

The Child Protection Register

s3AA & s3E Child Protection (Offenders Registration) Act (NSW) 2000
O'Neil v Commissioner of Police [2020] NSWSC 1805

NSW Police maintain a register of offenders who are considered to pose a risk to the lives or sexual safety of children. However, this group is not limited to people who have committed offences against children. Police can apply for a court order that ANY offender be subject to the reporting conditions under the act. As such, every defence practitioner in NSW needs to know how to resist such an application.

Class 1 & 2 Offences

Class 1 & 2 offences are defined in s 3(1).¹ Class 1 includes murder (of a person under the age of 18 years) and all sexual offences or offences of violence committed against children. Class 2 offences are manslaughter (where the victim is a child) and a range of sexual and violent offences against children, generally of a lesser order than Class 1 offences.

Conviction for any of these offences will result in automatic registration and reporting obligations under the Act. However, police can apply to the Local Court for an order that ANY offender comply with the reporting obligations under the act on the basis that they pose a risk to the sexual safety of children.²

The effect of s 3E(2)(a) is that a person sentenced for even a traffic infringement, or possession of a small quantity of an illegal drug for personal use, or a minor offence of dishonesty may be the subject of an application under the section, notwithstanding that the elements and the circumstances of the offence were in no way indicative of any threat whatsoever to children and irrespective of the relative triviality of the offence.³

Risk to Sexual Safety of Children

Section 3AA(3)⁴ provides six mandatory factors that the court must take into account when determining this question:

- (3) *A court is to take the following into account in determining whether a person poses a risk to the lives or sexual safety of one or more children, or of children generally—*
- (a) *the seriousness of each registrable offence committed by the person,*
 - (b) *the age of the person at the time each of those offences was committed,*
 - (c) *the age of each victim of each of those offences at the time that the offence was committed,*
 - (d) *the seriousness of any other offences committed by the person,*

¹ Child Protection (Offenders Registration) Act (NSW) 2000

² s3E Child Protection (Offenders Registration) Act (NSW) 2000

³ O'Neil v Commissioner of Police [2020] NSWSC 1805 at [6]

⁴ Child Protection (Offenders Registration) Act (NSW) 2000

- (e) *the impact on the person if the order being sought is made compared with the likelihood that the person may commit a registrable offence,*
- (f) *any other matter that the court considers to be relevant.*

O'Neil v Commissioner

Mr O'Neil was convicted of driving a motor vehicle with an illicit drug present in his blood and possession of a prohibited drug. Neither of these offences involved a child and, indeed, there was no evidence that he had ever inappropriately dealt with a child. Nevertheless, police made the application and, despite being represented, Mr O'Neil inexplicably consented to the order being made.

Mr O'Neil subsequently came to his senses and appealed to the Supreme Court which promptly quashed the order. The court had multiple bases for this. Firstly, the police had filed their application outside the 60 day time limit from the date of conviction. Secondly, they had filed papers seeking a different order under a different act. But most importantly, Fagan J found that the magistrate could not have been satisfied that Mr O'Neil posed a risk to the life or sexual safety of children.⁵ Fagan J found that at [12]:

Section 3AA makes it clear that the enquiry under s 3E(2)(a) about whether the person poses a risk to children is not at large but is constrained and directed by the statute. It shows that a conclusion as to the existence of a risk cannot be drawn lightly.

The first three considerations listed in s 3AA, pars (a), (b) and (c), contemplate that the respondent has been proved beyond reasonable doubt to have committed an offence against a child or children. As earlier mentioned, a conviction for such an offence is not a prerequisite to the making of an order under s 3E. However, the fact that three out of six mandatory considerations are directed to cases where the respondent has been so convicted is a clear indication that, in other cases, the contention that a respondent is a threat to children would have to be based upon something stronger than a police officer's speculation or suspicion.

The remaining considerations under s 3E(3) are to be construed, applied and weighed having due regard to their context, juxtaposed with considerations (a), (b) and (c). For example, the "seriousness of any other offence" referred to in par (d) must be measured with particular regard to whether any such other offence involved a child victim, which is the focus of pars (a), (b) and (c). A drug possession charge or a driving infringement, as in the present case, could not be regarded as "serious" within the meaning of par (d), given its context.

Underlining added by counsel

The upshot is that the police carry the burden of proving that the offender is a risk to the life or sexual safety of children and that the court must have regard to the six mandatory factors in s3AA(3). The court should not make such an order based on speculation or supposition by the police.

⁵ O'Neil v Commissioner of Police [2020] NSWSC 1805 at [30]

I'm available every day if you have any interesting issues.

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