persons who need to be added to the Register creates unnecessary work for Registry officers. It also creates the risk that a registrable person will be missed being put on the Register, because the Registry is not aware that they have been sentenced. While the sentencing court is required under the CPOR Act to notify the NSW Police Force any time a registrable person is sentenced, as discussed in Chapter 7,<sup>553</sup> for a number of reasons this often does not happen in practice.

The Workforce Intelligence Unit noted in the Register Staffing Review that ‘inconsistencies and errors’ in the way Registry officers had monitored these records in CPR COPS in the past had resulted in persons ‘not being registered when they should have been’.<sup>554</sup> The Unit clearly spelt out the ‘inherent risk’ that if Registry staff are unable to adequately monitor records in CPR COPS to identify in a timely manner new Register cases that need to be created, local commands could have registrable persons ‘residing in their command but would be completely unaware of it.’<sup>555</sup>

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<sup>550</sup> Law Enforcement Conduct Commission consultation with NSW Police Force, Parramatta, 11 April 2018.

<sup>551</sup> Referred to in CPR COPS as the ‘Mismatch log’.

<sup>552</sup> Workforce Intelligence Unit, Human Resources Command, NSW Police Force, *HR Analysis: Child Protection Register Staffing Review*, 20 July 2017, D/2017/630614, NSW Police Force response to item 1 of Law Enforcement Conduct Commission Notice 929 of 2017, p 64.

<sup>553</sup> See section 7.2.

<sup>554</sup> Workforce Intelligence Unit, Human Resources Command, NSW Police Force, *HR Analysis: Child Protection Register Staffing Review*, 20 July 2017, D/2017/630614, NSW Police Force response to item 1 of Law Enforcement Conduct Commission Notice 929 of 2017, p 65.

<sup>555</sup> *Ibid.*



This problem with CPR COPS has existed for a number of years. Registry officers discussed this problem with BTS in November 2014, raising concerns that some records were 'slipping through the system'.<sup>556</sup> In December 2014 the officers sent a formal work request to BTS to see if these issues could be addressed.<sup>557</sup>

The Workforce Intelligence Unit recommended in its Register Staffing Review in July 2017 that the relevant screen in CPR COPS be updated 'to only show cases that are ready for a [Child Protection Register] case to be created' (ie those matters in which a sentence or other court outcome has been recorded).<sup>558</sup>

In December 2018 the NSW Police Force advised us that the improvement recommended by the Workforce Intelligence Unit will be included in the CPR COPS upgrade project mentioned above.<sup>559</sup> The need for these improvements, so that Registry staff can clearly identify each day any offenders who may need to be put on the Register, further supports our recommendation above that the NSW Police Force prioritise the completion of the CPR COPS upgrade project.

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<sup>556</sup> *Child Protection Register BTS Meeting Minutes*, 6 November 2014, p 2, attachment to Child Protection Registry, NSW Police Force, *BTS Work Request Application Form*, 8 December 2014, D/2014/444902, NSW Police Force response to item 11 of Law Enforcement Conduct Commission Notice 929 of 2017.

<sup>557</sup> Child Protection Registry, NSW Police Force, *BTS Work Request Application Form*, 8 December 2014, D/2014/444902, NSW Police Force response to item 11 of Law Enforcement Conduct Commission Notice 929 of 2017.

<sup>558</sup> Workforce Intelligence Unit, Human Resources Command, NSW Police Force, *HR Analysis: Child Protection Register Staffing Review*, 20 July 2017, D/2017/630614, NSW Police Force response to item 1 of Law Enforcement Conduct Commission Notice 929 of 2017, p 65.

<sup>559</sup> Governance, Risk & Compliance, NSW Police Force, *Child Protection Register – Governance and Accountability Arrangements for the NSW Police Force*, 12 December 2018, D/2018/1013232, NSW Police Force response to Law Enforcement Conduct Commission Notice 978 of 2018, p 8.

# 9.

## IMPROVING GOVERNANCE, QUALITY ASSURANCE AND ACCOUNTABILITY IN RELATION TO THE REGISTER

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## 9.1 INTRODUCTION

In 2014 and 2015 the NSW Police Force Child Protection Registry (the Registry) reported internally that there were a number of systemic issues which were impacting on the accuracy of the Child Protection Register (the Register).<sup>560</sup> These issues were discussed with the NSW Police Force Executive at internal forums in 2015 and in 2016.<sup>561</sup>

In 2016 the NSW Police Force also acknowledged at a corporate level the need to evaluate the functioning and resourcing of the Register. One of the strategies contained in the 2016-2018 NSW Police Force Corporate Plan was: 'Evaluate Child Protection Register resourcing and compliance arrangements'.<sup>562</sup>

The NSW Police Force has completed reviews relevant to this strategy, including a comprehensive analysis of the staffing of the Registry by the Workforce Intelligence Unit in the NSW Police Force Human Resources Command (the Register Staffing Review). This review was completed in July 2017, and made 22 recommendations.<sup>563</sup> Between 2016 and 2018 the NSW Police Force also completed a review of 5,749 Register case files in order to identify and correct errors (the CPR case review).<sup>564</sup>

During Operation Tuskett the NSW Police Force acknowledged the need to improve governance, quality assurance and accountability in relation to the Register.

In this chapter we discuss the gaps in governance and accountability arrangements between the NSW Police Force and other authorities with responsibilities under the *Child Protection (Offenders Registration) Act 2000* (NSW) (CPOR Act). We support the suggestion from the NSW Police Force that an interagency committee be established to determine the obligations and governance arrangements for the NSW Police Force and partner agencies with respect to the Register.

In addition we discuss the need to improve internal NSW Police Force governance and accountability measures between different parts of the NSW Police Force with responsibility for Register activities. Finally, we outline the need for independent auditing of the Register, designed to ensure the accuracy of the information on the Register and compliance by the NSW Police Force with the statutory framework for the Register.

The recommendations in this chapter are intended to improve governance and accountability, improve compliance with the CPOR Act and *Child Protection (Offenders Registration) Regulation 2015* (NSW) (the CPOR Regulation), and increase public confidence in the administration of the Register by the NSW Police

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<sup>560</sup> See Chapter 3 section 3.2.

<sup>561</sup> Letter from Commissioner of Police, NSW Police Force, to Chief Commissioner, Law Enforcement Conduct Commission, 30 September 2019, p 2.

<sup>562</sup> NSW Police Force, *NSW Police Force Corporate Plan 2016-2018* (2016), p 2 <[https://www.police.nsw.gov.au/\\_\\_data/assets/pdf\\_file/0008/474830/Corporate\\_Plan\\_A3\\_18\\_August\\_2017.pdf](https://www.police.nsw.gov.au/__data/assets/pdf_file/0008/474830/Corporate_Plan_A3_18_August_2017.pdf)>.

<sup>563</sup> Workforce Intelligence Unit, Human Resources Command, NSW Police Force, *HR Analysis: Child Protection Register Staffing Review*, 20 July 2017, D/2017/630614, NSW Police Force response to item 1 of Law Enforcement Conduct Commission Notice 929 of 2017. For a discussion of this review see Chapter 5 section 5.4.2.

<sup>564</sup> See Chapter 3 section 3.3.

Force in the future. However, without legislative reform, the risk of error in the Register cannot be entirely mitigated.

## 9.2 INTERAGENCY GOVERNANCE FRAMEWORK TO ENSURE COMPLIANCE WITH THE STATUTORY FRAMEWORK

In Chapter 7 we discussed the issues with compliance by courts and other authorities with their responsibilities under the legislative framework created by the CPOR Act and the CPOR Regulation. There are many factors contributing to the inconsistent performance by the courts and other authorities, including the complexity and ambiguity in the CPOR Act. However, these factors are exacerbated by the absence of an appropriate interagency governance framework that defines the roles, responsibilities and practices required of each authority.

In 2017 the Workforce Intelligence Unit in the NSW Police Force Human Resources Command recommended the creation of memorandums of understanding between the NSW Police Force and external agencies to outline agreed responsibilities and practices under the CPOR Act and the CPOR Regulation.<sup>565</sup> In December 2018 the NSW Police Force advised us that no new memoranda have been created.<sup>566</sup> The Commission is concerned that despite the recognition of the need for an interagency governance framework in 2017, none exists at the time of writing.

In his response to the Commission's interim report on Operation Tuskett, the NSW Commissioner of Police stated that until 'an overarching governance structure' is put in place there exists a level of risk of errors in the Register that cannot be properly mitigated.<sup>567</sup> He commented that:

The NSW Police Force is only one part of a multi-agency approach promoted by the legislation. The success of the register relies heavily on a coordinated system between legislated authorities, with an overarching governance structure in place that establishes responsibility for key compliance control activities.

The NSW Police Force is committed to working with the Commission to ensure that a proper governance structure is put in place across responsible government agencies.<sup>568</sup>

The NSW Police Force suggested a committee be set up comprising of all relevant authorities and chaired by the Department of Justice to discuss the obligations, compliance risks and mitigation strategies of each authority.<sup>569</sup> The Commission supports this suggestion.

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<sup>565</sup> Workforce Intelligence Unit, Human Resources Command, NSW Police Force, *HR Analysis: Child Protection Register Staffing Review*, 20 July 2017, D/2017/630614, NSW Police Force response to item 1 of Law Enforcement Conduct Commission Notice 929 of 2017, p 61 (Recommendation 15).

<sup>566</sup> Governance, Risk & Compliance, NSW Police Force, *Child Protection Register - Governance and Accountability Arrangements for the NSW Police Force*, 12 December 2018, D/2018/1013232, NSW Police Force response to Law Enforcement Conduct Commission Notice 978 of 2018, p 8.

<sup>567</sup> NSW Police Force, *NSW Police Force response to the interim report of Operation Tuskett*, 23 October 2018, F/2018/94374; D/2018/851674, p 2.

<sup>568</sup> Ibid.

<sup>569</sup> Ibid p 7.

**RECOMMENDATION 8: Establish an interagency Child Protection Register Committee.** The NSW Police Force initiate the establishment of a Child Protection Register Committee with relevant authorities to discuss and decide the obligations, compliance risks and mitigation strategies of each authority in relation to the statutory framework governing the Register.

It is desirable that a committee such as that described in Recommendation 8 develop an interagency framework or memorandum of understanding to implement the decisions of the NSW Police Force and other authorities regarding the administration of the Register.

The framework will need to define the roles, obligations, and desired outcomes for each authority and articulate measurable key performance indicators to support its functioning. In keeping with the principles of good interagency governance, consideration should also be given to setting up an interagency steering group consisting of senior representatives from each authority, developing a mechanism for joint case review, and implementing appropriate information sharing, administrative and recording procedures.

**RECOMMENDATION 9: Develop an interagency governance framework.** The NSW Police Force initiate the creation and implementation of a robust interagency governance framework to ensure consistent service delivery in accordance with each authority's responsibilities under the statutory framework for the Register.

**NSW Police Force response to Recommendations 8 and 9:** The NSW Police Force stated that it supports these recommendations 'to the extent that the NSWPF agrees to initiate an interagency governance review of the administration of the CPOR Act in order to promote the objectives of the Act...the NSWPF notes that the success of the review depends on the engagement and cooperation of other agencies.'<sup>570</sup>

### 9.3 INTERNAL NSW POLICE FORCE GOVERNANCE FRAMEWORK TO ENSURE COMPLIANCE WITH THE STATUTORY FRAMEWORK

*'There is scope to develop a more robust framework within the NSWPF to ensure greater accountability in management of the Child Protection Register.'*

– Manager, Child Protection Registry, NSW Police Force, 2018<sup>571</sup>

Within the NSW Police Force, responsibility for the administration of the Register is shared between the Registry (within the State Crime Command) and officers in the Police Area Commands and Police Districts (local commands). The Registry is the unit within the NSW Police Force with expertise in relation to the Register and CPOR Act. As outlined in Chapter 2, the Registry's key responsibilities are to identify

<sup>570</sup> Letter from Commissioner of Police, NSW Police Force, to Chief Commissioner, Law Enforcement Conduct Commission, 30 September 2019 (Annexure B – Submissions on Proposed Recommendations).

<sup>571</sup> Manager, Child Protection Registry, NSW Police Force, *Management of the Child Protection Register in New South Wales: Michael O'Brien Scholarship 2017* (2018), NSW Police Force response to item 1 of Law Enforcement Conduct Commission Notice 929 of 2018, p 12.

registrable persons, place them on the Register, and determine and update their reporting periods. However, the monitoring of the vast majority of registrable persons in the community, and the enforcement of their reporting obligations, is undertaken by the local commands in which the registrable persons live and report.<sup>572</sup>

### 9.3.1 LACK OF CONSISTENCY ACROSS NEW SOUTH WALES

Local commands across New South Wales perform Register-related activities differently from each other. The amount and nature of Register-related work required of each local command varies as the numbers of registrable persons, and those with high or extreme risk ratings, are not evenly distributed across the state. There are unofficial databases and record-keeping processes designed at local levels 'for convenience only' such as spreadsheets containing key data of registrable persons in the command.<sup>573</sup> While crime managers have the primary responsibility for management of registrable persons, they will generally delegate these responsibilities to other police officers.

However there have recently been significant improvements in this regard. As discussed in Chapter 5, in 2019 the NSW Police Force deployed 15 officers to local commands for the specific purpose of monitoring registrable persons. The NSW Commissioner of Police has advised that another 33 dedicated Register positions will be allocated to local commands in the coming years.<sup>574</sup>

The introduction of dedicated positions in local commands will likely over time bring consistency and expertise to the performance of Register-related activities at the local command level. However, this will be dependent on significant training, and the dedicated positions being allocated to local commands according to need.<sup>575</sup>

### 9.3.2 THE NEED TO IMPROVE THE ACCOUNTABILITY AND SUPPORT OF LOCAL COMMANDS

The NSW Police Force uses an intranet-based Command Performance Accountability System called COMPASS. This system 'contributes to the assessment and improvement of corporate performance', and includes monthly reporting.<sup>576</sup> The NSW Police Force also holds COMPASS forums which 'identify emerging risks and trends with organisation-wide consequences', and 'contribute to evidence based

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<sup>572</sup> See the discussion in Chapter 2 sections 2.5 and 2.6.

<sup>573</sup> Governance, Risk & Compliance, NSW Police Force, *Child Protection Register - Governance and Accountability Arrangements for the NSW Police Force*, 12 December 2018, D/2018/1013232, NSW Police Force response to Law Enforcement Conduct Commission Notice 978 of 2018, p 4.

<sup>574</sup> Letter from Commissioner of Police, NSW Police Force, to Chief Commissioner, Law Enforcement Conduct Commission, 30 September 2019, p 2.

<sup>575</sup> See further the discussion in Chapter 5 section 5.6.

<sup>576</sup> NSW Police Force, *Annual Report 2011-12*, p 13, <[https://www.police.nsw.gov.au/\\_\\_data/assets/pdf\\_file/0020/250148/2011-12\\_NSW\\_Police\\_Force\\_Annual\\_Report.pdf](https://www.police.nsw.gov.au/__data/assets/pdf_file/0020/250148/2011-12_NSW_Police_Force_Annual_Report.pdf)>.



decision-making and explore how to best achieve corporate objectives from alternative strategies'.<sup>577</sup>

The NSW Police Force identified issues with reporting mechanisms and statutory compliance in relation to the Register at a COMPASS forum in 2015.<sup>578</sup>

Recommendations from this forum led to changes in how the NSW Police Force recorded Register-related activities; from July 2015 these activities were recorded in COMPASS, rather than the Command Management Framework.<sup>579</sup>

Following these changes the Registry started producing a monthly report in COMPASS collating key performance indicators and providing it to the Senior Executive team, region commanders and local commanders.<sup>580</sup> The dataset in COMPASS is sourced from COPS and includes registrable persons who have failed to make an initial or subsequent report to police, and registrable persons whose DNA has not been collected.

While the Registry is the unit in the NSW Police Force with expertise in Register-related functions and activities, it has no role in monitoring local commands' compliance with the CPOR Act beyond collating the performance data for the monthly reports.<sup>581</sup> Analysis of this data could help identify whether local commands are compliant with their responsibilities under the CPOR Act, however, the Registry has not had the resources to undertake this kind of analysis,<sup>582</sup> and in any event, it has no 'line-command' supervisory responsibility to ensure local commands act on its recommendations.<sup>583</sup>

In addition, COMPASS targets are set by the Planning Team of the NSW Police Force Performance and Program Support Command based on risk assessment and corporate plan priorities. It does not appear that the Planning Team seeks the

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<sup>577</sup> Ibid.

<sup>578</sup> These issues were identified at the 'Sexual Violence COMPASS Forum' in February 2015: Governance, Risk & Compliance, NSW Police Force, *Child Protection Register – Governance and Accountability Arrangements for the NSW Police Force*, 12 December 2018, D/2018/1013232, NSW Police Force response to Law Enforcement Conduct Commission Notice 978 of 2018, p 4.

<sup>579</sup> Governance, Risk & Compliance, NSW Police Force, *Child Protection Register – Governance and Accountability Arrangements for the NSW Police Force*, 12 December 2018, D/2018/1013232, NSW Police Force response to Law Enforcement Conduct Commission Notice 978 of 2018, p 4.

<sup>580</sup> Ibid p 5.

<sup>581</sup> Manager, Child Protection Registry, NSW Police Force, *Management of the Child Protection Register in New South Wales: Michael O'Brien Scholarship 2017* (2018), NSW Police Force response to item 1 of Law Enforcement Conduct Commission Notice 929 of 2018, p 11.

<sup>582</sup> The Workforce Intelligence Unit of the NSW Police Force established in its Register Staffing Review in 2017 that due to the under-resourcing of the Registry, Registry officers were struggling to manage the volume of administrative work required to administer the Register, which was pulling sergeants away from other duties: Workforce Intelligence Unit, Human Resources Command, NSW Police Force, *HR Analysis: Child Protection Register Staffing Review*, 20 July 2017, D/2017/630614, NSW Police Force response to item 1 of Law Enforcement Conduct Commission Notice 929 of 2017, p 5.

<sup>583</sup> Manager, Child Protection Registry, NSW Police Force, *Management of the Child Protection Register in New South Wales: Michael O'Brien Scholarship 2017* (2018), NSW Police Force response to item 1 of Law Enforcement Conduct Commission Notice 929 of 2018, p 11.

Registry's input prior to determining the targets for local commands in relation to their responsibilities for the Register.<sup>584</sup>

In light of the complexity and ambiguity present in the statutory framework, and the risks associated with the administration of the Register, it appears prudent for the NSW Police Force to leverage the Registry's expertise to identify compliance risks and improve practice in local commands. This may also help to ensure consistency, identify local innovation, and implement best practice across the state.

The Registry Manager has explored the governance frameworks in place in other police jurisdictions that have offender registers.<sup>585</sup> He has proposed two relevant models for the NSW Police Force which could support the performance of Register-related activities in local commands. The first model would involve the creation of a Child Protection Register Committee or 'Governance Board' chaired by the Commander of the State Crime Command and including commanders from local commands and the Registry Manager.<sup>586</sup> This Committee or Governance Board could meet quarterly or every six months, and could provide a forum for senior police officers, informed by subject matter experts, to monitor and address emerging compliance issues within local commands, and for the Registry to support commands to address these issues and implement best practice.

Alternatively, the second model would involve the creation of a Child Protection Register Compliance Unit in each police region, supported by dedicated Registry staff.<sup>587</sup> The Compliance Unit could monitor compliance by the local commands within each region to ensure effective and consistent management of registrable persons across that region. Compliance Units could assist local commands to comply with all the obligations under the CPOR Act in relation to the collection of personal information of registrable persons, implement proactive strategies, and lead case reviews of matters where, for example, registrable persons are charged with a further registrable offence while on the Register.<sup>588</sup>

**RECOMMENDATION 10: Implement a Child Protection Register governance framework.** The NSW Police Force develop and implement a governance framework to ensure compliance by all local commands across New South Wales with the statutory framework for the Register. This framework should:

- leverage the expertise of the Child Protection Registry to support local commands and provide quality assurance;

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<sup>584</sup> Governance, Risk & Compliance, NSW Police Force, *Child Protection Register – Governance and Accountability Arrangements for the NSW Police Force*, 12 December 2018, D/2018/1013232, NSW Police Force response to Law Enforcement Conduct Commission Notice 978 of 2018, p 5.

<sup>585</sup> Manager, Child Protection Registry, NSW Police Force, *Management of the Child Protection Register in New South Wales: Michael O'Brien Scholarship 2017* (2018), NSW Police Force response to item 1 of Law Enforcement Conduct Commission Notice 929 of 2018, pp 10-12 and see generally.

<sup>586</sup> Ibid p 88.

<sup>587</sup> Ibid.

<sup>588</sup> Ibid pp 10-12, and see the discussion on p 32 of the benefits of undertaking a case review in circumstances where a registered person commits a further registrable offence such as a sexual assault.

- ensure that emerging compliance risks are identified and addressed, and
- contain appropriate reporting mechanisms to ensure future accountability.

**NSW Police Force response to Recommendation 10:** The NSW Police Force stated that it supports this recommendation.<sup>589</sup>

## 9.4 INDEPENDENT MONITORING OF COMPLIANCE

There is no provision in the CPOR Act for independent monitoring of NSW Police Force compliance with the statutory framework for the Register. Operation Tuskett has confirmed that there have been serious compliance issues with the Register for many years, resulting in a variety of consequences including child sex offenders being unmonitored in the community, persons being wrongly convicted and imprisoned for breaching reporting obligations under the CPOR Act which did not as a matter of law apply to them, and the consequent risk of successful civil claims against the State of New South Wales.

### 9.4.1 THE EXPERIENCE IN VICTORIA

New South Wales is not the only jurisdiction to experience significant problems in the administration of its sex offender registration scheme. In 2011, following a large investigation, the Victorian Ombudsman reported there had been ‘a systemic breakdown in the management of registered sex offenders’ in Victoria with children exposed to an unacceptable risk of harm from registered sex offenders.<sup>590</sup> The Victorian Ombudsman reported this systemic breakdown resulted from a number of factors including ‘inadequate commitment to the Sex Offenders Register by Victoria Police, partly due to a lack of resources’.<sup>591</sup>

In 2016 the *Sex Offenders Registration Act 2004* (Vic) (the Victorian Act) was amended to introduce a statutory requirement for the Independent Broad-based Anti-corruption Commission (IBAC) to monitor the maintenance of the Sex Offender Register by Victoria Police.<sup>592</sup> The IBAC now monitors police compliance with certain parts of the Victorian Act, including the provisions relating to registrable offenders’ reporting periods and reporting obligations. The IBAC has developed a methodology that enables audits of relevant records held by Victoria Police to be conducted within a reasonable timeframe and budget. Officers from the IBAC are given the power to enter Victoria Police premises, to inspect and copy documents, and to report to the Minister for Police about compliance by Victoria Police with the Victorian Act.<sup>593</sup> The

<sup>589</sup> Letter from Commissioner of Police, NSW Police Force, to Chief Commissioner, Law Enforcement Conduct Commission, 30 September 2019 (Annexure B – Submissions on Proposed Recommendations).

<sup>590</sup> Ombudsman Victoria, *Whistleblowers Protection Act 2001: Investigation into the failure of agencies to manage registered sex offenders* (2011) p 7.

<sup>591</sup> Ibid.

<sup>592</sup> *Sex Offenders Registration Act 2004* (Vic) pt 5B, inserted by the *Sex Offenders Registration Amendment Act 2016* (Vic).

<sup>593</sup> *Sex Offenders Registration Act 2004* (Vic) s 70N(1) and s 70O.

inspection reports produced by the IBAC are also laid before each House of Parliament and subsequently made public.<sup>594</sup>

In addition, under the Victorian Act, the Victorian Chief Commissioner of Police is required each year to report to the Minister for Police on the total number of registrable offenders, the number of new offenders added to the register, and the number of prohibition orders and registration orders put in place.<sup>595</sup> This provides a measure of public accountability for any increase in resources required and for the use of proactive tools available to police for the management of sex offenders in the community.

In June 2018 in its report on the audit of the Victorian Sex Offenders Register, the IBAC concluded there was ‘an effective framework for managing governance and operational issues within Victoria Police’<sup>596</sup> and that ‘Victoria Police continue to prioritise the work of the Registry in acquitting legislative responsibilities under the Act by continually assessing the workload demands created by the scheme.’<sup>597</sup> The IBAC stated Victoria Police were fully or substantially compliant with all audited categories,<sup>598</sup> and that:

[t]he open discussions between IBAC and staff at the Sex Offenders’ Registry, as well as the Registry’s willingness to engage constructively with IBAC’s oversight function, demonstrate Victoria Police’s continued commitment to meeting its statutory obligations and ensuring best practice...<sup>599</sup>

#### 9.4.2 PREVIOUS REVIEWS IN NEW SOUTH WALES

The CPOR Act has been the subject of a number of independent reviews including a review of the operation of the first two years of the Act by the NSW Ombudsman completed in 2005,<sup>600</sup> a statutory review completed in 2007,<sup>601</sup> and a statutory review completed in 2013.<sup>602</sup>

Aspects of the CPOR Act and the Register have also been examined as part of other broader reviews and inquiries including:

- NSW Sentencing Council, *Penalties Relating to Sexual Assault Offences in New South Wales*, volume 3 (2009);

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<sup>594</sup> *Sex Offenders Registration Act 2004* (Vic) s 700.

<sup>595</sup> *Sex Offenders Registration Act 2004* (Vic) s 70P(1).

<sup>596</sup> Independent Broad-based Anti-corruption Commission, *Report to the Minister for Police Pursuant to s 70N of the Sex Offenders Registration Act 2004* (Vic), 1 January 2015 to 31 December 2016 (2018) p 23.

<sup>597</sup> *Ibid.*

<sup>598</sup> *Ibid* p 7.

<sup>599</sup> *Ibid* p 24.

<sup>600</sup> New South Wales Ombudsman, *Review of the Child Protection Register: Report under s 25(1) of the Child Protection (Offenders Registration) Act 2000* (2005).

<sup>601</sup> Ministry for Police (NSW), *Report to Parliament: Review of Child Protection (Offenders Registration) Act 2000* (2007).

<sup>602</sup> Ministry for Police and Emergency Services (NSW), *Report: Statutory review of the Child Protection (Offenders Registration) Act 2000* (2013).

- NSW Ombudsman, *Responding to Child Sexual Assault in Aboriginal Communities: A report under Part 6A of the Community Services (Complaints, Reviews and Monitoring) Act 1993* (2012), and
- Parliament of New South Wales Joint Select Committee on Sentencing of Child Sexual Assault Offenders, *Every Sentence Tells a Story – Report on Sentencing of Child Sexual Assault Offenders* (2014).<sup>603</sup>

While these reviews identified issues with the implementation of the CPOR Act, they did not establish the longstanding errors in the Register. The extent of these errors has only emerged through interrogation of Register case files by the NSW Police Force and the Commission.

### 9.4.3 RECOMMENDATION FOR INDEPENDENT AUDITS

The Commission recommends that a similar audit and reporting process as successfully implemented in Victoria be adopted in New South Wales. The introduction of an audit role for the IBAC has helped improve and maintain compliance by Victoria Police with its obligations regarding the registration of sex offenders in that state. The compliance reports prepared by IBAC also assist to restore and maintain public confidence in the Victorian Sex Offenders Register and its administration by Victoria Police. Despite multiple reviews of the statutory framework in New South Wales, the extent and nature of the errors that have been made in the implementation of the NSW Register has not emerged publicly. This has had significant consequences for individuals and for community safety.

The Commission suggests that an independent audit of a sample of Register case files be undertaken every two years, or as necessary, to ensure compliance with the statutory framework. A report of the (de-identified) results of this compliance audit should be made public.

Independent auditing and de-identified public reporting would assist to restore and maintain public confidence in the registration and management of child sex offenders by the NSW Police Force into the future.

Such a mechanism requires legislative amendment.

**RECOMMENDATION 11: Introduce independent compliance auditing of the Child Protection Register.** Provisions should be included in the *Child Protection (Offenders Registration) Act 2000* (NSW) (or any Act which replaces it) for independent compliance audits of the Register, with publicly reported (and de-identified) results, similar to those in the *Sex Offenders Registration Act 2004* (Vic).

**NSW Police Force response to Recommendation 11:** The NSW Police Force stated that it supports this recommendation.<sup>604</sup>

<sup>603</sup> Joint Select Committee on Sentencing of Child Sexual Assault Offenders, Parliament of New South Wales, *Every Sentence Tells a Story – Report on Sentencing of Child Sexual Assault Offenders*, Report 1/55 (2014).

<sup>604</sup> Letter from Commissioner of Police, NSW Police Force, to Chief Commissioner, Law Enforcement Conduct Commission, 30 September 2019 (Annexure B – Submissions on Proposed Recommendations).

## 9.5 MONITORING OF THE NSW POLICE FORCE RESPONSE TO OUR FINDINGS AND RECOMMENDATIONS

The Commission will seek a progress report from the NSW Police Force in six months from the date of publication of this report, including details about what it has done to implement each of our recommendations. The progress report should include the reasons for not implementing any specific recommendations if that is the case. The Commission will publish a summary of the NSW Police Force response on our website.

In two years from the date of publication of this report, the Commission intends to conduct a follow-up inquiry into the administration of the Register by the NSW Police Force, to ensure it is consistent with statutory requirements. We will also examine the adequacy of the resourcing of the Registry and the governance and accountability arrangements put in place to ensure the information in the Register is accurate.



# **APPENDIX 1:** RESULTS OF THE NSW POLICE FORCE CHILD PROTECTION REGISTER CASE REVIEW

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# NSW POLICE FORCE CHILD PROTECTION REGISTER CASE REVIEW

In July 2016 the NSW Police Force initiated an internal review of Child Protection Register (Register) case files, referred to in this report as the 'CPR case review'.

The CPR case review was completed in October 2018, and reviewed 5,749 Register case files.<sup>605</sup> The review included Register files for persons whose Register cases had been finalised.

The Commission requested the final results of the CPR case review through a Notice to Produce Documents issued under s 55 of the *Law Enforcement Conduct Commission Act 2016* (NSW). The Commission also requested any documents containing analysis of, and/or commentary on the final results.

In response the NSW Police Force produced a copy of the table which is recreated below.<sup>606</sup> No documents containing analysis of or commentary on these results were provided.

**Table: Results of the CPR case review**

Grand Totals Year to... 2018		% of total audited
Correct	2913	50.60%
In custody not recorded correctly - EG time added/subtracted	906	15.70%
Reporting period correct but suspended in custody	279	4.85%
Reporting period increased - EG 8 to 15 years or LIFE	485	8.40%
Reporting period decreased - EG LIFE to 15 to 8 years	144	2.50%
Travel error	520	9%
Sentence date/Crim records/charge not linked	368	6.40%
Interstate (QLD) Error in reporting period notification	89	1.50%
Should not be on register	45	0.70%
Total	5749	

<sup>605</sup> NSW Police Force response to the interim report of Operation Tuskett, 23 October 2018, F/2018/94374; D/2018/851613, p 1; Grand totals year to date 2018, NSW Police Force response to item 1 of Law Enforcement Conduct Commission Notice 988 of 2018.

<sup>606</sup> NSW Police Force response to item 1 of Law Enforcement Conduct Commission Notice 988 of 2018.

# **APPENDIX 2:** ANALYSIS OF THE *CHILD PROTECTION (OFFENDERS REGISTRATION) ACT 2000 (NSW)*

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# 1. INTRODUCTION

The *Child Protection (Offenders Registration) Act 2000* (NSW) (CPOR Act) gives the NSW Commissioner of Police responsibility for ensuring that a Child Protection Register (the Register) is established and maintained, containing personal information about persons who have been convicted of sexual or certain violent offences involving children, or offences relating to child abuse material.<sup>607</sup> The Act requires ‘registrable persons’ to make an initial and then annual reports to the NSW Police Force of their personal details, and to report changes to their details, and travel plans, within certain timeframes.<sup>608</sup> If a person fails to comply with any of these reporting obligations, they may be liable for up to five years’ imprisonment.<sup>609</sup>

The CPOR Act commenced in October 2001. It has been amended 41 times. Some of the most significant amendments had retrospective application.<sup>610</sup>

In September 2017 the Law Enforcement Conduct Commission (the Commission) launched an investigation into the administration of the Register by the NSW Police Force (Operation Tuskett). After a review of Register case files, and initial consultations with the NSW Police Force, it became clear to the Commission that there are a number of significant problems with the CPOR Act, which can make implementation very difficult.

The Commission prepared a Consultation Briefing which included detailed and technical analysis of the problems it had identified with the CPOR Act. This Consultation Briefing was provided to the officers in the NSW Police Force Child Protection Registry (the Registry), the specialist unit in the NSW Police Force State Crime Command that is primarily responsible for maintenance of the Register, as well as legal officers in the State Crime Command who regularly assist the Registry. We conducted a consultation on 18 October 2018 with those officers, to hear their views on the problems with the Act.

This appendix contains our final analysis of the problems with the CPOR Act, which has been informed by the feedback from the officers consulted.<sup>611</sup>

The consensus between the Commission and the NSW Police Force is that there is an urgent need for comprehensive reform of the CPOR Act. The NSW Commissioner of Police has stated that the CPOR Act ‘has been enormously challenging for the NSWPF to administer’.<sup>612</sup> There are a number of areas of complexity, ambiguity and errors in the Act which may result, or have already resulted, in incorrect decisions being made about which persons are registrable under the Act, and how long other registrable persons are required by the Act to report their personal information to police (their ‘reporting periods’).

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<sup>607</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) s 19.

<sup>608</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) ss 9 – 11F.

<sup>609</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) s 17.

<sup>610</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) sch 2 pt 3, pt 4, and pt 8.

<sup>611</sup> Throughout this appendix the term ‘Registry officers’ is used to refer collectively to the officers in the Registry unit and the legal officers in the State Crime Command who regularly assist them.

<sup>612</sup> Letter from Commissioner of Police, NSW Police Force, to Chief Commissioner, Law Enforcement Conduct Commission, 30 September 2019, p 1.

This appendix includes case studies which illustrate how difficult it can be to apply the Act in practice. They also highlight the serious consequences which can flow from an incorrect decision about a person's registrable status, or the length of their reporting period. A number of persons in the case studies have been charged, convicted and sentenced, including to imprisonment, for offences under the CPOR Act which they did not commit.

This appendix identifies provisions of the CPOR Act which need to be redrafted in order to reduce the risk of errors in the Register. It also highlights approaches in other jurisdictions which may provide useful models for reform.

Given the extent of the deficiencies in the Act set out in this appendix, the Commission recommends that the entire CPOR Act be urgently referred to the NSW Law Reform Commission for review, to be completed in six months (see Chapter 6, Recommendation 3).

This report contains two other recommendations to address the risks of errors being made in relation to the Register which should also be considered in the course of any law reform process:

- Recommendation 4: A provision should be included in the CPOR Act (or any Act which replaces it) which gives a person the right to seek review by the NSW Police Force of the decision that they meet the definition of a registrable person under the Act, and/or the decision as to which reporting period in s 14A applies to the person. Consideration should be given to providing a right of appeal from the NSW Police Force review to a tribunal or court.<sup>613</sup>
- Recommendation 11: Provisions should be included in the CPOR Act (or any Act which replaces it) for independent compliance audits of the Child Protection Register with publicly reported (and de-identified) results, similar to those in the *Sex Offenders Registration Act 2004* (Vic).<sup>614</sup>

The NSW Police Force has stated that it supports both of these recommendations.<sup>615</sup>

Also, given the complexity of the CPOR Act, the Commission suggests that any law reform process should consider whether judicial officers should be given statutory responsibility for determining whether a person meets the definition of a registrable person, and calculating their initial reporting period.<sup>616</sup>

## 2. OVERVIEW OF PROBLEMS WITH THE CPOR ACT

In order to implement the CPOR Act, the NSW Police Force must be able to:

- 1) identify when a person has been convicted of a 'registrable offence' (including in a different jurisdiction);

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<sup>613</sup> See Chapter 6, section 6.4.

<sup>614</sup> See Chapter 9, section 9.4.

<sup>615</sup> Letter from Commissioner of Police, NSW Police Force, to Chief Commissioner, Law Enforcement Conduct Commission, 30 September 2019 (Annexure B – Submissions on Proposed Recommendations).

<sup>616</sup> See Chapter 7, in particular section 7.7.

- 2) determine if the person is a 'registrable person' in the particular circumstances, or whether an exception to registration applies;
- 3) calculate for how long the registrable person is required to make reports of their personal information to the NSW Police Force (ie their 'reporting period');
- 4) identify the different timeframes within which the registrable person is required to report changes to their personal information, and therefore when they will be liable to prosecution for failing to report, and
- 5) identify when, and for how long, the registrable person's reporting obligations need to be suspended and/or extended for periods during which the person was in government custody, travelling, or in breach of their reporting obligations.

The conclusion of the Commission is that given the current provisions in the CPOR Act, it is inevitable that the NSW Police Force will make errors in administering the Register. This is because:

- the CPOR Act makes it difficult, if not impossible, to identify every offence that will be registrable, as it does not specifically list each registrable offence, and there are errors in the Act (see part 3 in this appendix);
- a significant amount of detail about a person's criminal history is required to correctly determine whether a person is registrable and their reporting period, sometimes more detail than was required to convict the person of the offences (see parts 4.1 and 4.2, 5.1 to 5.3);
- certain provisions which are ambiguous or lack specificity allow for different interpretations and inconsistent decisions as to who is registrable and the length of their reporting period, and when their reporting obligations will be extended (see parts 4.2, 5.3 and 8);
- ambiguity in some of the reporting obligation provisions, particularly in relation to timeframes for reporting, make it unclear exactly when criminal liability for failing to report will arise (see part 7), and
- the provisions relating to the reporting obligations of persons who commit registrable offences in other jurisdictions and move to New South Wales are particularly challenging to apply (see parts 6 and 7.3).

### 3. IDENTIFYING 'REGISTRABLE OFFENCES'

There are three groups of registrable offences under the CPOR Act, 'Class 1' offences, 'Class 2' offences and offences that result in the making of a child protection registration order.<sup>617</sup> Which 'class' the offence falls into affects the calculation of the person's reporting period (discussed in part 5 below).

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<sup>617</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) s 3(1) (definition of 'registrable offence').



The definitions of Class 1 and Class 2 offences sit in the definitions section of the CPOR Act. The way these definitions are drafted makes it very difficult to identify all possible registrable offences.

The definitions also capture a broad range of offences. The NSW Police Force has identified over 800 different charges that relate to potentially registrable offences under the CPOR Act.<sup>618</sup>

### 3.1 CPOR ACT DOES NOT SPECIFICALLY IDENTIFY EACH REGISTRABLE OFFENCE

The definition of Class 1 offences contains 10 different limbs, and the definition of Class 2 offences contains 18 limbs. Some of the limbs only describe general categories of offences.

#### 3.1.1 THE 'ELEMENT' LIMBS

Limb (g) of Class 1 offences and limb (l) of Class 2 offences make any offence 'an element of which is an intention to commit an offence of a kind listed in this definition' a registrable offence (the element limbs).<sup>619</sup> It is necessary to carefully examine the definitions of offences in criminal statutes to determine which offences include the type of element described in 1(g) and 2(l), and are therefore caught by these limbs.

The complexity that can be involved in applying the element limbs is demonstrated by considering whether the offence in s 113(1) of the *Crimes Act 1900* (NSW) is registrable. Section 113(1) makes it an offence to break and enter a house or building with the intention to commit a serious indictable offence. This offence may be registrable under the element limbs, but it will depend on the particular way in which it is committed. It will only be registrable if:

- 1) the serious indictable offence the offender intended to commit was a registrable offence (for example, murder, manslaughter or sexual touching) **and**
- 2) the person that the offender intended to commit the serious indictable offence against was a child.

Another issue created by the element limbs is how they interact with other limbs of the definitions of Class 1 and 2 offences. For example, offences against s 86 of the *Crimes Act 1900* (NSW) (offences of kidnapping with certain intentions), are expressly included in the definition of a Class 2 offence.<sup>620</sup> However, one of the offences in s 86 is the offence of kidnapping with the intention of committing a serious indictable offence (s 86(1)(a1)).

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<sup>618</sup> NSW Police Force response to item 3 of Law Enforcement Conduct Commission Notice 929 of 2017.

<sup>619</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) s 3(1) (definitions of 'Class 1 offence' and 'Class 2 offence').

<sup>620</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) s 3(1) (definition of 'Class 2 offence' para (b)).

It is therefore not clear under the CPOR Act whether a person who is convicted of kidnapping a child with the intention to murder that child under s 86(1)(a1) has committed a Class 2 offence, or a Class 1 offence, because the offence includes as an element an intention to commit a Class 1 offence (murder of a child).

### 3.1.2 OFFENCES THAT 'INVOLVE' SEXUAL TOUCHING OR A SEXUAL ACT

Prior to December 2018 limb (a1) of Class 2 made registrable any offence 'that involves an act of indecency against or in respect of a child, being an offence that is punishable by imprisonment for 12 months or more'.

On 1 December 2018 limb (a1) was amended to refer to 'sexual touching or a sexual act' rather than an act of indecency.<sup>621</sup>

In *R v Moss* Judge Cogswell in the District Court interpreted the word 'involves' in limb (a1) broadly, and concluded that for an offence to be caught by that limb it was not necessary that the 'act of indecency' be an actual element of the offence.<sup>622</sup> His Honour's view was that limb (a1) made any offence registrable that included behaviour that could be classified as 'an act of indecency' in the way it was committed.<sup>623</sup>

This broad interpretation of limb (a1) would mean there are offences which could become registrable depending on a subjective view as to whether in the particular circumstances of the case, the behaviour constituting the offending included 'a sexual act...in respect of a child'. This would make it very difficult for the NSW Police Force to identify all of the offences which could fall within this limb.

In *R v Moss* the defendant had repeatedly texted a 12 year old girl suggestive messages, and his Honour held that this met the definition of 'an act of indecency in respect of a child'. It would be open to debate whether this behaviour would, if considered under the amended CPOR Act, meet the definition of a 'sexual act...in respect of a child' so as to potentially make the defendant registrable.<sup>624</sup>

## 3.2 ERRORS IN THE DEFINITIONS OF CLASS 1 AND CLASS 2 OFFENCES

There are errors in the definitions of Class 1 and Class 2 offences. For example, an offence against s 272.11 of the Commonwealth Code is explicitly included in the definitions of both a Class 1 offence and a Class 2 offence.<sup>625</sup>

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<sup>621</sup> *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* (NSW) sch 2 cl 1.

<sup>622</sup> *R v Moss* [2013] NSWDC 207 (9 May 2013) [39]-[40].

<sup>623</sup> *R v Moss* [2013] NSWDC 207 (9 May 2013) [32]-[40].

<sup>624</sup> Section 61HC of the *Crimes Act 1900 (NSW)* defines a 'sexual act' as 'an act (other than sexual touching) carried out in circumstances where a reasonable person would consider the act to be sexual'.

<sup>625</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) s 3(1) (definition of 'Class 1 offence' para (d) and 'Class 2 offence' para (g)).

There are also errors in the definitions that have resulted from amendments to criminal statutes not being reflected in the CPOR Act. For example, the definition of a Class 2 offence includes an offence against s 270.6 of the Commonwealth Code.<sup>626</sup> However, s 270.6 has not contained any offences since it was amended in March 2013.<sup>627</sup>

### 3.3 DEFINITION OF 'A CHILD' IS BROADER IN THE CPOR ACT THAN IN THE *CRIMES ACT 1900* (NSW)

In the *Crimes Act 1900* (NSW), the definitions of sexual offences are separated into those committed against 'children' (in Subdivisions 5 to 9 of Division 10) and those committed against adults. The specific sexual offences in Subdivisions 5 to 9 only apply to offences committed against children who are under the age of 16.

However, 'child' is defined in the CPOR Act as any person who is under the age of 18 years.<sup>628</sup> Therefore the references in the definitions of registrable offences to an offence that 'involves sexual intercourse with a child', or 'involves sexual touching or a sexual act against or in respect of a child', includes offences committed against a 16 or 17 year old.

This means that in order to identify all possible registrable persons under the CPOR Act, the NSW Police Force needs to review the convictions of all those persons sentenced for sexual offences which under the Crimes Act can only be committed against 'adults', as the victim of these offences may be 16 or 17 years old, and therefore a 'child' for the purposes of the CPOR Act. Also, as discussed below in part 4.1, in some cases it will be difficult for the NSW Police Force to obtain sufficient information to determine the exact time the offence was committed (and therefore the age of the victim at the time).

### 3.4 NEED FOR REFORM OF DEFINITIONS OF CLASS 1 AND CLASS 2 OFFENCES

In December 2017 the Commission requested from the NSW Police Force a list of all charges it had identified as potentially relating to registrable offences. The Commission compared the list against the CPOR Act, the *Crimes Act 1900* (NSW) and *Criminal Code Act 1995* (Cth) (the Commonwealth Code). The Commission identified:

- 58 charges that were missing from the NSW Police Force list;
- 56 charges which were on the list but with the incorrect 'CPR flag' (which indicates whether the offence would be classified as Class 1 or Class 2), and
- six charges that were listed as registrable offences by the NSW Police Force, but in fact did not fall within the definition of a Class 1 or Class 2 offence.

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<sup>626</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) s 3(1) (definition of 'Class 2 offence' para (h)).

<sup>627</sup> *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Act 2013* (Cth).

<sup>628</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) s 3(1).

It is important for the NSW Police Force, offenders, the courts and the community that it is clear when a person's offending will bring them within the application of the CPOR Act.

The definitions of Class 1 and Class 2 offences in the CPOR Act need to be revised and restructured, to ensure all registrable offences can be easily identified, and to remove errors and ambiguity.

The offender registration laws in every other Australian jurisdiction and in New Zealand list the registrable offences in a schedule, and each offence appears in a separate clause.<sup>629</sup> This approach to drafting makes it easier to identify registrable offences, and to amend the list when offences in criminal statutes are altered.

At the time of writing, no other offender registration law in Australia included in its definition of registrable offences reference to offences that 'involve' an 'act of indecency' or a 'sexual act' against or in respect of a child.

The simplest definitions of registrable offences are found in the offender registration laws in the Australian Capital Territory and New Zealand.<sup>630</sup> These laws identify each registrable offence by reference to a specific section of a criminal statute, and include a short definition of the substance of the offence. They do not include categories of offending such as the elements limbs in the CPOR Act, or offences that 'involve' an 'act of indecency' or 'a sexual act'.

These approaches to defining registrable offences are manifestly clearer and easier to apply than that currently in the CPOR Act.

### **Conclusions following consultation with the NSW Police Force:**

The definitions of Class 1 offences and Class 2 offences in the CPOR Act need to be reviewed and updated.

A list of all registrable offences, which identifies each offence individually, should appear in a schedule to the Act, presented in a similar way to the definitions of registrable offences in *Crimes (Child Sex Offenders) Act 2005* (ACT) and the *Child Protection (Child Sex Offender Government Agency Registration) Act 2016* (NZ).

The limbs in the current definitions that make registrable offences 'an element of which is an intention to commit an offence of a kind listed in this definition', or any offence 'that involves sexual touching or a sexual act against or in respect of a child', should be deleted and Parliament should instead specify exactly which offences it intends to be registrable.

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<sup>629</sup> *Sex Offenders Registration Act 2004* (Vic) schs 1-4; *Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004* (Qld) sch 1; *Community Protection (Offender Reporting) Act 2005* (Tas) schs 1-3 (but also ss 13-15); *Child Protection (Offender Reporting and Registration) Act 2004* (NT) schs 1 - 2 (but also s 12); *Crimes (Child Sex Offenders) Act 2005* (ACT) schs 1 and 2; *Child Sex Offenders Registration Act 2006* (SA) sch 1; *Community Protection (Offender Reporting) Act 2004* (WA) schs 1 & 2 (but also ss 9 - 11, and *Community Protection (Offender Reporting) Regulations 2004* (WA) regs 10 and 11); *Child Protection (Child Sex Offender Government Agency Registration) Act 2016* (NZ) sch 2.

<sup>630</sup> *Crimes (Child Sex Offenders) Act 2005* (ACT) schs 1 and 2; *Child Protection (Child Sex Offender Government Agency Registration) Act 2016* (NZ) sch 2.

## 4. DETERMINING IF AN EXCEPTION TO REGISTRATION APPLIES

Even if a person has been convicted of a Class 1 or Class 2 offence, they will not necessarily be a 'registrable person'. Whether they are registrable will depend on whether an exception to registration applies.

There are exceptions to registration in s 3A(2)(c) for offenders who were under 18 years old (juveniles) when they committed:

- (i) a single offence involving sexual touching or a sexual act, or
- (ii) a single offence under section 91H of the Crimes Act 1900 or an offence of producing, disseminating or possessing child abuse material (in whatever terms expressed) under the laws of a foreign jurisdiction, or
- (iii) a single offence under section 91J (1)[voyeurism], 91K (1) [filming a person engaged in a private act for the purpose of sexual arousal or gratification] or 91L (1) [filming a person's private parts for the purpose of sexual arousal or gratification] of the Crimes Act 1900, or
- (iv) a single offence (including an offence committed under the laws of a foreign jurisdiction) that falls within a class of offence the regulations prescribe for the purposes of this subparagraph, or
- (v) a single offence an element of which is an intention to commit an offence of a kind listed in this paragraph, or
- (vi) a single offence of attempting, or of conspiracy or incitement, to commit an offence of a kind listed in this paragraph.

The reference to a 'single offence' in these exceptions is not to be interpreted literally. Section 3A sub-section (5) provides that '[a] reference to a single offence in this section includes a reference to more than one offence of the same kind arising from the same incident.' The Act further states (in s 3(3)) that offences 'arise from the same incident' **only** if:

- 1) they are 'committed within a single period of 24 hours', **and**
- 2) are 'committed against the same person'.

### 4.1 DIFFICULTIES CREATED BY THE NEED TO IDENTIFY THE TIME REGISTRABLE OFFENCES WERE COMMITTED

The specific dates on which and/or times when a person committed registrable offences can be relevant under the CPOR Act if:

- there is a question whether the offender was under 18 at the time of the offending, and/or
- the offender committed multiple offences but they may have been committed within a single 24 hour period.

Whether or not the person was under 18 at the time of the offending, and/or whether the person committed multiple registrable offences within a 24 hour period can be relevant both for determining whether an exception to registration applies, and (if no

exception applies) to calculating the person's reporting period (discussed below in part 5).

However, in some cases the timing of the offending, in terms of time of day or even specific dates, is not established during the criminal proceedings.

In cases involving sexual offences committed against children, it can often be difficult for the prosecution to establish on which day an offence was committed. The Registry officers the Commission consulted emphasised that children often struggle to particularise incidents. In such cases the prosecution will avoid having to nominate in the indictment a specific date on which the offending is alleged to have occurred. Instead the prosecution will allege only that the offence occurred within a particular timeframe, which can cover a matter of months. This is referred to as a 'between dates' charge.

During our consultation Registry staff confirmed that they frequently experience problems in trying to apply the CPOR Act when charges for registrable offences do not specify the timing of the offending.<sup>631</sup>

These problems are likely to become more frequent, as the trend in criminal law reform is to move away from requiring the prosecution to prove the specific timing of child sex offences. For example, on 1 December 2018 the offence of persistent child sexual abuse in s 66EA of the *Crimes Act 1900* (NSW) was amended.<sup>632</sup> It no longer requires the prosecution to prove '3 or more separate occasions occurring on separate days during any period'. Instead, the prosecution will only need to prove '2 or more unlawful sexual acts with or towards a child over any period', which will constitute an 'unlawful sexual relationship'.

The less specificity regarding the timing of offences that is required in order to secure a conviction, the more difficult it will be for the NSW Police Force to determine whether the exceptions to registration should apply, and to calculate reporting periods.

#### 4.1.1 DIFFICULTIES DETERMINING WHETHER OFFENDER WAS UNDER 18

If a person is convicted on a 'between dates' charge, and he or she turned 18 in the timeframe given for the offending, it can be difficult for the NSW Police Force to determine whether the exception to registration can apply. In those cases it may not be clear even from the judgment or Agreed Facts whether the person was under or over 18 at the time of the offending.

Example 1 below demonstrates these difficulties.

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<sup>631</sup> Law Enforcement Conduct Commission consultation with the NSW Police Force, Sydney, 26 July 2018; Law Enforcement Conduct Commission consultation with NSW Police Force, Parramatta, 18 October 2018.

<sup>632</sup> *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* (NSW) sch 1 cl 20.



#### Example 1:

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Mr EE<sup>633</sup> was convicted in 2011 for a single offence of indecent assault against a person under 16 and was given a suspended sentence.

The indictment indicated only that the offence had occurred at some point in a four and a half month period. Mr EE had turned 18 in that period. The NSW Police Force made the decision that Mr EE was registrable, and calculated his reporting period to be eight years.

Later that year Mr EE was charged with failing to comply with reporting obligations under s 17 of the CPOR Act. He was refused bail and was held on remand for 40 days. He was convicted and (after a successful appeal) was ultimately sentenced to an 18 month good behaviour bond.

In October 2016 the NSW Police Force reviewed Mr EE's file and sought legal advice as to whether Mr EE was a registrable person. The legal advice was that as the NSW Police Force could not establish that Mr EE was 18 at the time of the offending, he should be given the benefit of the exception for persons who commit an offence involving an 'act of indecency' when they are under 18 (s 3A(c)(i)), and should not therefore have been put on the Register.

In April 2017 the NSW Police Force requested an application be made to the court to annul Mr EE's conviction and sentence for the failure to report offence. The annulment was granted.

#### 4.1.2 DIFFICULTIES DETERMINING WHEN MULTIPLE OFFENCES SHOULD BE GROUPED AND CONSIDERED A 'SINGLE OFFENCE'

As mentioned above, the exceptions will apply to juveniles sentenced for more than one offence of the kind listed in s 3A(2)(c) if the multiple offences were 'of the same kind' and were 'arising from the same incident'. The test in s 3(3) for whether offences arise from the same incident includes two requirements, (1) that they are 'committed within a single period of 24 hours', and (2) that they are 'committed against the same person'.

As discussed above, it may not always be apparent from the court documents exactly when the offending occurred. This can make it difficult for the NSW Police Force to determine whether or not multiple offences committed against the same victim were committed within the same 24 hour period, and so should be treated as a 'single offence' for the purpose of the exceptions.

This problem is demonstrated by Example 2 below.

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<sup>633</sup> Mr EE's CPR case file was produced by the NSW Police Force in response to item 2(f) of Law Enforcement Conduct Commission Notice 929 of 2018.

## Example 2:

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In 2006 Mr DD<sup>634</sup> was convicted and sentenced for one count of indecent assault and one count of an act of indecency, both against a victim under the age of 10 years. Mr DD was under 18 at the time he committed the offences. In November 2006 the NSW Police Force determined Mr DD was a registrable person and placed him on the Register.

Between June 2010 and March 2016 Mr DD was charged, convicted and sentenced for three separate offences of failing to report under s 17 of the CPOR Act. As a result of these charges he spent a total of 413 days in custody.

In July 2016 the NSW Police Force reviewed Mr DD's Register case file. The NSW Police Force requested the Agreed Facts sheet from the court that convicted Mr DD in 2006. The Agreed Facts revealed that Mr DD had committed the two indecency offences 'on the same day' in a between dates period, and against the same victim. The NSW Police Force realised that under the CPOR Act those offences should have been counted as a 'single offence' involving an act of indecency, with the consequence that Mr DD fell within the exception to registration in s 3A(2)(c)(i) of the CPOR Act, and should not have been put on the Register in 2006.<sup>635</sup>

As a result of this error, Mr DD had therefore been wrongly arrested and convicted under s 17 of the CPOR Act on three occasions, and spent a total of 413 days in custody without lawful basis.

On 16 June 2017 the NSW Police Force requested that an application be made to the court to annul Mr DD's three convictions and sentences under s 17 of the CPOR Act for failing to report. The application was made and the annulments were granted.

## 4.2 PARTICULAR ISSUES WITH CHILD ABUSE MATERIAL (CAM) OFFENCES

One of the exceptions applies to juveniles who commit a 'single offence' of producing, disseminating or possessing child abuse material (the CAM exception).<sup>636</sup>

There are a number of issues with the wording of this exception which make it particularly difficult for the NSW Police Force to determine whether it will apply. This is because the language used in the test for when multiple offences should be counted as a 'single offence' can be very difficult to apply to CAM offences.

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<sup>634</sup> Mr DD's case file was produced by the NSW Police Force in response to item 2(e) of Law Enforcement Conduct Commission Notice 929 of 2018. Mr DD's case is also the subject of Case Study 4 in Chapter 3 of the report.

<sup>635</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) s 3(3), 3A(2)(c)(i) and (5).

<sup>636</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) s 3A(2)(c)(ii).

Section 3(3) requires multiple offences to be treated as arising from the same incident (and therefore counted as a 'single offence')<sup>637</sup> if they are 'committed within a single period of 24 hours', and are 'committed against the same person'.<sup>638</sup>

#### 4.2.1 IDENTIFYING WHETHER OFFENCES OF POSSESSING CAM WERE 'COMMITTED WITHIN' 24 HOURS

There is the potential for different interpretations of when an offence of possession can be said to be 'committed within' 24 hours, because a person may **obtain** CAM in a matter of seconds, but may **retain** that material for months or years.

It can be argued that the offence of possession is 'committed' at the point the person obtains the material, because all the elements of the offence have been fulfilled at that point – ie the offence is complete as a matter of law.<sup>639</sup>

However, it can also be argued that the offence of possession continues for as long as the person has control over the material, and therefore the possession is only 'committed' once it has ended (ie complete as a matter of fact).

Adopting this interpretation, if a person possesses the material for longer than 24 hours, then the possession was not 'committed **within** a single period of 24 hours', because the possession did not **end** within 24 hours. Therefore, if a juvenile possesses the material for over 24 hours, that possession cannot be grouped with other possession offences into 'a single offence' for the purpose of the CAM exception.

The CPOR Act does not further define the term 'committed', and therefore does not guide the NSW Police Force as to which of these interpretations should be adopted. This ambiguity in the Act could lead to inconsistencies in the assessment of whether the CAM exception applies (and in the determination of reporting periods, discussed in 5.3 below).

A further issue arises from an apparent NSW Police Force practice of listing the date and time that officers located the material in a person's possession as the 'time' that the possession offence was committed. If, in the course of one search, officers find more than one image, this practice can result in multiple charges of possession being listed on the charge sheet as having occurred on the same day (or even in the same hour).

For example, one of the Register case files reviewed by the Commission concerned Mr RR.<sup>640</sup> On 29 June 2014 officers searched Mr RR's laptop and a portable hard drive and found hundreds of CAM images. Mr RR admitted to police that he had downloaded the images 'throughout the year'. He was charged with two counts of possession offences, one count relating to four images and two videos, the other count relating to 300 images. For both counts, the time of the offending listed on the

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<sup>637</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) s 3A(5).

<sup>638</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) s 3(3).

<sup>639</sup> This was the argument raised by legal representatives in the case of Mr PP (Example 7 discussed below in part 5.3).

<sup>640</sup> Mr RR's CPR case file was produced by the NSW Police Force in response to item 2(b) of Law Enforcement Conduct Commission Notice 929 of 2018. Mr RR is also the subject of Case Study 11 in Chapter 8.

charge sheet was the same 35 minute period on 29 June 2014 (when the NSW Police Force conducted the search).

Mr RR's case did not raise a question regarding the CAM exception. However it illustrates how, if the NSW Police Force relies upon the time that the CAM was located in a person's possession as being the time the offences were 'committed', the possession of hundreds of images, downloaded over the course of several months, may be treated as having been 'committed within a single period of 24 hours', and therefore as a 'single offence' under the CPOR Act.

#### 4.2.2 REQUIREMENT TO IDENTIFY THE PERSON CAM OFFENCES ARE 'COMMITTED AGAINST'

A further issue for the NSW Police Force when attempting to determine if the CAM exception should apply in the case of multiple CAM offences is how to interpret the requirement that the offences be 'committed against the same person'.

Under s 91H of the *Crimes Act 1900* (NSW), the prosecution does not need to identify any person against whom the offence of production, dissemination or possession of CAM was 'committed' in order to secure a conviction. Those offences are proven once the prosecution has established that the defendant handled material that meets the definition of 'child abuse material', in the relevant way.<sup>641</sup>

In April 2018 a juvenile applied to the Supreme Court for review of the decision by the NSW Police Force that he was a registrable person under the CPOR Act.<sup>642</sup> He had been convicted of one offence of possession of CAM (which pictured one victim) and one offence of disseminating that same material. The two offences had been committed on the same day. His legal representatives submitted that his offending met the requirements in s 3(3) and 3A(5) to be counted as a 'single offence', and therefore the exception to registration in s 3A(2)(c)(ii) applied to him.

The Court was required to consider how to apply the requirement in s 3(3) that offences be 'committed against the same person' to the plaintiff's case.

Justice Latham accepted, based on the agreement of the parties, that the person that both the possession offence and the dissemination offence were 'committed against' for the purpose of s 3(3) was the girl pictured in the material.<sup>643</sup> Her Honour rejected the argument that the persons to whom the material was made available should also be counted as persons that the dissemination offence was 'committed against'.<sup>644</sup>

Her Honour's interpretation of s 3(3) creates practical difficulties for the NSW Police Force. It means that s 3(3) requires the NSW Police Force to view the relevant

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<sup>641</sup> *KE (by his next friend and tutor NE) v Commissioner of Police & Ors* [2018] NSWSC 941, [29].

<sup>642</sup> *KE (by his next friend and tutor NE) v Commissioner of Police & Ors* [2018] NSWSC 941.

<sup>643</sup> *KE (by his next friend and tutor NE) v Commissioner of Police & Ors* [2018] NSWSC 941, [28] and [45].

<sup>644</sup> *KE (by his next friend and tutor NE) v Commissioner of Police & Ors* [2018] NSWSC 941, [41]-[45].

images or videos and identify whether it is the same child that is depicted in each. If so, the exception to registration may apply.

During the consultation with the Commission, Registry officers stated that for the purposes of prosecuting CAM offences, the NSW Police Force is moving away from reviewing each image carefully in order to grade it according to its relative level of seriousness. Instead the NSW Police Force is moving towards adopting the Interpol Baseline classification scheme for such material. The officers informed the Commission that the adoption of this more simplified classification system will reduce the need for police officers to view the material.

This change in practice may therefore make it harder, or increase the workload involved, for the NSW Police Force to apply s 3(3) of the CPOR Act. To determine if a person is registrable the NSW Police Force may need to scrutinise the material in greater detail than was necessary for the purposes of the prosecution of the person.

#### 4.2.3 WHETHER THE EXCEPTION APPLIES TO A JUVENILE CONVICTED OF 'ACCESSING' CAM

The CAM exception applies to a juvenile who commits 'a single offence under s 91H of the *Crimes Act 1900* or an offence of producing, disseminating, or possessing child abuse material (in whatever terms expressed) under the laws of a foreign jurisdiction'.<sup>645</sup>

It is not clear from this wording whether the CAM exception applies to a juvenile convicted of **accessing** CAM under s 474.22 of the Commonwealth Code.<sup>646</sup>

'Accessing' child abuse under s 474.22 is an offence separate from 'possessing' CAM in s 474.23.<sup>647</sup> The offence of possession requires a copy of the data or material to be under the person's control, for example saved on their computer.<sup>648</sup> If a person only views or live streams the material online, but does not download a copy of the material, they may have 'accessed' the material, but have not 'possessed' it.

It would be open to argue that the CAM exception cannot apply to a juvenile convicted of a single offence under s 474.22, because accessing CAM is a distinct concept from possessing CAM, and therefore the former is not included in the wording 'an offence of producing, disseminating or possessing child abuse material (in whatever terms expressed)'.

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<sup>645</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) s 3A(5)(c)(ii). 'Foreign jurisdiction' for the purposes of the CPOR Act is defined as including a jurisdiction in Australia other than New South Wales: *Child Protection (Offenders Registration) Act 2000* (NSW) s 3 (definition of 'foreign jurisdiction').

<sup>646</sup> An offence against s 474.22 is a Class 2 offence: *Child Protection (Offenders Registration) Act 2000* (NSW) s 3 (definition of 'Class 2 offence', para (g)).

<sup>647</sup> The offence of accessing child abuse material online in s 474.22 of the Commonwealth Code includes 'the **display** of the material by a computer or any other **output** of the material from a computer': s 473.1 (emphasis added). 'Possessing, controlling, supplying or obtaining child abuse material for use through a carriage service' is an offence under s 474.23. The Code defines 'possession' of material or data as being interchangeable with 'control', and states that possession includes 'having possession of a computer or data storage device that **holds** or **contains** the data': s 473.2.

<sup>648</sup> *Criminal Code Act 1995* (Cth) s 473.2.

This ambiguity in the CAM exception may lead to inconsistent decisions regarding whether juveniles who view CAM must be put on the Register. Given the exception applies to juveniles convicted of possessing CAM, it would seem anomalous from a policy perspective that it would not apply to a juvenile convicted of accessing CAM.

### 4.3 NEED FOR REFORM OF SECTIONS 3A(2)(C), 3A(5) AND 3(3) OF THE CPOR ACT

The current wording of the exceptions to registration in s 3A(2)(c) for juveniles who commit certain 'single offences', combined with the definitions in s 3A(5) and s 3(3), create significant difficulties for the NSW Police Force.

These provisions have been drafted based on certain assumptions about the information that will be known by the person who is responsible for determining whether the exceptions apply. In particular, it is assumed that the person applying those provisions will know precisely when the person committed each of his or her offences.

The well-established prosecution practice of using 'between dates' charges on indictments for child sex offences means that the specific date (let alone time) an offence occurred may not be established during proceedings. This detail may not be known by the arresting officer, the prosecutor, or the court when passing sentence.

It is not practical for the CPOR Act to require the NSW Police Force to determine whether the offending 'was committed within a single 24 hour period' to apply the exceptions, when this level of detail about the offending may not have been required to secure a conviction.

Reform is also necessary to resolve the significant difficulties that arise when attempting to apply the language of s 3(3) to CAM offences. It may be that a separate provision is needed to address how such offences should be counted (both for the purposes of applying the exceptions and calculating reporting periods, discussed further below).

On 1 December 2018 a new provision (s 3C) was inserted into the CPOR Act. This provision gives the court sentencing a juvenile for a 'sexual offence' the discretion to exempt the person from being registrable under the Act, if:

- the victim of the offence was under the age of 18 at the time of the offending;
- the court did not impose a sentence of full-time detention, or a control order (unless suspended) on the offender for the offence;
- the offender has not been previously convicted of a Class 1 or Class 2 offence, and
- the court is satisfied that the offender does not pose a risk to the lives or sexual safety of one or more children, or children generally.<sup>649</sup>

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<sup>649</sup> *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* (NSW) sch 2 cl 6.



This new discretion sits alongside the automatic exceptions to registration in s 3A(2)(c) of the Act.<sup>650</sup> It therefore does not remove the need for the NSW Police Force to apply those exceptions (although its existence may in practice reduce the number of occasions on which it needs to do so).

### Conclusions following consultation with the NSW Police Force:

The exceptions in s 3A(2)(c), and the definitions in s 3A(5) and s 3(3) need to be reviewed, to remove ambiguity and ensure that they are workable.

One possible solution to consider is amending s 3C to effectively require the judge sentencing a juvenile for any of the registrable offences currently mentioned in s 3A(2)(c) to determine whether that juvenile should be registrable if they have not previously been sentenced for a registrable offence. The automatic exceptions in s 3A(2)(c) could then be removed.

If the exceptions are retained, the definition in s 3(3) of when offences should be taken as 'arising out of the same incident' needs to be changed so that it does not require a determination of whether the offences were 'committed within a single 24 hour period'.

Section 3(3) also needs to be amended so that it is clear how it should be applied when determining whether multiple child abuse material offences should be counted as 'arising out of the same incident'/'a single offence'. Reference to the person the offences were 'committed against' is problematic in this context.

Consideration should be given as to whether the wording in the *Child Sex Offenders Registration Act 2006* (SA) would be useful to adopt: s 4(2) of that Act defines offences as arising from the 'same incident' if:

- they are committed within a single period of 24 hours, and against the same person, or
- they are the result of a single act or omission of the offender (whether committed against the same person or not).

Further, if retained the exception in s 3A(2)(c)(ii) of the CPOR Act should be amended to specify whether it includes a single offence of accessing or using child abuse material under s 474.22 of the Commonwealth Code.

## 5. CALCULATING THE PERSON'S REPORTING PERIOD

Once the NSW Police Force has determined that a person is registrable, it needs to calculate his or her reporting period, using the following formulas in s 14A of the CPOR Act:

- (1) A registrable person must continue to comply with the reporting obligations imposed by this Part for:
  - (a) 8 years, if the person has only ever been found guilty of a single Class 2 offence, or

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<sup>650</sup> Sub-section 3C(4) provides that 'this section...does not limit section 3A(2)(c) as it applies to offences committed by children'.

- (b) 15 years, if the person:
  - (i) has only ever been found guilty of a single Class 1 offence, or
  - (ii) has ever been found guilty of more than a single registrable offence but is not covered by paragraph (c), or
- (c) the remainder of the person's life, if the person is a registrable person in respect of:
  - (i) a Class 1 offence and the person subsequently commits and is found guilty of another registrable offence, or
  - (ii) a Class 2 offence and the person subsequently commits and is found guilty of a Class 1 offence, or
  - (iii) a Class 2 offence and the person subsequently commits and is found guilty of another Class 2 offence and has ever been found guilty of 3 or more Class 2 offences.
- (2) Subsection (1) (c) does not apply if the registrable person was not given notice of the person's reporting obligations under this Act or a corresponding Act before the person committed the subsequent offence.
- (3) A reference in subsection (1) to an offence extends to an offence committed before the commencement of that subsection.
- (4) For the purposes of this section:
  - (a) 2 or more offences arising from the same incident are to be treated as a single offence, and
  - (b) 2 or more offences arising from the same incident are to be treated as a single Class 1 offence if at least one of those offences is a Class 1 offence.

If the registrable person was under the age of 18 at the time he or she committed each registrable offence, then his or her reporting period will be half that listed in the above formulas (or in the case of life-time reporting, 7.5 years).<sup>651</sup>

Determining which of these formulas applies to a particular registrable person is a complex task. In the NSW Police Force Workforce Intelligence Unit's analysis of the Registry's workload in 2017 (the Register Staffing Review), that Unit stated that:

In many cases it is not possible to either flowchart the calculation process, or use matrices, to consistently evaluate reporting periods. It requires an in-depth understanding of the *Child Protection (Offenders Registration) Act*, other legislation, and the circumstances surrounding the case.<sup>652</sup>

For the NSW Police Force to correctly apply the formulas in s 14A, it must:

- review the entire criminal history of the offender, including offences prior to the commencement of the Register, to identify potentially registrable offences;

<sup>651</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) s 14B.

<sup>652</sup> Workforce Intelligence Unit, Human Resources Command, NSW Police Force, *HR Analysis: Child Protection Register Staffing Review*, 20 July 2017, D/2017/630614, NSW Police Force response to item 1 of Law Enforcement Conduct Commission Notice 929 of 2017, p 50.

- tally up how many registrable offences the person has been found guilty of in their life, in any jurisdiction (including determining whether multiple offences of the same kind should be counted as a 'single offence' because they arose 'out of the same incident');
- classify whether each of those offences is a Class 1 or Class 2 offence;
- determine whether the person was under the age of 18 when they committed each registrable offence, and
- identify whether the offender committed further registrable offences while on the Register (as offending subsequent to registration may increase the person's reporting period to life).<sup>653</sup>

The difficulties that the NSW Police Force experiences in identifying all registrable offences,<sup>654</sup> and determining when multiple offences should be grouped and treated as a 'single offence',<sup>655</sup> also affect the reporting period calculation process. The result is a legislative minefield.

Correctly calculating a person's reporting period also requires access to a lot of detail about the person's criminal history. The Workforce Intelligence Unit noted that:

Any documents relevant to the case, such as criminal history, custodial history, police fact sheets, agreed fact sheets, are required to make a determination as to the reporting period ... Some historical matters require agreed facts and judges comments; in some cases the indictments may be enough on their own. Plea arrangements complicate matters. In the past, decisions have been made on insufficient facts due to procedural short cutting (e.g. using the original police facts sheet rather than agreed facts sheet). Clarification with the Officer in Charge is often required, which becomes problematic if they are absent from duty for any period, has retired or left NSWPF. Even where all the information is available, agreed facts or otherwise, this may be extensive and take considerable time to adequately review.<sup>656</sup>

The complexity of calculating reporting periods is demonstrated by the fact that a 'Reporting Matrix' which the NSW Police Force had developed and used for several years prior to 2016 to calculate reporting periods 'to assist in reducing the subjectivity of individual interpretation' was 'found to be in error itself.'<sup>657</sup>

The difficulties are further demonstrated by the results of a review of Register case files conducted by the NSW Police Force between July 2016 and October 2018 (the CPR case review, discussed in Chapter 3). The review team identified 629 Register

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<sup>653</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) s 14A(1)(c) and (2).

<sup>654</sup> See the discussion in part 3 of this appendix.

<sup>655</sup> See the discussion in parts 4.1 and 4.2 of this appendix.

<sup>656</sup> Workforce Intelligence Unit, Human Resources Command, NSW Police Force, *HR Analysis: Child Protection Register Staffing Review*, 20 July 2017, D/2017/630614, NSW Police Force response to item 1 of Law Enforcement Conduct Commission Notice 929 of 2017, p 64.

<sup>657</sup> Ibid p 52; Officer, Child Protection Registry, *Serious concerns raised regarding the Child Protection Register (CPR) reporting period timeframes and the lack of review of matters prior to case finalisation*, 26 May 2016, D/2016/277899, NSW Police Force response to Law Enforcement Conduct Commission Notice 914 of 2017, p 2.

case files in which errors had been made in calculating the person's reporting period under the CPOR Act.<sup>658</sup>

## 5.1 IDENTIFYING THE AGE OF THE OFFENDER ON THE DATE OF OFFENDING

If a person was under 18 at the time he or she committed a registrable offence, he or she will be given a much shorter reporting period than if he or she had offended as an adult.<sup>659</sup> The NSW Police Force therefore needs to be able to identify exactly when the person committed each registrable offence, to calculate the reporting period correctly. As discussed in part 4.1, this can be very difficult when the person was convicted on a 'between dates' charge.

As Example 3 demonstrates, a difference of less than five days for the date of offending can result in a person being registrable for 7.5 years, or 15 years. This example also demonstrates the serious consequences that can result if a reporting period is calculated incorrectly.

### Example 3:

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In February 2001 Mr CC<sup>660</sup> was convicted and sentenced for one count of attempted sexual intercourse with a child under 10, which Mr CC committed when he was 13 or 14 years old, and one count of aggravated sexual assault against a victim under 16 years of age, which Mr CC committed just four days short of his 18th birthday.<sup>661</sup>

The NSW Police Force determined that he was a registrable person under the CPOR Act, but applied the wrong formula for calculating his reporting period. It determined that his reporting period was 15 years (the period for a person who committed two Class 1 offences as an adult). However, as Mr CC was under 18 at the time of committing both the offences, the correct reporting period for him was 7.5 years.

Mr CC's reporting obligations under the CPOR Act ended in 2008.

However, as a consequence of error made by the NSW Police Force in calculating his reporting period, Mr CC was charged, convicted and sentenced for offences under the CPOR Act on multiple occasions after 2008. Between January 2010 and April 2016 he was wrongly convicted for six different offences of failing to comply with reporting obligations, under s 17 of the CPOR Act. He was also convicted and

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<sup>658</sup> See the categories 'reporting period increased' and 'reporting period decreased' in the table in Appendix 1.

<sup>659</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) s 14B.

<sup>660</sup> Mr CC's CPR case file was produced by the NSW Police Force in response to item 2(p) of Law Enforcement Conduct Commission Notice 929 of 2018. Mr CC's case is also the subject of Case Study 6 in Chapter 3 and Case Study 8 in Chapter 4.

<sup>661</sup> Mr CC was sentenced to a good behaviour bond for a period of three years, and therefore was an 'existing controlled person' on the date the CPOR Act commenced (15 October 2001): See *Child Protection (Offenders Registration) Act 2000* (NSW) s 3 (definition of 'existing controlled person', limb (f))

sentenced for an offence of providing misleading information, contrary to s 18 of that Act, and for resisting arrest (for one of the failure to report charges).

As a result of these wrongful convictions, he spent in total over 540 days in custody.

In May 2016 legal representatives for Mr CC, and the NSW Police Force, became aware that an error may have been made by the NSW Police Force when calculating Mr CC's reporting period.

On 11 August 2016 the Registry sought advice from the Office of the General Counsel regarding the annulment of convictions and sentences imposed on Mr CC, noting that a 'fundamental error' had been made in calculating his reporting period.

In April 2018 representatives for Mr CC filed a Statement of Claim in the Supreme Court, seeking damages from the State of New South Wales for wrongful imprisonment for a total of 545 days. In November 2018 a Defence was filed, in which the State of New South Wales admitted that an error had been made in calculating Mr CC's reporting period, but denied any liability. It appears that the matter was settled in December 2018.<sup>662</sup>

## 5.2 GROUPING OF MULTIPLE OFFENCES

The difficulties discussed in parts 4.1.2 and 4.2 above, regarding determining when to treat multiple offences as 'arising from the same incident', also affect the calculation of reporting periods. The test in s 3(3) for when to count multiple offences as a 'single' offence which must be applied when determining if an exception to registration is enlivened, must also be applied when counting offences for the purpose of calculating reporting periods.<sup>663</sup>

### Example 4:

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In March 2008 Mr MM<sup>664</sup> was convicted of two counts of aggravated indecent assault against a person under 16 years, and was ultimately sentenced to eight months' imprisonment, with a three month non parole period. He was released from custody in August 2008, and the NSW Police Force notified Mr MM that his reporting period was eight years.

In about May 2016, just months prior to when Mr MM's reporting obligations as recorded by the NSW Police Force were due to expire, the NSW Police Force reviewed his file and determined that it had incorrectly calculated his reporting period. The NSW Police Force appeared to have counted his two convictions for offences in 2008 as a 'single offence' for the purpose of calculating his reporting period. However, while the two offences were committed with a 24 hour period, they were committed against different victims. Section 3(3) of the CPOR Act

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<sup>662</sup> Law Enforcement Conduct Commission review of JusticeLink.

<sup>663</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) s 14A(4)(a).

<sup>664</sup> Mr MM's CPR case file was produced by the NSW Police Force in response to item 2(o) of Law Enforcement Conduct Commission Notice 929 of 2018.

therefore did not apply, and Mr MM's reporting period was therefore 15 years, for two Class 2 offences.

On 9 July 2016 the NSW Police Force wrote to Mr MM, informing him that his reporting period had been incorrectly calculated in 2008, and that because he had been found guilty of two separate Class 2 offences, his reporting obligations under the CPOR Act would continue until 5 June 2023.

#### Example 5:

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In August 2008 Mr VV<sup>665</sup> was convicted of two counts of indecent assault against a child under the age of 10 years, and was given a suspended sentence.

It appears that the NSW Police Force originally calculated Mr VV's reporting period to be eight years. However, Mr VV had committed two Class 2 offences; although both offences had been committed against the same victim, they had been committed on two separate days, two weeks apart. These offences therefore did not meet the requirements in s 3(3) to be counted as a 'single offence' under s 14(4)(a). As he had committed two Class 2 offences, his correct reporting period was 15 years.<sup>666</sup>

In around June 2016, a few months prior to when the reporting period the NSW Police Force had recorded for Mr VV was due to expire, the NSW Police Force reviewed his case and discovered the error. It recalculated his reporting period as ending in August 2023, and drafted a letter to send to Mr VV advising him of the error and the new date his reporting obligations would end.

## 5.3 PARTICULAR ISSUES WITH COUNTING CAM OFFENCES

Calculating reporting periods for persons convicted of CAM offences is particularly difficult, given the need to apply the test in s 3(3) for grouping offences 'arising out of the same incident' to those offences. As discussed in part 4.2, this can be a very challenging exercise.

The team that conducted the NSW Police Force CPR case review reported in December 2017 there were 140 persons who had been put on the Register for possessing, disseminating or producing CAM, but were recorded as having finished their reporting obligations. The review team found that for 41 of those persons, the NSW Police Force had calculated their reporting period to be eight years, when in fact their reporting periods under the CPOR Act was 15 years. The cases of those persons should not therefore have been finalised.<sup>667</sup>

The CPR case review stated that a full review would be conducted of those 41 cases, including reopening of cases, and correction of reporting periods.

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<sup>665</sup> A draft letter from the NSW Police Force to Mr VV, dated 22 June 2016, was produced by the NSW Police Force in response to Law Enforcement Conduct Commission Notice 977 of 2018.

<sup>666</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) (version in force as at 19 August 2008) s 14A(1)(b)(ii).

<sup>667</sup> *Child Protection Register - Business Risk Committee - December 2017*, NSW Police Force response to item 19(a) of Law Enforcement Conduct Commission Notice 929 of 2017, p 3.



The difficulties involved in interpreting and applying s 3(3) so as to correctly group CAM offences for the purpose of calculating reporting periods are illustrated by Examples 6 and 7.

#### Example 6:

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In May 2004 Mr WW<sup>668</sup> was convicted of six offences of possessing child pornography, and was given a \$2000 fine and a 12 month suspended sentence.

The NSW Police Force determined Mr WW was a registrable person under the CPOR Act, and calculated his reporting period to be 12 years (for multiple Class 2 offences), ending in 2016.<sup>669</sup>

In May 2016 the NSW Police Force reviewed Mr WW's case and realised that the time of 'possession' listed for all of the offences for which he had been convicted was the two hour period during which police officers had searched his computer in 2003. Therefore, based on the way the NSW Police Force had particularised his charges, all of the offences had been 'committed' within a single 24 hour period.

The NSW Police Force appeared to conclude in 2016 that all six of his offences met the test in s 3(3) of the CPOR Act to be counted as 'arising from the same incident' for the purposes of calculating his reporting period. However, it is apparent from the charge sheets that there were multiple children depicted in the material that he had in his possession. It appears therefore that the NSW Police Force either proceeded on the assumption that the requirement in s 3(3) that offences be 'committed against the same person' did not need to be satisfied (because it could have no application) in the case of Mr WW's possession offences, or erroneously concluded that it had been satisfied in his case.

On this basis, the NSW Police Force concluded in 2016 that s 3(3) applied to Mr WW's possession offences, and therefore his reporting period under the CPOR Act had been eight years, and his reporting period therefore had ended on 31 May 2012.

However, in June 2018 Latham J handed down a decision of the Supreme Court in relation to the application of s 3(3) of the CPOR Act to CAM offences (the case involved one offence of possession and one offence of dissemination of the same material, which pictured one girl). Her Honour concluded in that case that the person that both the possession offence and the dissemination offence were 'committed against' for the purpose of s 3(3) was the girl pictured in the material.<sup>670</sup>

If this interpretation of s 3(3) is applied to Mr WW's case, then in fact the original decision by the NSW Police Force that Mr WW's reporting period was 12 years was correct, as the material he had possessed depicted multiple children.

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<sup>668</sup> Mr WW's CPR case file was produced by the NSW Police Force in response to item 2(d) of Law Enforcement Conduct Commission Notice 929 of 2018.

<sup>669</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) (version in force as at May 2004) s 14(3)(b).

<sup>670</sup> *KE (by his next friend and tutor NE) v Commissioner of Police & Ors* [2018] NSWSC 941, [45]. This case is discussed in part 4.2.2 of this appendix.

Therefore his offences were not committed 'against the same person' and so did not 'aris[e] from the same incident', and therefore should have been counted as multiple offences when calculating his reporting period.

#### Example 7:

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In 2008 Mr PP<sup>671</sup> was convicted of one count of producing child pornography and one count of possessing child pornography. Both offences related to the same video footage of a 14 year old girl, which Mr PP had taped on 1 May and kept until 11 May, when the NSW Police Force found it in his home. The date listed on the charge sheet for the production offence was 1 May, and the date for the possession offence was 11 May.

Mr PP was given a four month suspended sentence and a three year good behaviour bond. As producing and possessing child pornography are both Class 2 offences, the NSW Police Force determined that Mr PP was a registrable person, and calculated his reporting period to be eight years.

In December 2017 the NSW Police Force reviewed Mr PP's case, and concluded that as he had been convicted of two Class 2 offences on two different dates, his reporting period was in fact 15 years. The NSW Police Force wrote to Mr PP informing him that his reporting period had initially been incorrectly calculated, and that his reporting obligations would continue until July 2023.

In March 2018 legal representatives for Mr PP wrote to the NSW Police Force seeking a review of the decision that his reporting period was 15 years and not eight years. The legal representatives argued that despite the different dates on the indictments, Mr PP's two Class 2 offences 'arose out of the same incident', and therefore should be counted as a 'single' Class 2 offence, giving him a reporting period of eight years. They argued that, as a matter of fact, both the production and possession offences related to the same incident, as Mr PP has produced the video of the 14 year old, and 'as soon as the video was produced, it was possessed'.<sup>672</sup> They argued that both the production and possession offences were 'complete and committed at exactly the same time', but the possession continued until 11 May, when the NSW Police Force retrieved the tape from Mr PP's house.<sup>673</sup>

In March 2018 the NSW Police Force wrote back to Mr PP's legal representatives informing them that it was seeking legal advice from the Crown Solicitors Office.<sup>674</sup>

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<sup>671</sup> Mr PP's CPR case file was produced by the NSW Police Force in response to item 2(n) of Law Enforcement Conduct Commission Notice 929 of 2018.

<sup>672</sup> Letter from Mr PP's legal representatives to the NSW Police Force, 3 March 2018, NSW Police Force response to item 2(n) of Law Enforcement Conduct Commission Notice 929 of 2018, p 4.

<sup>673</sup> Letter from Mr PP's legal representatives to the NSW Police Force, 3 March 2018, NSW Police Force response to item 2(n) of Law Enforcement Conduct Commission Notice 929 of 2018, p 7.

<sup>674</sup> Letter from the NSW Police Force to Mr PP's legal representatives, 13 March 2018, NSW Police Force response to item 2(n) of Law Enforcement Conduct Commission Notice 929 of 2018.

## 5.4 NEED FOR REFORM OF FORMULAS FOR CALCULATING REPORTING PERIODS

Based on the error rate in the calculation of reporting periods identified by the CPR case review, the case studies reviewed by the Commission, and the Commission's consultation with the Registry officers, it is apparent there is a need for the reporting period formulas in the CPOR Act to be simplified.

The other Australian jurisdictions adopt a variety of approaches in their offender registration laws regarding the formulas for calculating reporting periods.

Some jurisdictions, such as Victoria, the Australian Capital Territory and South Australia, have formulas that require identification and tallying of all registrable offences committed by the person (like in New South Wales). These formulas are less complex than those in s 14A of the CPOR Act.<sup>675</sup> However, those three jurisdictions have equivalent provisions to s 3(3) and s 14A(4) in the CPOR Act, which require examination of the details of past offending to determine if multiple offences arose out of the 'same incident' and therefore need to be counted as a 'single' offence.<sup>676</sup>

New Zealand's approach to the calculation of reporting periods appears to be the most simple. The *Child Protection (Child Sex Offender Government Agency Registration) Act 2016* (NZ) (the NZ Act) provides the following formulas:

- if a person has committed a class 1, 2 or 3 offence, but only received a non-custodial sentence – 8 years;
- if a person has been sentenced to imprisonment for a class 1 offence – 8 years;
- if a person has been sentenced to imprisonment for a class 2 offence – 15 years, and
- if a person has been sentenced to imprisonment for a class 3 offence – remainder of the person's life.<sup>677</sup>

There are no separate formulas for persons who commit multiple qualifying (ie registrable) offences. The NZ Act simply provides that if a 'registrable offender' has reporting obligations in respect of more than one qualifying offence, the reporting periods for each of those offences run concurrently (to the extent that they overlap), not cumulatively.<sup>678</sup> Under the NZ Act therefore, the problems with determining

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<sup>675</sup> The formulas in those jurisdictions do not involve assessing whether registrable offences were committed after the person had been put on the register and notified of their obligations, which makes them more simple than the formulas in s 14A(1)(c) of the CPOR Act: *Sex Offenders Registration Act 2004* (Vic) s 34; *Crimes (Child Sex Offenders) Act 2005* (ACT) ss 84-87; *Child Sex Offenders Registration Act 2006* (SA) s 34(1).

<sup>676</sup> *Sex Offenders Registration Act 2004* (Vic) s 5(1) and s 34(3); *Crimes (Child Sex Offenders) Act 2005* (ACT) s 90 (and see definition of 'same incident' in the Dictionary); *Child Sex Offenders Registration Act 2006* (SA) s 4(2) and s 34(3).

<sup>677</sup> *Child Protection (Child Sex Offender Government Agency Registration) Act 2016* (NZ) s 35(1). It should be noted that under the NZ Act class 1 offences are those that attract criminal penalties at the lower end of the scale, and class 3 offences are those that attract the higher penalties.

<sup>678</sup> *Child Protection (Child Sex Offender Government Agency Registration) Act 2016* (NZ) s 35(5).

whether multiple offences arose from the 'same incident' and therefore should be counted as 'single offence' are avoided.

If Parliament were to decide to adopt a similar approach to the New Zealand reporting period formulas, it would need to consider whether to create a third class of offences under the CPOR Act. One benefit of creating a third class is that this may allow for greater reflection of the different levels of risk to the community represented by different offending.

#### **Conclusions following consultation with the NSW Police Force:**

The formulas for calculating reporting periods in s 14A of the CPOR Act need to be reviewed and simplified. The test for when multiple offences will be grouped and counted as single offence for the purpose of calculating reporting periods, in s 3(3), also needs to be reviewed, particularly as to how it applies to CAM offences.

Consideration should be given to whether New South Wales should adopt the type of approach reflected in the *Child Protection (Child Sex Offender Government Agency Registration) Act 2016* (NZ). The officers the Commission consulted with supported consideration of such a model with three classes and three formulas, and commented that this approach was simple and easier to apply than that in the CPOR Act. However, those officers stated that they did not support adopting the first tier in the NZ Act, being a different formula for registrable persons who are given non-custodial sentences.

## **6. IDENTIFYING WHEN PERSONS WHO HAVE OFFENDED IN OTHER JURISDICTIONS NEED TO REPORT UNDER THE CPOR ACT**

Under the CPOR Act there are two ways in which a person who commits an offence in a jurisdiction outside New South Wales and then moves to New South Wales can be classified as a 'registrable person' who has reporting obligations. These are:

- through the 'foreign jurisdiction offence' limbs of the definitions of Class 1 and Class 2 offences, and
- through the 'corresponding registrable persons' provisions in Part 3, Division 10.

### **6.1 IDENTIFYING WHEN A PERSON WHO HAS COMMITTED OFFENCES 'UNDER THE LAW OF A FOREIGN JURISDICTION' IS REGISTRABLE**

The 'foreign jurisdiction offence' limbs include within the definitions of Class 1 and Class 2 offences 'any offence under a law of a foreign jurisdiction that, if it had been committed in New South Wales, would have constituted an offence of a kind listed'

in the other limbs of those classes.<sup>679</sup> Therefore offences committed in other jurisdictions which are 'of a kind' that are listed in either of those definitions will also constitute registrable offences under the CPOR Act.<sup>680</sup>

A 'foreign jurisdiction' for the purposes of the CPOR Act is defined as including a jurisdiction in Australia other than New South Wales.<sup>681</sup>

Accordingly, if a court outside New South Wales sentences a person for an offence that would have been a registrable offence if committed in New South Wales, the person will become a (directly) registrable person under the CPOR Act under s 3A, unless one of the exceptions in s 3A(2) apply.

If a person who is sentenced for offences outside of New South Wales becomes registrable through these provisions, then his or her reporting period under the CPOR Act will be calculated using the formulas in s 14A.

## 6.2 IDENTIFYING PERSONS WHO ARE 'CORRESPONDING REGISTRABLE PERSONS'

The second way that a person who is sentenced for an offence outside of New South Wales can become a registrable person once in New South Wales is through the 'corresponding registrable person' provisions in Division 10 of Part 3 of the CPOR Act.

The CPOR Act defines a corresponding registrable person as someone who has:

- at any time been required to report to a corresponding registrar in a jurisdiction other than New South Wales, and
- subsequently moved to New South Wales while still subject to the reporting obligations in the other jurisdiction.<sup>682</sup>

Provided these criteria are met, the person will have reporting obligations under the CPOR Act as a corresponding registrable person even if the offence the person committed is **not** a registrable offence in New South Wales.<sup>683</sup>

For corresponding registrable persons the CPOR Act effectively picks up the reporting periods set by other jurisdictions. The Act provides that a corresponding registrable person is required to make reports to the NSW Police Force for as long as the person would be required to report in the other jurisdiction in which they were registered.<sup>684</sup>

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<sup>679</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) s 3 (para (e) of the definition of 'Class 1 offence' and para (j) of the definition of 'Class 2 offence').

<sup>680</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) s 3 (para (e) of the definition of 'Class 1 offence' and para (j) of the definition of 'Class 2 offence').

<sup>681</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) s 3.

<sup>682</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) s 19BB(1).

<sup>683</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) s 19BB(2).

<sup>684</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) s 19BB and s 19BC.

The corresponding registrable person provisions in the CPOR Act therefore require the NSW Police Force to have a good understanding of offender registration laws in other jurisdictions to ensure that it correctly identifies:

- 1) which persons who enter New South Wales from other jurisdictions are required to make reports under the CPOR Act, and therefore need to be put on the New South Wales Register, and
- 2) for how long their reporting obligations in New South Wales will continue.

These tasks are complicated by the fact that there is a lack of consistency across the offender registration laws in Australia as to which offenders are registrable, and the length of time for which they should provide reports to police.

For example, a comparison of the CPOR Act with the *Crimes (Child Sex Offenders) Act 2005* (ACT) reveals that manslaughter of a child (other than as a result of a motor vehicle accident) is a registrable offence in New South Wales, but not in the Australian Capital Territory (unless a specific child sex offender registration order is made).<sup>685</sup> Also, in the Australian Capital Territory an 'act of indecency in the first degree' is a Class 1 offence which results in a 15 year reporting period,<sup>686</sup> whereas in New South Wales, under the CPOR Act that same offence would be a Class 2 offence resulting in only an eight year reporting period.<sup>687</sup>

It should be noted that the exceptions to registration in s 3A(2) do not apply to corresponding registrable persons (in contrast to persons who are registrable through the 'foreign jurisdiction offence' provisions).

### 6.3 DETERMINING WHETHER THE FOREIGN JURISDICTION OFFENCE PROVISIONS AND/OR THE CORRESPONDING REGISTRABLE PERSON PROVISIONS APPLY

There is overlap between the foreign jurisdiction offence provisions and the corresponding registrable person provisions. It is not clear under the CPOR Act which provisions should be preferred if both would apply to a person. This will occur where:

- a person in a foreign jurisdiction is sentenced for an offence that would be a Class 1 or Class 2 registrable offence under the CPOR Act if committed in New South Wales, and
- as a result of that sentence, the person is required to comply with reporting obligations under the offender registration law in the foreign jurisdiction, and
- the person moves to New South Wales while still subject to reporting obligations in the foreign jurisdiction.

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<sup>685</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) s 3 (definition of 'Class 2 offence' para (a)) and *Crimes (Child Sex Offenders) Act 2005* (ACT) s 10 and schs 1 and 2.

<sup>686</sup> *Crimes (Child Sex Offenders) Act 2005* (ACT) s 84 and sch 1; *Crimes Act 1900* (ACT) s 57.

<sup>687</sup> Under either para (a2) or (l) and (a1) of the definition of 'Class 2 offence' in s 3 of the *Child Protection (Offenders Registration) Act 2000* (NSW).



Determining under which set of provisions the person should be dealt with is important because, as mentioned above:

- the exceptions to registration in s 3A(2) will apply to a person dealt with under the 'foreign jurisdiction offence' limbs, but not to a person who is (or is also) a corresponding registrable person, and
- the person's reporting period in New South Wales may be significantly different depending on whether the reporting period is calculated under the formulas in s 14A of the CPOR Act (for 'foreign jurisdiction offence' registrable persons) or the reporting period is picked up from the other jurisdiction under s 19BC (for a corresponding registrable person).

Example 8 below demonstrates the difficulty of trying to determine the obligations under New South Wales law that apply to a person who was convicted and registered in another jurisdiction, particularly when the person is caught in the overlap between these two sets of provisions. This example also demonstrates how this task can be further complicated by being required to apply amendments to the CPOR Act which were given retrospective effect.

#### Example 8:

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In March 2008 Mr GG,<sup>688</sup> who was under the age of 18, pled guilty in a Tasmanian Court to 14 counts of indecent assault. The court made an order releasing Mr GG without recording a conviction, and a 12 month probation order under the *Youth Justice Act 1997* (Tas). The court also made an order that he comply with reporting obligations under the *Community Protection (Offender Reporting) Act 2005* (Tas) for a period of two years.

In around April 2008 Mr GG moved to New South Wales. In May 2008 the NSW Police Force determined Mr GG was a registrable person and placed him on the Register. On 6 June 2008 he was informed by the NSW Police Force that his reporting obligations under the CPOR Act could continue for seven years and 111 days. His reporting period was extended in 2011 due to periods Mr GG spent in custody in 2010 and 2011. As a result, according to NSW Police Force records, his reporting obligations would end in December 2016 at the earliest.

Between July 2011 and June 2016, Mr GG was charged with a total of 14 counts of failing to comply with reporting obligations under s 17 of the CPOR Act, on four different occasions. He was convicted on seven counts, was fined \$300 for each of those offences and was placed on a bond for 18 months.

#### **NSW Police Force review of Mr GG's case in 2016**

In July 2016 the NSW Police Force reviewed Mr GG's case. It concluded that it had made an error in 2008 in concluding that Mr GG was a registrable person under the CPOR Act when he came to New South Wales in April 2008.

The NSW Police Force noted that under the definition of a 'corresponding registrable person' which was in force in April 2008, a person who was registered

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<sup>688</sup> Mr GG's CPR case file was produced by the NSW Police Force in response to item 2(g) of Law Enforcement Conduct Commission Notice 929 of 2018.

in another jurisdiction would only be required to report in New South Wales as a corresponding registrable person if the person's reporting period in the other jurisdiction would be **longer** than the period the person would have been given for the offences under the CPOR Act.<sup>689</sup> However, Mr GG's reporting period of two years in Tasmania was significantly shorter than the reporting period he would have received under the CPOR Act had he been sentenced in New South Wales for those offences.

The NSW Police Force therefore concluded in 2016 that Mr GG had not been a corresponding registrable person in April 2008. It further concluded that he should never have been placed on the Register in New South Wales.

The NSW Police Force, and at its request, the Department of Justice, consequently applied for annulments of Mr GG's convictions and sentences for offences under the CPOR Act between 2010 and 2016. These annulments were granted by the courts in 2017.<sup>690</sup>

### **Commission's review of Mr GG's case in 2018**

In May 2018 the Commission reviewed Mr GG's case, and noted the NSW Police Force had made an error when it reviewed his case in 2016.

The Commission concluded that although Mr GG was not a corresponding registrable person when he came to New South Wales in April 2008, he had become one on 20 October 2008. On that date the definition of 'corresponding registrable person' in the CPOR Act had been amended to include any offender who had at any time had reporting obligations in another jurisdiction, and would still be required to report, if still in that jurisdiction.<sup>691</sup> This new definition had retrospective application, as it applied to any person whose reporting obligations in the other jurisdiction had arisen before the commencement of the new definition.<sup>692</sup>

The Commission noted that Mr GG's reporting period in New South Wales as a corresponding registrable person under the amended provisions in the CPOR Act was the same as it was under the Tasmanian Act – two years from March 2008.<sup>693</sup>

In 2018 the Commission therefore concluded that the NSW Police Force had made an error in 2016 in concluding that Mr GG had never been a registrable person. He had become a corresponding registrable person on 20 October 2008, and as such had been required to comply with the reporting obligations in the CPOR Act until at least 2010 (excluding the extensions for his time in custody in 2010-2011).

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<sup>689</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) (version in force as at May 2008) s 3C.

<sup>690</sup> Law Enforcement Conduct Commission review of Justicelink.

<sup>691</sup> *Child Protection (Offenders Registration) Amendment Act 2007* (NSW); *Child Protection (Offenders Registration) Act 2000* (NSW) (version in force as at 20 October 2008) s 3C.

<sup>692</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) sch 2 pt 5 cl 13.

<sup>693</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) (version in force as at 20 October 2008) s 3C(b) and 14D.

## Commission's re-review of Mr GG's case in 2019

In March 2019 the Commission re-reviewed Mr GG's case in the context of preparing the final report for Operation Tuskett.

The Commission realised that when reviewing Mr GG's case, neither the NSW Police Force (in 2016) nor the Commission (in 2018) had considered whether Mr GG had been a registrable person under the 'foreign jurisdiction offence' limb of the definition of 'Class 2 offence' in the CPOR Act.

Mr GG had been convicted in a foreign jurisdiction of indecent assaults, which, had he committed those offences in New South Wales, would have constituted Class 2 offences under the CPOR Act.<sup>694</sup> They accordingly were registrable offences under the 'foreign jurisdiction offence' limb in paragraph (j) of the definition of a Class 2 offence. He was therefore a registrable person under s 3A of the CPOR Act when he entered New South Wales in April 2008.<sup>695</sup>

The Commission concluded in March 2019 that Mr GG was both a registrable person under the foreign jurisdiction offence provisions (from when he entered New South Wales in April 2008) and a corresponding registrable person (from 20 October 2008).

Mr GG's reporting period under the foreign jurisdiction offence provisions would have been calculated under s 14A of the CPOR Act as 7.5 years, as he had pled guilty to multiple Class 2 offences which he committed when he was under 18 years of age.<sup>696</sup> When he (also) became a corresponding registrable person in October 2008, his reporting period was governed by s 14D of the CPOR Act, which (then) provided:

Despite anything in this Part, a corresponding registrable person must continue to comply with the reporting obligations imposed by this Part until he or she ceases to be a corresponding registrable person (emphasis added).

As that section only prescribed a minimum reporting period, there was no inconsistency between the requirements of s 14D and s 14A. Both sections would be satisfied if Mr GG complied with reporting obligations for 7.5 years.

The Commission accordingly concluded in 2019 that Mr GG had been a registrable person under the CPOR Act when he came to New South Wales in April 2008, and had been required to comply with reporting obligations in New South Wales for 7.5 years, from March 2008 to September 2015 (this period later being extended for time in custody). This was consistent with the (remaining) reporting period the NSW Police Force had noted for Mr GG in June 2008.<sup>697</sup>

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<sup>694</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) (version in force as at April 2008) s 3 (definition of 'Class 2 offence' para (a)).

<sup>695</sup> The exception in s 3A(2)(a) did not apply to Mr GG, as the orders made in his case by the Tasmanian court were not equivalent orders to an order under s 33(1)(a) of the *Children (Criminal Proceedings) Act 1987* (NSW): see *Youth Justice Act 1997* (Tas) s 47(1)(d) and s 47(1)(f).

<sup>696</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) (version in force as at April 2008) s 14A(1)(b)(ii) and s 14B.

<sup>697</sup> His reporting period would have been backdated to begin from the date his sentence was imposed in Tasmania: *Child Protection (Offenders Registration) Act 2000* (NSW) s 14.

This meant that the original decision made by the NSW Police Force in 2008 about Mr GG's registrable status and reporting period had been correct. The NSW Police Force had therefore erred in concluding in 2016 that he was not a registrable person, and in applying for annulments of his convictions under the CPOR Act from between 2010 and 2016.

In March 2019 the Commission provided its analysis of Mr GG's case to the NSW Police Force.

#### Conclusion following consultation with the NSW Police Force:

Sections 19BB and 19BC need to be reviewed and redrafted in order to clarify the relationship between:

- the corresponding registrable person provisions, and
- the provisions relating to persons who are registrable persons because they were sentenced for offences in foreign jurisdictions which, if committed in New South Wales, would have been registrable offences under the CPOR Act (the 'foreign jurisdiction offence' limbs in paragraphs (f) and (j) of the definitions of Class 1 and Class 2 offences respectively).

## 6.4 DETERMINING THE REPORTING PERIOD FOR A PERSON WHO HAS HAD REPORTING OBLIGATIONS IN MULTIPLE JURISDICTIONS

One problem raised by Registry officers was how to calculate a corresponding registrable person's reporting period when that person has moved through multiple jurisdictions before coming to New South Wales, and in each jurisdiction a different reporting period applied to that person.

For example if a person:

- 1) commits a registrable offence in jurisdiction A, and under the offender registration law in that jurisdiction has a reporting period of five years, then
- 2) moves to jurisdiction B, and under that jurisdiction's offender registration law has a reporting period of eight years, then
- 3) moves to New South Wales,

is the correct reporting period for the person under the CPOR Act five years, or eight years?

Section 19BC provides that a corresponding registrable person's reporting period is 'the whole period during which the person is a corresponding registrable person'. Under s 19BB(1), a person is a corresponding registrable person if they: (1) have at **any time** been in a foreign jurisdiction where they were required to report to a corresponding registrar and (2) would, if they were still in that jurisdiction, still be required to report to that registrar.<sup>698</sup>

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<sup>698</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) s 19BB(1) (emphasis added).

There is no explicit reference in the definition of a corresponding registrable person in s 19BB(1) to the jurisdiction in which the person originally committed the offence (the originating jurisdiction). This can be contrasted with s 19BB sub-section (3), which explicitly refers to the jurisdiction in which the person was found guilty. It is clear however from the word 'includes' in the opening to sub-s (3) that it does not provide an exhaustive definition of who is a corresponding registrable person (ie sub-s (3) does not limit the scope of sub-s (1)).

One interpretation of s 19BB(1) is that a corresponding registrable person's reporting period in New South Wales continues for as long as they would be required to make reports in **any** other jurisdiction, not just the originating jurisdiction. In the example above, therefore, the person's reporting period would be eight years. Another possible interpretation is that sub-s (1) should be read in line with sub-s (3), and therefore should be read as referring to the originating jurisdiction, in which case in the example above the person's reporting period would be five years.

The Registry officers advised that clarity is required in the CPOR Act as to how to determine the reporting periods for corresponding registrable persons who have been required to report in multiple jurisdictions.

#### **Conclusion following consultation with the NSW Police Force:**

**Sections 19BB and 19BC need to be reviewed and redrafted in order to make clear what should be the length of a corresponding registrable person's reporting period if the person has been (and continues to be) required to report to a corresponding registrar in more than one foreign jurisdiction.**

## **7. INTERPRETING AND ENFORCING REPORTING OBLIGATIONS**

The CPOR Act requires registrable persons to report their personal information, and changes to that information, to the NSW Police Force within certain timeframes. However, some of the timeframes are unclear.

This lack of clarity may make it difficult for registrable persons to identify exactly what they are required to tell the NSW Police Force, and by what date. This is significant as the penalty for failing to comply with any of the reporting obligations under s 17 of the CPOR Act can be up to five years' imprisonment.

The lack of clear timeframes for reporting can also make it difficult for the NSW Police Force to determine when a breach of a reporting obligation has occurred, and when arrest and prosecution for the offence in s 17 of the CPOR Act is warranted. The lack of clarity can also make it difficult for a court to determine whether the offence of failing to comply with reporting obligations has been proven.

Another relevant consideration is that reporting obligations have not kept up to date with changes in technology. For example, the CPOR Act requires a registrable person to report to the NSW Police Force a variety of different details about their internet usage, but it does not explicitly cover the use of mobile phone 'apps' such as

WhatsApp.<sup>699</sup> This however could be rectified through amendments to the regulations.<sup>700</sup>

The Commission has identified a number of reporting obligations which do not appear to be sufficiently precise, with the result that in certain circumstances it will be difficult for the NSW Police Force to identify when breaches of these obligations have occurred.

The Registry officers consulted by the Commission stated that there should be a consistent approach in the CPOR Act to timeframes for reporting. Currently there are many different timeframes that apply, which leads to confusion and uncertainty for officers in the NSW Police Force.

## 7.1 OBLIGATION TO REPORT CHANGES REGARDING RESIDENCE WITH CHILDREN

A registrable person's initial report to the NSW Police Force must include information about any child who 'generally resides' in the person's household.<sup>701</sup> Section 9(2)(b) of the CPOR Act states that a child 'generally resides' in a person's household if they 'reside together in that household for a least 3 days (whether consecutive or not) in any period of 12 months'.

A registrable person is required to report a change regarding the children who 'generally reside' with that person, 'within 24 hours after the change occurs'.<sup>702</sup>

That 'change' will only occur **after** the child has resided with the person for the '3 days in 12 months' period in s 9(2)(b).<sup>703</sup> The registrable person has then 24 hours after the last of those three days to report the residence of the child to the NSW Police Force.

However it is unclear from the wording in s 9(2)(b) exactly when the threshold of residing for '3 days in 12 months' will have been met, triggering the obligation to report within 24 hours.

The term 'reside' in s 9(2)(b) is not further defined in the CPOR Act. It is unclear whether the requirement that the child 'reside' for at least '3 days' should be interpreted as requiring that the child has stayed at the person's house for three full 24-hour periods, or slept three nights at the person's residence, or some other interpretation.

Additionally, the reference to the child residing in the household for at least three days (including non-consecutive days) 'in any 12 month period' creates uncertainty. This was identified by the Victorian Law Reform Commission (VLRC) in its review of the *Sex Offenders Registration Act 2004* (Vic) (the Victorian Act) in 2011. In 2011 that

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<sup>699</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) s 9(1)(q).

<sup>700</sup> See *Child Protection (Offenders Registration) Act 2000* (NSW) s 9(1)(q).

<sup>701</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) s 9(1)(e).

<sup>702</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) s 9(1)(e) and s 11(1)(a).

<sup>703</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) s 11(2).



Act contained a provision which was identical to s 9(2)(b) in the CPOR Act.<sup>704</sup>  
The VLRC stated:

it is unclear whether this 12-month period refers to a calendar year or to 12 months from the first day of residing together. A literal interpretation suggests that it is the latter. Registered sex offenders are required to report residing with a child within one day—presumably within one day of the third day of residing together. It seems that a registered sex offender must keep a record of all days for which they have resided in the same household as a particular child, and calculate whether these days have fallen in one 12-month period.<sup>705</sup>

The VLRC further commented that:

The Commission considers this definition unhelpful. Although it requires registered sex offenders to report residing in the same house as a child or children within one day of the third occurrence in a 12-month period, this may be months after the first and second occasions on which the registered sex offender has stayed under the same roof as a child. From a child protection perspective, the child or children could have been at risk of harm on either of these earlier occasions without any requirement for the offender to have made a report. Any attempt to redefine 'residing with a child' by number of days or length of time is equally arbitrary.<sup>706</sup>

The VLRC recommended that the Victorian Act be amended to include 'residing with a child or children' as one type of contact that registered sex offenders are required to report, and remove the 'three days in 12 months' threshold.<sup>707</sup> This recommendation was implemented, and now 'stay[ing] overnight at a place of residence where the child resides or is staying overnight' is included in the definition of 'contact with a child' in the Victorian Act. A registrable offender is required to report any such contact within one day of it occurring.<sup>708</sup>

The risk that the VLRC identified (ie that setting the threshold at three non-consecutive days in any 12 month period may lead to long delays before the first day of 'residence' is reported) is equally likely under s 9(2)(b) of the CPOR Act.

The wording of s 9(2)(b) therefore not only creates uncertainty for the NSW Police Force, but also seems inconsistent with the object of the CPOR Act to protect children from serious harm.<sup>709</sup> The Registry officers the Commission consulted stated that the threshold of three non-consecutive days was very difficult for NSW Police Force investigators to apply. They suggested that registrable persons should be required to report any changes in terms of the children residing with them within 24 hours.

### **Conclusions following consultation with the NSW Police Force:**

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<sup>704</sup> *Sex Offenders Registration Act 2004* (Vic) (version in force as at 1 August 2011) s 14(2)(b).

<sup>705</sup> Victorian Law Reform Commission, *Sex Offenders Registration: Final Report* (2011) para 7.31.

<sup>706</sup> Victorian Law Reform Commission, *Sex Offenders Registration: Final Report* (2011) para 7.32.

<sup>707</sup> Victorian Law Reform Commission, *Sex Offenders Registration: Final Report* (2011) para 7.33 and Recommendation 31.

<sup>708</sup> *Sex Offenders Registration Act 2004* (Vic) s 4A(b), s 14(1)(e) and (ea), and s 17(1A).

<sup>709</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) s 2A(a).

Sections 9(1)(e), 9(2)(b), 11(1)(a) and 11(2) need to be reviewed. The phrase 'reside together...for at least 3 days' in s 9(2)(b) needs to be further defined or replaced, to remove ambiguity as to when the threshold for reporting will be met. Consideration should be given to whether the three (non-consecutive) days 'in any period of 12 months' threshold is appropriate in light of the risks identified by the VLRC. Consideration should also be given to adopting the Victorian approach of requiring registrable persons to report 'stay[ing] overnight' at a place of residence where a child 'resides or is staying overnight' within one day of it occurring.

## 7.2 OBLIGATION TO REPORT EMPLOYMENT

### 7.2.1 CALCULATING TIMEFRAMES FOR REPORTING CHANGES TO EMPLOYMENT

A registrable person is required under s 9(1)(f) of the CPOR Act to include in his or her initial report to the NSW Police Force:

- (i) the nature of the person's work, and
- (ii) the name of the person's employer (if any), and
- (iii) the address of each of the premises at which the person generally works.

The CPOR Act states in s 9(2)(d) that a registrable person is only 'generally employed' at a particular premises if he or she is employed there for 'at least 14 days (whether consecutive or not) in any period of 12 months'.<sup>710</sup>

A registrable person must report a change to the nature of their work, their employer or place where they 'generally work' within seven days.<sup>711</sup> However, a 'change' to the place where the person is **generally employed** will only be taken to have occurred once the 14 day period in s 9(2)(d) has expired.<sup>712</sup>

It is unclear whether the three limbs of s 9(1)(f) should be read as separate obligations, with the consequence that the extended timeframe for reporting changes under s 9(2)(d) only applies to the limb (iii). This would mean that a registrable person must report a change to the limb (i) (nature of their work) or (ii) (their employer) within seven days, but is only required to report a change to (iii) (the location where they are working) within seven days after the period in s 9(2)(d) has been fulfilled.

If the three limbs are treated as a single obligation, however, the registrable person may be relieved from having to report changes to the nature of his or her work, or employer, until the period for changes to his or her place of employment under s 9(2)(d) has been satisfied.

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<sup>710</sup> It should be noted that s 9(1)(f) originally referred to premises where a person was 'generally employed'. Section 9(2)(d) should have been updated when s 9(1)(f) was amended in 2013 to refer to 'generally works' rather than 'generally employed': see *Child Protection Legislation Amendment (Children's Guardian) Act 2013* (NSW).

<sup>711</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) s 11(1).

<sup>712</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) s 11(2).

Example 9 demonstrates the consequences if this latter interpretation is adopted. It also illustrates the potential problems with s 9(2)(d) as currently drafted.

#### Example 9:

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In early 2012 Mr XX<sup>713</sup> was convicted of possessing child pornography and became a registrable person under the CPOR Act.

On 10 April 2012 Mr XX informed Corrective Services NSW that the following day he would be commencing work at an aged care facility under a work for the dole program.

On 11 April 2012 Mr XX completed his first day of work at the facility under an 'employment pathway plan' with Job Services Australia. Under the plan he would work three days a week at the facility.

On 27 April 2012 the NSW Police Force arrested Mr XX for failing to comply with reporting obligations under s 17 of the CPOR Act, for failing to inform the NSW Police Force about his work for the dole arrangements.

At that point of Mr XX's arrest it had been 16 days since he had first started working at the facility. However, he had only completed six days of actual work.

Mr XX was initially refused bail by a magistrate in the Local Court. Mr XX's lawyer raised the issue that Mr XX could not have committed any offence under s 17 because he had not yet completed 14 days of work as required by s 9(2)(d) of the CPOR Act.

On 30 April 2012 the Police Prosecutor submitted that s 9(2)(d) should be interpreted so that the 'change' in work premises occurs as soon as 14 days have elapsed since the registrable person's first day of work (no matter how many of those 14 days the person had actually worked). Based on this interpretation, Mr XX's change in where he was 'generally employed' occurred on 25 April 2012, as this was 14 calendar days after 11 April, the day he first worked.

Mr XX's representative submitted that s 9(2)(d) should be read as requiring the person to actually work 14 days before they can be said to be 'generally working' at a place of employment.

Ultimately the Magistrate hearing Mr XX's matter did not need to make a ruling on the correct interpretation of s 9(2)(d). This was because even if the Police Prosecutor's interpretation of s 9(2)(d) was correct (which would mean Mr XX was 'generally employed' at the facility by end of 25 April 2012), s 11(1) effectively gave Mr XX a 14 day<sup>714</sup> notification period **after** the period in s 9(2)(d) had been **completed** in which to report his change of place of employment. Even on the Police Prosecutor's interpretation, it was only after the expiry of 14 days after 25 April that Mr XX would be committing the offence of failing to comply with his

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<sup>713</sup> All documentation in relation to Mr XX relied upon for this case study was produced by the NSW Police Force in response to item 2 of Law Enforcement Conduct Commission Notice 929 of 2017.

<sup>714</sup> Fourteen days was the period provided under s 11(1) of the *Child Protection (Offenders Registration) Act 2000* (NSW) as in force in 2012.

reporting obligations. However he had been arrested for this offence on 27 April 2012.

The Magistrate concluded that, whichever interpretation of s 9(2)(d) was correct, 'either way the offence isn't going to be made out' and granted bail.<sup>715</sup> The charge against Mr XX of failing to report was ultimately dismissed for other reasons (see part 7.2.2 below).

Example 9 demonstrates that there is a question as to how s 9(2)(d) should be interpreted, specifically how the 14 days should be counted.

This question will be particularly relevant in the case of part-time or casual work. If s 9(2)(d) requires a registrable person to actually have completed 14 days of work before the obligation to report the change in employment is triggered, then if, for example, the person only works one day a week, they could be employed for 3.5 months before the obligation to tell police would arise under s 11(1).

The case also demonstrates that there is a question whether the three limbs of s 9(1)(f) are in practice being treated as a single obligation, and therefore all subject to the extended timeframe for reporting in s 9(2)(d).

These questions will create difficulties for the NSW Police Force in prosecuting breaches of the obligation to report changes to employment.

The Registry officers the Commission consulted stated that in practice they treat the reporting timeframe for all three limbs of s 9(1)(f) as the same (as the Magistrate did in Mr XX's case). They confirmed that the qualification in s 9(2)(d) that the 14 days of employment need not be consecutive creates practical difficulties for them in seeking to ascertain when the reporting obligation has been breached.

The Registry officers suggested that s 9(1)(f), s 9(2)(d) and ss 11(1)-(2) should be reviewed, and that the CPOR Act should instead simply impose an obligation on registrable persons to report details of a change in place of employment within seven (calendar) days of signing the employment contract or the first day of work.

Conclusions following consultation with the NSW Police Force:

**Sections 9(1)(f), s 9(2)(d) and s 11(1)-(2) need to be reviewed. At a minimum:**

- **s 9(2)(d) needs to be amended to refer to 'generally works' rather than 'generally employed' (as the latter term is not used in s 9(1)(f));**
- **the same, explicit timeframe for reporting should apply to all the details in each of the three limbs of s 9(1)(f), and**
- **the Act should define the meaning of 'employed...for at least 14 days (whether consecutive or not)' (to avoid the problems raised by Mr XX's case (above)).**

**However consideration should be given to adopting the Registry's suggestion that the obligations in sub-ss 9(1)(f) and 9(2)(d) (and their complicated interaction with sub-ss 11(1) and (2)) be replaced with an obligation to report**

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<sup>715</sup> Transcript of Proceedings, *R v [Mr XX]: Application for Bail* (Local Court, 30 April 2012), NSW Police Force response to item 2 of Law Enforcement Conduct Commission Notice 929 of 2017, pp 7-8.

changes in employer or place of employment within seven (calendar) days of signing an employment contract, or the first day of work (whichever is earlier).

## 7.2.2 QUESTION WHETHER WORK FOR THE DOLE HAS TO BE REPORTED

In the matter in Example 9, discussed above, Mr XX's representative raised the question whether a registrable person had an obligation under the CPOR Act to report 'work for the dole' as 'employment'.

Under the CPOR Act as in force in 2012 (the time of Mr XX's case), a registrable person was required to report the 'nature of their employment', their 'employer' and where they were 'generally employed'.<sup>716</sup> The CPOR Act did not define these terms, but stated that for the purposes of that obligation, 'employer' and 'employment' had the same meaning as that given in the *Commission for Children and Young People Act 1998* (NSW) (CCYP Act).<sup>717</sup>

On 30 November 2012 the Magistrate hearing Mr XX's matter considered that the definition of those terms in s 33 of the CCYP Act did not include work done as part of the work for the dole program.<sup>718</sup> Accordingly he held that the CPOR Act did not require Mr XX to report to the NSW Police Force about his work under such a program, and therefore acquitted him of the charge of failing to comply with a reporting obligation under the CPOR Act.<sup>719</sup> Mr XX subsequently sent a Letter of Demand to the NSW Police Force seeking damages for unlawful arrest, false imprisonment and malicious prosecution. The matter was ultimately settled without admission of liability.

The Magistrate had noted on 30 November 2012 that his interpretation of the term 'employment' under the CPOR Act meant there was:

an urgent need for legislative review. There is a clear need for persons in the position of the defendant to be so supervised and to be so responsible for reporting... and I will expect a large number of people who are on such orders [ie registrable persons] to be in fact unable to get work elsewhere and consequently working for the dole.<sup>720</sup>

Since the decision in relation to Mr XX, the CCYP Act has been repealed and replaced by the *Child Protection (Working with Children) Act 2012* (NSW) (WWC Act), and the CPOR Act has been amended as a consequence. However, the introduction of the WWC Act and these amendments do not appear to have addressed the concerns raised by the Magistrate in Mr XX's case that work for the dole is not required to be reported under the CPOR Act.

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<sup>716</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) (version in force as at 10 April 2012) s 9(1)(f).

<sup>717</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) (version in force as at 10 April 2012) s 9(3).

<sup>718</sup> Transcript of Proceedings, *R v [Mr XX]* (Local Court, 30 November 2012) NSW Police Force response to item 2 of Law Enforcement Conduct Commission Notice 929 of 2017, pp 5-6.

<sup>719</sup> *Ibid* p 6.

<sup>720</sup> *Ibid*.

Section 9(1)(f) as currently drafted requires a registrable person, if they are a 'worker', to report the nature of their work, their employer, and the address of each premises at which the person generally works. The terms 'worker' and 'employer' in s 9(1)(f) of the CPOR Act have the same meanings as those terms are given in s 5 of the WWC Act.<sup>721</sup>

A person engaged in the work for the dole program does not appear to fit in any of the categories contained in the definition of 'worker' in the WWC Act. Such a person is not an 'employee' as the person receives no remuneration for the work and is required to participate in the work program in order to receive income support from Centrelink, but does not enter into a contractual relationship with the host organisation. A person participating in work for the dole also is not a self-employed person, a contractor or sub-contractor, a volunteer, or a person undertaking practical training as part of an educational or vocational course.<sup>722</sup>

Further, the *Social Security Act 1991* (Cth) makes it clear that the fact a person is engaged in the work for the dole program does not make that person an employee for the purposes of the *Fair Work Act 2009*, the *Superannuation Guarantee (Administration) Act 1992* or the *Safety, Rehabilitation and Compensation Act 1988*, or a worker for the purposes of the *Work Health and Safety Act 2011*.<sup>723</sup>

It is therefore not clear from a reading of the WWC Act whether a registrable person undertaking work for the dole is a 'worker' under that Act, and therefore a 'worker' for the purposes of s 9(1)(f) of the CPOR Act. It is also therefore unclear whether such a person has an obligation to report the fact they are undertaking this work to the NSW Police Force under the CPOR Act. This issue needs to be clarified so that the NSW Police Force can enforce the reporting obligations in the CPOR Act correctly.

### **Conclusion following consultation with the NSW Police Force:**

The definition of 'worker' for the purposes of the CPOR Act should expressly include persons participating in a Work for the Dole program. Consideration should be given to including similar wording to that in s 631C of the *Social Security Act 1991* (namely a person who 'is participating in an approved program of work for income support, or undertaking an activity in accordance with a term (including an optional term) of a Newstart Employment Pathway Plan').

## **7.3 IDENTIFYING WHEN CORRESPONDING REGISTRABLE PERSONS NEED TO MAKE THEIR INITIAL REPORT**

It is difficult to determine when a corresponding registrable person is required to make their initial report under the CPOR Act. Section 19BD requires a person who 'becomes' a corresponding registrable person while in New South Wales to make an initial report within seven days 'after becoming' a corresponding registrable person.

However, the CPOR Act does not define at what point a person will 'become' a corresponding registrable person. Section 19BB, which defines who is a

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<sup>721</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) s 9(3).

<sup>722</sup> *Child Protection (Working With Children) Act 2012* (NSW) s 5.

<sup>723</sup> *Social Security Act 1991* (Cth) s 631C.



corresponding registrable person, does not shed much light on this issue, other than to suggest that a person can only become a corresponding registrable person once they have left the jurisdiction in which they were originally required to report.

Section 9C of the CPOR Act may provide some assistance. That section states that any person who has been required to report to a corresponding registrar must contact a person nominated by the NSW Commissioner of Police within seven days of entering New South Wales. The purpose of the contact is for the person to receive advice from the NSW Police Force as to whether they are a registrable person under the CPOR Act, and if so, to be informed about their reporting obligations (s 9C(3)).

It may be that a person ‘becomes’ a corresponding registrable person when they are advised that they are registrable in New South Wales under s 9C(3). Under s 19BD, the person would then have seven days from that advice to make their initial report. A corresponding registrable person cannot be convicted for failure to comply with s 19BD if the person has not received notice, or otherwise been made aware, of his or her reporting obligations under that section.<sup>724</sup> Accordingly, it would be logical if s 9C(3) and s 19BD were to be read together in this way.

However, a further complicating factor when attempting to identify the timeframe for a corresponding registrable person’s initial report is the relationship between s 19BD and the table in s 9A titled ‘When an initial report must be made’. The last item (item 3) in that table states:

A registrable person who enters New South Wales from a foreign jurisdiction and who had not previously been required under this Act to report his or her personal information to the Commissioner of Police...[must make an initial report] [w]ithin 7 days after entering and remaining in New South Wales for 14 or more consecutive days...

As the definition of a ‘registrable person’ includes a corresponding registrable person,<sup>725</sup> on its face this obligation would appear to apply to corresponding registrable persons. On the basis of that provision, it could be argued that a corresponding registrable person could have up to 21 days after entering New South Wales to make an initial report.

However a review of the legislative history of s 9A reveals that there previously was a fourth item in that table, which was specifically addressed to corresponding registrable persons.<sup>726</sup> That section was removed and became s 19BD.<sup>727</sup> This suggests that item 3 of the table was not designed with corresponding registrable persons specifically in mind, a reading which is supported by the legislative history of that provision.<sup>728</sup>

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<sup>724</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) s 17(3).

<sup>725</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) s 3A(1).

<sup>726</sup> *Child Protection (Offenders Registration) Act 2000* (NSW) s 9A (version in force as at 22 October 2014).

<sup>727</sup> *Child Protection (Offenders Registration) Amendment (Statutory Review) Act 2014 No 54* (NSW) s 29 and s 38.

<sup>728</sup> The third item in the table in s 9A is based on a provision that pre-dated the concept of corresponding registrable persons and related to persons who were found guilty of registrable offences outside of New South Wales: see s 10(1)(b) of the *Child Protection (Offenders Registration) Act 2000* (NSW)(version in force prior to 30 September 2005), and Explanatory Note, *Child Protection (Offenders Registration) Amendment Bill 2004* (NSW) p 4.

The Registry officers that the Commission consulted stated that the corresponding registrable person provisions in the Act need to be reviewed. They agreed that the Act needs to define at what point a person becomes a corresponding registrable person for the purpose of calculating the timeframe for their initial report under s 19BD. The officers also agreed that the Act needs to make explicit the relationship between s 9C, the last item in s 9A(1) and s 19BD.

#### **Conclusions following consultation with the NSW Police Force:**

The CPOR Act needs to make clear exactly when a corresponding registrable person is required to make his or her initial report to the NSW Police Force. Within the framework of the existing provisions, this would include inserting a definition of when a person ‘becomes a corresponding registrable person’ for the purpose of s 19BD, and making explicit how s 9C, s 9A(1) and s 19BD relate to each other.

## **7.4 ERROR IN PROVISIONS REGARDING MODIFIED OBLIGATIONS FOR PROTECTED WITNESSES**

Part 3, Division 5 of the CPOR Act concerns the power of the NSW Commissioner of Police to modify the reporting obligations which apply to protected witnesses. Section 13, in sub-ss (8), (9) and (10)(c), refers to persons aggrieved by decisions of the Commissioner of Police having a right to appeal to the NSW Ombudsman. However the Ombudsman no longer has this function; that role was taken over by the Commission on 9 July 2017.<sup>729</sup>

#### **Conclusion following consultation with the NSW Police Force:**

Section 13 sub-ss (8), (9) and 10(c) need to be amended to replace all references to the Ombudsman with references to the Law Enforcement Conduct Commission.

## **8. CALCULATING EXTENSIONS TO REPORTING OBLIGATIONS FOR TRAVEL**

Under s 15(1)(b) of the CPOR Act, a registrable person’s reporting obligations are suspended for any period during which they are outside New South Wales.<sup>730</sup>

Section 15(3) states that the period for which a person’s reporting obligations continue will be extended ‘by the length of time that their obligations were suspended’ if, ‘during the time in which the obligations were suspended’, the registrable person:

- (a) is outside of Australia for ‘one month or more’, and
- (b) is not required to report under any corresponding Act.

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<sup>729</sup> *Witness Protection Act 1995* (NSW) s 6(4).

<sup>730</sup> There is one exception in the case of the obligation in s 11B to report changes to the person’s travel plans.

The wording of these sub-sections is somewhat confusing and creates room for inconsistency and error, as discussed below.

## 8.1 THRESHOLD FOR WHEN TRAVEL WILL TRIGGER EXTENSION

It is not clear what exact period of time represents 'one month', after which the extension provision may be triggered under the CPOR Act. Documents provided by the NSW Police Force show that it has interpreted this period variously as 28 days, 30 days and 31 days.

This lack of clarity will lead to inconsistent extensions of reporting periods for registrable persons who travel overseas. A difference in interpretation of one day can result in an extra month of reporting obligations for the registrable person.

The Registry officers that the Commission consulted agreed that the CPOR Act needs to specify how many days a registrable person is required to be outside New South Wales to trigger the extension provision in s 15(3).

### Conclusion following consultation with the NSW Police Force:

**The CPOR Act needs to specify how many days a registrable person is required to be outside Australia to trigger the extension of the period of their reporting obligations.**

## 8.2 LENGTH OF EXTENSIONS FOR INTERNATIONAL TRAVEL

It is difficult to determine the length of the extensions to a person's reporting obligations that are required by s 15(3). It is unclear whether that sub-section requires they be extended:

- 1) by the **entire length of the period** the person's reporting period was **suspended** under s 15(1)(b), provided that the two requirements in s 15(3)(a) and (b) were met at **any point during** the suspension period, or
- 2) only by the **periods in which both the requirements in s 15(3)(a) and (b) were met** (during the person's suspension period).

If the first interpretation is adopted, the length of time by which a person's reporting obligations will be extended **because of** international travel will not necessarily match the amount of time the person was actually travelling outside of Australia.

For example, assume a registrable person leaves New South Wales to visit Victoria for five days, then travels to a country that does not have an offender register, and after 40 days in that country returns to Victoria for another 20 days before returning to New South Wales.

The person's reporting obligations will be suspended for the full 65 days. It is unclear however by what period the person's reporting period should be extended.

Under the first interpretation, the answer is the full 65 days, because the requirements in s 15(3) (a) and (b) were met at a certain point 'during' the suspension period (specifically, during the 40 days spent overseas).

Under the second interpretation, the answer is the person's reporting obligations should only be extended by 10 days.<sup>731</sup> This is because:

- For the first five days in Victoria, neither of the requirements in sub-s (3)(a) or (3)(b) were met (because a registrable person has to stay in Victoria for 14 days before being required to report).
- For the 40 days overseas, the requirement in sub-s (3)(b) was met, but the requirement in sub-s (3)(a) was only met after the person has been in the country for 'one month' (so only for the last 10 days).
- For the last 20 days in Victoria, the requirement in sub-s (3)(a) was not met.

This lack of clarity in sub-s 15(3) may lead to inconsistencies and errors in the calculation of extensions.

The Registry officers consulted by the Commission agreed that s 15(3) is unclear and needs amendment. They informed the Commission that the provision is particularly problematic for the NSW Police Force when attempting to calculate extensions for 'fly in fly out' workers, who work interstate and are frequently required to go in and out of different jurisdictions, and registrable persons who live or work in border areas such as Albury-Wodonga.

**Conclusion following consultation with the NSW Police Force:**

**The CPOR Act needs to be amended to clearly identify the amount of time a person's reporting obligations will be extended by under s 15(3).**

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<sup>731</sup> Assuming for the purposes of this example that the 'one month' threshold in s 15(3)(a) should be interpreted as 30 days.

# GLOSSARY

Glossary	Description
BTS	Business and Technology Services, NSW Police Force
CAM/ Child abuse material	Defined in s 91FB of the <i>Crimes Act 1900</i> (NSW), and includes material that depicts or describes a person under the age of 16 as a victim of torture, cruelty or physical abuse; or engaged in a sexual pose or sexual activity; or in the presence of another person who is engaged in a sexual pose or sexual activity; or material that depicts or describes the private parts of a person under the age of 16, in a way that reasonable persons would regard as being, in all the circumstances, offensive.
Child	For the purposes of the <i>Child Protection (Offenders Registration) Act 2000</i> (NSW), a 'child' is defined as any person who is under the age of 18 years.
Child protection prohibition order	Order made under the <i>Child Protection (Offenders Prohibition Orders) Act 2004</i> (NSW)
Class 1 offence/Class 2 offence	An offence that falls within the definition of 'Class 1 offence' or 'Class 2 offence' in s 3(1) of the <i>Child Protection (Offenders Registration) Act 2000</i> (NSW).
Commission	Law Enforcement Conduct Commission, New South Wales
COMPASS	NSW Police Force Command Performance Accountability System
COPS	NSW Police Force Computerised Operational Policing System
Corresponding registrable person	A person who has been required to report to police under an offender registration law in a jurisdiction other than New South Wales, and who moves to New South Wales while they are still required to report in that other jurisdiction: see <i>Child Protection (Offenders Registration) Act 2000</i> (NSW) s 19BB.
CPOR Act	<i>Child Protection (Offenders Registration) Act 2000</i> (NSW)
CPOR Regulation	<i>Child Protection (Offenders Registration) Regulation 2015</i> (NSW)
CPR	New South Wales Child Protection Register
CPR case review	Internal review of 5,749 Child Protection Register case files initiated by the NSW Police Force in July 2016, and completed in October 2018.
CPR COPS	The section of the NSW Police Force Computerised Operational Policing System (COPS) that contains information about

	registrable persons under the <i>Child Protection (Offenders Registration) Act 2000</i> (NSW).
<b>Form 3</b>	A written notice that informs a registrable person that they are required to attend a police station within seven days to provide the personal information required under the CPOR Act. It must be signed by the registrable person.
<b>IBAC</b>	Independent Broad-based Anti-corruption Commission, Victoria
<b>JusticeLink</b>	Electronic database used by all courts in New South Wales to record court proceedings and outcomes
<b>LECC</b>	Law Enforcement Conduct Commission
<b>LECC Act</b>	<i>Law Enforcement Conduct Commission Act 2016</i> (NSW)
<b>Local commands</b>	NSW Police Force Police Area Commands and Police Districts
<b>Mental Health (FP) Act</b>	<i>Mental Health (Forensic Provisions) Act 1990</i> (NSW)
<b>NSW</b>	New South Wales
<b>NSWPF</b>	New South Wales Police Force
<b>Offender registration laws</b>	Laws in jurisdictions other than New South Wales which require certain offenders to register and report their details to police on an ongoing basis
<b>OGC</b>	Office of the General Counsel, a command within the NSW Police Force that provides legal services to the Commissioner of Police and other police officers
<b>OIMS</b>	Offender Integrated Management System, the electronic system used by Corrective Services NSW to manage offenders in custodial facilities
<b>Operation Tuskett</b>	Investigation by the Commission under Part 6 of the <i>Law Enforcement Conduct Commission Act 2016</i> (NSW) into alleged 'agency maladministration' by the NSW Police Force in relation to the Child Protection Register
<b>Register</b>	NSW Child Protection Register, established under s 19 of the <i>Child Protection (Offenders Registration) Act 2000</i> (NSW)
<b>Register Staffing Review</b>	Review of the NSW Police Force Child Protection Register staffing, conducted by the Workforce Intelligence Unit in the New South Wales Human Resources Command, finalised in July 2017.
<b>Registrable offence</b>	Defined in s 3 of the <i>Child Protection (Offenders Registration) Act 2000</i> (NSW). If a person is convicted of a 'registrable offence' they may become a 'registrable person' under that Act.
<b>Registrable person</b>	Defined in s 3A of the <i>Child Protection (Offenders Registration) Act 2000</i> (NSW) as a person who has been sentenced for a registrable offence.



<b>Registry</b>	The Child Protection Registry, a specialist unit in the Child Abuse and Sex Crimes Squad, in the State Crime Command of the NSW Police Force
<b>Registry Manager</b>	Manager of the New South Wales Police Force Child Protection Registry
<b>Reporting obligations</b>	Requirements in Part 3 of the <i>Child Protection (Offenders Registration) Act 2000</i> (NSW) that registrable persons report certain personal information to the NSW Police Force within certain timeframes
<b>Reporting period</b>	Length of time for which a person must comply with the reporting obligations in the <i>Child Protection (Offenders Registration) Act 2000</i> (NSW)
<b>Supervising authority</b>	A government agency that is prescribed under the <i>Child Protection (Offenders Registration) Regulation 2015</i> (NSW) as having control of a registrable person (for example, Corrective Services NSW).
<b>Treasury Managed Fund</b>	An insurance scheme created by the NSW Government to insure NSW government agencies

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