

# **STANDING COMMITTEE ON ENVIRONMENT AND PUBLIC AFFAIRS**

**INQUIRY INTO CHILDREN AND YOUNG PEOPLE ON THE SEX OFFENDERS  
REGISTER—IS MANDATORY REGISTRATION APPROPRIATE?**



**TRANSCRIPT OF EVIDENCE  
TAKEN AT PERTH  
WEDNESDAY, 21 AUGUST 2019**

## **Members**

**Hon Matthew Swinbourn (Chairman)  
Hon Colin Holt (Deputy Chairman)  
Hon Tim Clifford  
Hon Samantha Rowe  
Hon Dr Steve Thomas**

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**Hearing commenced at 8.58 am**

**Mrs CLAIRE ROSSI**

**Lawyer, Youth Law Team, Criminal Law Division, Legal Aid Western Australia, examined:**

**Ms SARAH DEWSBURY**

**Lawyer, Youth Law Team, Criminal Law Division, Legal Aid Western Australia, examined:**

**The CHAIRMAN:** All right, everyone is here. We will just get through the formalities to begin with. I will introduce the committee. On the end is Hon Samantha Rowe, next to her is Hon Dr Steve Thomas and next to me is the Deputy Chair, Hon Colin Holt. I am the Chair, Matthew Swinbourn. On my left is Alex Hickman and on his left is Hon Tim Clifford. We will get stuck into it.

On behalf of the committee, I would like to welcome you to the hearing. Today's hearing will be broadcast. Before we go live, I would just like to remind all parties that if you have any private documents with you to keep them flat on the desk to avoid the cameras. Please begin the broadcast. You will have signed a document called "Information for Witnesses". Have you read and understood that document?

**The WITNESSES:** Yes.

**The CHAIRMAN:** These proceedings are being recorded by Hansard and broadcast on the internet. Please note that the broadcast will also be available for viewing online after this hearing. Please advise the committee if you object to the broadcast being made available in this way. A transcript of your evidence will be provided to you. To assist the committee and Hansard please quote the full title of any document you refer to during the course of this hearing for the record. Please be aware of the microphones and try to talk near them and ensure that you do not cover them or make unnecessary noise near them. Could the two of you please make sure that only one of you speaks at any given time, and we will try to give you that courtesy as well.

I remind you that your transcript will be made public. If for some reason you wish to make a confidential statement during today's proceedings, you should request that the evidence be taken in private session. If the committee grants your request, any public and media in attendance will be excluded from the hearing. Until such time as the transcript of your public evidence is finalised it should not be made public. I advise you that publication or disclosure of an uncorrected transcript of evidence may constitute a contempt of Parliament and may mean that the material published or disclosed is not subject to parliamentary privilege. Would you like to make an opening statement to the committee?

**Ms DEWSBURY:** Yes, we do intend to.

**Mrs ROSSI:** The opening statement we would like to make is, firstly, we would like to thank the standing committee for the opportunity to appear to give evidence as part of the inquiry into the mandatory register of children and young people on the sex offender register. This has been a matter of great concern to us and to other legal practitioners who represent children who are charged with child-related sexual offences and who are subject to mandatory registration.

We would also like to bring to the committee's attention that we are bound by rules of confidentiality from the Children's Court act, the Legal Aid Commission Act and the Community Protection (Offender Reporting) Act 2004 and therefore we are unable to identify specific offenders

or give any evidence which might identify a specific young offender in the course of our evidence today. That is basically our opening statement.

**The CHAIRMAN:** Thank you. I do not think we will be seeking any identification of any individuals but I do appreciate you bringing that to the attention of the committee.

My first question relates to findings of guilt, sentencing and convictions. In your submission you discussed the definition and effect of the terms “finding of guilt” and “sentence” in the act. Why are these definitions significant for registration purposes?

**Ms DEWSBURY:** Pursuant to the provisions of the Western Australian Young Offenders Act 1994 there are a number of dispositions which can be utilised by the Children’s Court for a young person convicted of any offence, and that includes sexual offences. Many of those dispositions do not result in a conviction against the young person. If the disposition—I am using that word rather than sentence to make it clear—is successfully completed, quite frequently the young person will not have a conviction for the purpose of a police clearance, future employment, travel and instances like that. The definitions in the Community Protection (Offender Reporting) Act 2004 mean that many of these dispositions will result in a child being subject to the—I will call it the “sex offender register” for ease of convenience—irrespective of what the court’s intention was with regard to a future conviction. We have felt that has meant that there could be a great disparity between the nature of a sentence imposed by a court—here I am using “sentencing” meaning disposition—and the ultimate impact upon the child being on the sex offender register. Whilst the court’s disposition will be to have a therapeutic focus—it might be focused on counselling, appropriate behaviour modelling or addressing underlying issues—the consequences of being on the child sex offender register, which lasts for an extremely long time, and, in fact, being on the register is for life, really carry through beyond anything which the court originally deemed appropriate.

**The CHAIRMAN:** Do you see offences that are prosecuted against children that perhaps are of a more serious nature but do not involve a sexual element being treated, in effect, where the child might not end up with a criminal conviction against much lower order sexual offences where, effectively, because they are put on the register, they do end up with that criminal conviction? Is there a disparity between those sorts of outcomes?

**Mrs ROSSI:** Yes, we do. Frequently, young people who commit quite serious offences will be placed on community-based orders. That would be a youth community-based order or an intensive youth supervision order or possibly a conditional-release order, which is a sentence of detention served within the community, effectively suspended detention, if you like. For an intensive youth supervision order or a youth community-based order, once those orders are completed no conviction is recorded. You could commit quite a serious robbery and be placed on one of those orders, and at the end of that period of time, if you successfully rehabilitate and complete the order, you would have no conviction recorded and no record of convictions, if you like. A conditional release order, if it is successfully completed and you do not reoffend, subsequent to that, 12 months later, there will be no conviction recorded. Under the Young Offenders Act, that conviction will fall away.

But for a young person who might commit a relatively minor sexual offence against another child—an indecent assault or even an indecent dealing—would possibly right at the outset have no conviction recorded but because of the section of the act, which is one of the scheduled offences, they are immediately reportable. They go away with no conviction, but they have this reportability, or this label, if you like, as being on the register hanging over them effectively henceforth. That is really damaging in terms of the rehabilitative focus and effect of the Young Offenders Act and what we are trying to achieve the Children’s Court.

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**The CHAIRMAN:** Is there something especially different about sexual offences that would justify a different approach?

**Mrs ROSSI:** I think for some sexual offences and sex offenders a different approach would be required, yes. That would be looking at the top end. We have always acknowledged that there would be some young offenders whose behaviour may be considered particularly serious or predatory and they may need to be monitored. For most young people, offences, particularly if they are very young, aged between 10 to say 13 or 14 years of age, often the young people have intellectual disabilities or they are at a stage of development when they are developing sexuality or they are sexually curious. One of the big issues is the availability of pornography now—the incredible availability of pornography. Now young people are exposed to that, whether they want to be or not, far more frequently and without any restrictions, and that for young people who are developing sexually increases curiosity. The other issue is that young people only offend against young people. They do not go and try things out on adults; they try things out on children.

**Hon COLIN HOLT:** Can I just paraphrase for my own benefit. Often the court will approach a young offender, or an issue, with a therapeutic focus of their disposition, which is all about the future of the young person, but that is actually in conflict with the mandatory nature of the act, which says, “Too bad how the court feels about it; you’re registered anyway.” Is that about right?

**Ms DEWSBURY:** That is correct, yes. I think we noted this in our submission quoting Her Honour Judge Davis. A court will often comment about issues, such as the registration of a young person, which are beyond their control, because the court’s outcome is irrelevant.

**Hon COLIN HOLT:** Is there a sense of frustration in that, do you think?

[9.10 am]

**Ms DEWSBURY:** We feel that, but I know that various members of the judiciary have also expressed frustration with that over the years.

**The CHAIRMAN:** Does the effect of these terms—I am talking about a finding of guilt and the use of a sentence—for the purpose of registration, differ to how they usually apply in the justice system and the principles of juvenile justice in particular?

**Mrs ROSSI:** I think with children there has always been a little bit of a difficulty between the meaning of conviction in the sense of a finding of guilt, and a conviction for the purpose of having a criminal record. We have always sort of split the meaning of conviction. The first step is that a child is read a charge and they plead guilty and, at that point, there is a conviction recorded—that is, a finding of guilt on the record. That is what triggers the reportability for a child who then has a finding of guilt on the record for the purpose of a scheduled offence, as opposed to, as we discussed before, a finding of guilt—so, there is a conviction—and a conviction being recorded; in other words, a record of it that will then be something that can be used in the future to determine your status as an offender, if you like. So, yes. The issue for us, of course, is that you can have no criminal record per se but because of your finding of guilt and that conviction, that is what leads to you being a registrable offender. That is relevant because for all of the penalties that can be imposed under the Young Offenders Act that are mentioned in the Community Protection (Offender Reporting) Act 2004, there must be a finding of guilt on the record, with the exception maybe of a referral to a juvenile justice team, but the act is silent on the status of the juvenile justice team and reportability.

Where a child is eligible for a referral to the juvenile justice team, the referral can be made at a number of stages. Firstly, the referral could be made before a finding of guilt is recorded. If a child accepts responsibility for an offence but does not formally plead guilty, the court can refer the child to the juvenile justice team without a finding of guilt being recorded on the record. The relevance

of that to reportable offending is that there are very few offences that can be referred to the team that are scheduled offences for reportability. Indecent dealing is one of those. Our view has always been that if a child were able to accept responsibility for a low-level indecent dealing offence and be referred to the juvenile justice team before a finding of guilt were recorded, then that could avoid registration.

**The CHAIRMAN:** Is that in a way gaming the system to avoid registration or —

**Mrs ROSSI:** It certainly is.

**Ms DEWSBURY:** Perhaps I could add to that. There are two issues with respect to the team. One is that even if the application is made in court for the young person to accept responsibility and be referred to the team, the matter is in the discretion of the judicial officer and frequently will not be referred to the team. The facts are heard. The state has an opportunity to be heard through the Director of Public Prosecutions in the Perth Children's Court and through the police prosecutors in the suburban and country courts. It is still a matter of discretion for the court. Secondly, the circumstances are so limited, as Claire said. There is indecent dealing and two offences—I think we could only find one—under the Classification (Publications, Films and Computer Games) Enforcement Act 1996, section 101 "Objectionable material ...". It is very, very limited. Claire and I were talking about this before we came in here today. We have never come across that provision. We have come across Criminal Code provisions, which cannot go to the team, but the circumstances are so limited in which a matter could go to the team. Although it could be perceived as gaming the system, it has to go through the appropriate hearing in court for that decision to be made and then there is a potential for that decision to be reviewed subsequently. If the state disagrees with the outcome and the decision to refer to the team, that decision could then be reviewed by the president, pursuant to section 40 of the Children's Court of Western Australia Act 1988. At each stage, the state has a right to be heard. It is not a loophole, if I can call it that, because it is properly and appropriately addressed and the circumstances in which a matter might be referred to the team would have to be at the extremely low end of the scale as this matter currently stands.

**The CHAIRMAN:** In your practice, is it happening very often that this diversion is happening before the point of being registered?

**Mrs ROSSI:** We make the application if a child is charged with a low-level indecent dealing—and often there maybe negotiation with the state to gauge the state's attitude beforehand in any event. We may make the application that the child should not be required to plead but should be allowed to accept responsibility pending that referral. Frequently we make the application, but it is rarely granted. Generally, children are required to plead and that is the relevance because at that point a finding of guilt is on the record. Notwithstanding they may not get a criminal conviction later, they are convicted with the finding of guilt for the purpose of the act.

**Hon SAMANTHA ROWE:** What sort of situation have they got themselves into? Are you able to give an example of what you mean?

**Ms DEWSBURY:** Yes. We might make an application for a matter to go to the team where, for example, at school a boy has grabbed a girl around the chest in the breast area. It is really misbehaviour. It is bad behaviour, but technically it could be regarded as indecent dealing by the court. Another situation which has occurred is where a young person gave his young girlfriend love bites. There was no suggestion of any other form of sexual activity but they were love bites and they were relatively lowdown. She was wearing a singlet top and her father reported the matter to the police. She was 15. That is the sort of situation which I imagine would be quite common amongst young people.

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**The CHAIRMAN:** How old was he?

**Ms DEWSBURY:** He was 17 and he actually went to trial on that and was found not guilty, but that would have been a situation where I would have asked—because it was indecent dealing, it went to trial on the issue of whether or not it was indecent.

**Mrs ROSSI:** We have also had situations where children may have a rude or pornographic picture and they show another kid thinking it is funny and that other child does not think it is funny and tells somebody. That would be an indecent dealing as well that we might ask about. I think the point that also needs to be made is that the juvenile justice team is a diversion but it is not a soft option because the child has to meet with a juvenile justice officer and a police officer and the victim can be part of that process if they wish. The idea is to be an educational program—put in place an action plan that the child must complete to try to reduce the risk of offending again, engaging in any psychological counselling as required. Although it is a diversionary program, it is not a soft option because a whole range of measures to protect the community, to reduce the risk of offending and to address the victim are considered and put in place by the juvenile justice team.

**Hon Dr STEVE THOMAS:** Would there be parental involvement in that process as well?

**Mrs ROSSI:** Absolutely, yes.

**Hon Dr STEVE THOMAS:** That is obviously a risk factor.

**Mrs ROSSI:** The child must attend with a responsible adult and, more often than not, that will be a parent, unless, of course, the child is in the care of the chief executive officer.

**Ms DEWSBURY:** I have also had a situation not involving a sexual offence at all where the victim of the offence objected to it being dealt with by the team and the team referred it back to the court. If there are any issues that arise that result in a dispute, whether it is a factual issue that ends up being in dispute or whether it is the fact that the victim objects strongly, then we have had matters returned to the court by the team. It is really a situation which can only be availed of where everybody is in agreement.

**The CHAIRMAN:** Can you give us some of the circumstances in which the court might impose no punishment, a conditional release order or a non-conviction order for a registerable offence?

[9.20 am]

**Mrs ROSSI:** By that, are you talking about an order under section 66 or 67 of the Young Offenders Act where there is no punishment imposed or no further punishment imposed?

**The CHAIRMAN:** What we are looking at is the circumstances where there might not be a punishment imposed but still the kind of offences that result in a non-punishment-type order but then end up on the register, so we can get some context as to the kind of behaviours. I think you touched on some of those indecent dealing-type ones but we are trying to understand the broad range of things and behaviours that might end up with a child not getting a punishment in the traditional sense or be on a conditional release or get a spent conviction and all those sorts of things, but then still be required to be registered.

**Mrs ROSSI:** If you are looking at low-level offending such as pinching somebody's bottom or touching their breasts or, for a period there, young boys were grabbing or tapping each other's genitals—it was stupid playground behaviour but it would constitute an indecent assault or indecent dealing. Where the court may be satisfied that the child has had appropriate interventions by parents or other appropriate professionals—if the child has gone to see a psychologist and has had appropriate education and is engaged in counselling to understand what is appropriate sexual touching and what is not; if the child has an intellectual disability and so protective educational

programs have been put in place—then the court may well be of the view that no further punishment should be imposed because enough has already been done, or it is in process, to avoid having to impose further obligations on the young person and that nothing further would be achieved by further youth justice supervision.

For example, the court can delay sentencing under section 68 of the Young Offenders Act 1994 in order for things to occur. If it was low-level offending, a letter of apology could be returned, they could have engaged in and completed psychological counselling completed and appropriate sexual education could be covered. Then when the child comes back, the court might say that that is enough and there is no further punishment under section 67 and therefore no conviction. But because of the nature of the offence, the child is still a reportable offender. The other end of that, I suppose, is more serious offending where the court is of the view that the child does need supervision within the community on a youth community-based order or an intensive youth supervision order. They would have to engage in psychological counselling and there would need to be appropriate plans put in place to reduce the risk of offending and protect the victim. At the end of that, as long as it is done successfully without breaches either by reoffending or by failing to comply with the conditions of the order, there would be no conviction but the child would continue to be reportable for half the time of the adult or as long as the commissioner deemed it appropriate.

**Ms DEWSBURY:** If I can perhaps add to what Claire has said. Just two comments. One is that in our experience, it would be fairly rare to have no disposition imposed by the court. More frequently, the young person would be placed on a youth community-based order or an intensive youth supervision order even if the sexual offending is relatively low level, because that gives an opportunity for Youth Justice to supervise the young person in the community as well as mandatory counselling and anything else which is deemed appropriate such as attendance at other programs. I just wish to make a little comment in relation to the use of the conditional release order. Under the Sentencing Act 1995, a conditional release order for an adult is like a good behaviour bond. In the Children's Court a good behaviour bond is a suspended fine where if the young person does not offend, they do not end up paying any money. If they reoffend in the period, they have to pay the money and it is a good behaviour bond. Whereas a conditional release order under the Young Offenders Act is a suspended detention sentence. It is a sentence of detention which is served in the community and it is regarded as a detention sentence. The terminology is a bit different when we are talking about adults from when we are talking about children.

**Hon COLIN HOLT:** In almost all cases, the court imposes some sort of disposition. Is that a bit of a safeguard approach by the courts to engage with an offender and make sure that they are not—well, protect the community in a sense and safeguard?

**Mrs ROSSI:** The imposition of an order—a youth community-based order or an intensive youth supervision order—would be done in accordance with the principles of juvenile justice. The magistrate or the judge would be considering the principles of juvenile justice and that, of course, not only goes to the rehabilitation of the young person but protection of the community, reintegration into the community, re-engagement with family and education but also taking responsibility for what they have done as part of preventing reoffending in the future. Of course, the victim needs to be considered in those dispositions as well. Frequently, there might be a victim impact statement read or the nature of the order would be to try to prevent anything happening again. That is then acknowledging the wrong that has been done to the victim, notwithstanding the level of the wrong.

**Hon COLIN HOLT:** Obviously, at some point in time the Parliament of Western Australia saw that mandatory reporting on the sex offenders register was an important safeguard.

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**Ms DEWSBURY:** The court is always anxious to ensure that everything is dealt with appropriately. As Claire indicated, that means addressing the principles of the Young Offenders Act. The role of the victim impact statement and the role of the state in providing that information is taken very seriously. Behaviour is never minimised by the court. Obviously, we are representing young people and we are there to provide an explanation for the behaviour and to alert the court to issues that need addressing and an explanation perhaps, but the court is always very careful to sentence appropriately and it is very clear that the subsequent effect of the young person being placed on the register is not something which the court can take into account. It is frustrating for the court because they may not deem that level of intense scrutiny in the future perhaps to be appropriate, but it is not taken into account in imposing a sentence.

**Mrs ROSSI:** I think, too, when the court imposes a penalty on a young person, one of the factors to be taken into account is the age of the young person. If you impose an order on an 11-year-old as opposed to a 17-year-old, the order may be quite different. What one needs to consider is the length of the order. Six months to an 11-year-old is very different from six months to a 17-year-old. Mandatory registration is not arbitrary in that sense. If you are registrable for four or seven and a half years, being half the period of an adult reportability, then that is a very, very long time for a child if their reportability is not amended or changed by the Commissioner of Police. Notwithstanding that there may be some children who certainly need to be monitored, for the majority of children who offend at 12 and 13, they are not paedophiles, which is clearly what the act was intended to be concerned with, and they may never offend again. I had one young person who offended at 12. He was charged when he was 15 or 16. He was found guilty of that offence. It was defended on the basis that he did not have criminal capacity at 12 to know that he should not have done what he did. He was a child who had been sexually abused. At 16 he was found to have the capacity, notwithstanding that the offence was brought several years later. He then became reportable and he was fine up until the point he turned 18 and then, suddenly, the weight of reportability descended because all the reporting conditions suddenly changed the minute he turned 18. He could not drink alcohol, live near a school or walk near a school, and all he had done was offend at the age of 12 in care. He has never offended again and had no further sexual offending. Notwithstanding the disposition of the court looking at the offence—the nature of the offence, when it happened and taking into account his age—the reportability does not do that. It is mandatory but it is not discretionary.

[9.30 am]

**The CHAIRMAN:** Would it be fair to say that when the court is dealing with the person, who either accepts responsibility or admits guilt, and then it is dealing with the disposition, that part of what is appropriate is considered the risk of further offending, but that happens in the court, for want of a better word, sentencing process and then on top of that being on the sex offenders register happens—bang!—but the other elements of punishment or supervision or any of those things all take into account risk?

**Ms DEWSBURY:** To the extent that the court wants a youth justice order, whether it is at the highest end or the lowest end, to address the underlying issues for the child, it takes into account risk. For example, counselling is almost always a mandatory condition of an order and the type of counselling may be specific. It may be psychological counselling. If a young person, for example, is on the autism spectrum disorder, it may be requested by the court that that counselling is highly specific and carried out by a psychologist with expertise in assisting young people who are on the autism spectrum disorder. To that extent, it is looking at risk, but the young person is sentenced for the offence before the court and not in anticipation that they may be doing something in the future.

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To the extent that court reports, which are required in the Children's Court before you can be placed on a youth community-based order or an intensive youth supervision order or a conditional-release order, will almost always include a psychological assessment if there is any sexual offending and the reports will address those issues. In those reports there will be recommendations about what should be done to ensure that the underlying issues are addressed. So to that extent, the order will be crafted in such a way that it is deemed to try to address any problems to prevent future offending, but the sentence itself will be for the actual offence and not in anticipation of future risk.

**The CHAIRMAN:** In sentencing principles in the Children's Court jurisdiction, are the principles of specific and general deterrence taken into account?

**Mrs ROSSI:** Yes, they are. They are frequently referred to, almost always referred to, in the course of a sentencing.

**Ms DEWSBURY:** The interpretation of sentencing is obviously the interpretation of the law is carried out by the courts, and both the president and the Supreme Court of Western Australia have said on occasion, with respect to offending generally—I am not talking specifically about sexual offending here—that sometimes an offence may be so heinous that the principle of rehabilitation carries less weight and the principles of personal and general deterrence outweigh the principle of rehabilitation. That has been said by the courts in interpretation of the statutes on occasion. I am talking generally there about a high level of offending—very serious nature of offending on occasion.

**The CHAIRMAN:** I am conscious of our time; we only have an hour and we have not passed my first page of questioning, so keep that in mind. Your contributions have been highly valuable but we need to be conscious of the time.

Can you just clarify for us what happens to a child's criminal record on becoming an adult?

**Mrs ROSSI:** It depends. As we have indicated, some of the sentencing dispositions will not attract convictions, so there are no convictions recorded, but there is always a sentencing history. The sentencing history of the child, everything they have ever done and been to court for and been found guilty of—a finding of guilt on the record—will be written on the court history, and the police and the court have access to that, but, depending on the age of the adult, some of the record may or may not be relevant and taken into account. If a child has incurred convictions two years after the disposition has been completed, those convictions effectively fall away for the purpose of consideration by an adult court, but a court would always see what was on the record—that a child has the history.

**The CHAIRMAN:** Okay. That is the court, but if somebody does a criminal history check on a person —

**Mrs ROSSI:** If a child does not have a conviction recorded, that should not come up on a check.

**The CHAIRMAN:** Once they become an adult?

**Mrs ROSSI:** Yes.

**Ms DEWSBURY:** I am not sure about the status of a working with children check. Quite irrespective of the register, there may be occasions when certain offences are still regarded as relevant for the department for child protection for example. I am not sure about that.

**The CHAIRMAN:** I think that is the case under the Spent Convictions Act as well. I understand you get your conviction spent but there are circumstances in which some offending is still relevant to working with children permits and other things and you must disclose them.

Putting aside the consequences of registration, in your view, are there employment, travel or other consequences for a young person who is given the following sentences for a child sex offence: a

spent conviction, no punishment or conditional release order and a custodial sentence? What we are getting out here is that obviously the sex offender register operates in a way that means that it can restrict people's capacity to travel not just internally within the country, but especially externally. If we put the registration consequences aside, are we looking at the same sorts of consequences for a young person when they are dealing with those sorts of punishments when they are dishd out, for want of a better word?

**Ms DEWSBURY:** I think it will depend on the questions being asked. For example, if you are wanting to get into certain countries and you are asked, "Do you have any convictions?", you can quite honestly say no. But if you are asked, "Have you ever been charged with a drug-related offence?", or something like that, then you would have to say yes. It will depend on the question that is asked for the purpose of, for example, travel to America, which is very strict. Usually the question is, "Have you any convictions?" In which case the young person can say no and in which case it will not affect them.

**The CHAIRMAN:** I suppose it will depend very much on the jurisdiction that you are travelling to and their own rules, but as we understand it being the sex offender register almost operates as a bar to travel to most developed countries. Whereas, for other forms of conviction or records sometimes it is whether you have had a period of detention for greater than two years and those sorts of things.

Your submission mentions the potential impact for children and young people regarding employment, accommodation and home life where there are younger children, and participation in sporting and social activities. What are the social, employment, travel and other impacts that registration has for young people compared with the criminal consequences discussed previously?

**Ms DEWSBURY:** They are absolutely awful. For young people who want to be involved in sport, obviously they are playing sport against people generally their own age, but usually with most sports there is two-year age group. That young person might have conditions that they are not allowed to associate with other people of a certain age or they might not be allowed to be on their own, for example. I think we mentioned going to the toilet. We had some young person who always had to have an adult accompany him. If you are 14, that is very odd. At school, there is a lot of gossip and rumour and innuendo that goes around. Quite frequently, it is the victim themselves who have disseminated that information. Then the young people, basically, their life is really awful—really awful. Quite a few of them have expressed suicidal ideation. As a result of that, most either have to change schools or move. One family moved completely from one location to another so that they would not have this follow them. The consequences are horrendous.

I think we have also described the impact on other siblings. It is the parents of the young person who have to get them to all their appointments, who have to accommodate all the reporting requirements and conditions. That can affect the siblings as well. There is a lot of running around, a lot of attention and a lot of consequences if the siblings are targeted because their brother or sister has been identified. Of course, it is not lawful to identify them, but children are children.

**The CHAIRMAN:** Yes. Would you say it would be a fair assessment to say that registration creates new victims and imposes punishments that are sometimes disproportionate to the offences for which they are found guilty?

[9.40 am]

**Mrs ROSSI:** I had one young person who was 12. He had offended against his eight-year-old sister, who eventually reported it to her parents, who were horrified by it. The parents rang the police who said, "Come in for a chat. Nothing much will happen, but we will have a chat." Of course, he was charged. When the parents discovered not only would he be charged but also the consequences if

he pleaded guilty, they were horrified. Within that family, his sister—bearing in mind she was a victim so she needed to be regarded as a victim. She wanted the behaviour to stop. She made it very clear that she did not want anything horrible to happen to her brother. She still loved her brother, but she just wanted him to stop his behaviour. Even going to court and the court dealing with it, the parents were okay about that. They realised that that was an appropriate consequence for his behaviour and his behaviour was then going to be addressed, and that recognised the sister as a victim and that she had done nothing wrong and nothing should have happened to her. But it was the consequence of registration and reportability that blew that family apart. The parents blamed each other for taking it to the police in the first place. He was a very bright little boy. He has a lot of potential going forward, but they felt that was going to really ruin his life. There was no way he could be a teacher or anything like that. His sister then began to feel terrible. She did not want anything to then happen. The parents' marriage really started to implode as a result of them all blaming each other for taking it forward in the first place. Rather than being free to do what the parents should have done to protect their daughter and make the appropriate reports and have the behaviour dealt with in an appropriate way, it was that reportability that was affecting the family dynamics badly.

Where siblings do offend against each other, often they still want contact with each other, but they cannot necessarily have unsupervised contact, so it does affect their relationship. Where there are much younger siblings who may have been offended against, the department of child protection, obviously, Department of Communities, do step in. But it is that ongoing reportability and any potential conditions that may be imposed being a reportable offender that can really affect relationships going forward in families, particularly between siblings and how parents then feel.

**The CHAIRMAN:** The Law Reform Commission's inquiry into the registration scheme back in 2012 received evidence that the possibility of registration as a sex offender may discourage offenders from entering a guilty plea. What is your experience in this regard?

**Mrs ROSSI:** You have nothing to lose often by going to trial to try to avoid a conviction and registration.

**The CHAIRMAN:** Is it your experience that that is actually the path that is taken?

**Ms DEWSBURY:** It is; clearly, obviously, subject to legal professional ethics. It is often a path that is taken. In fact, even before you get to that stage we find young people are less likely to disclose or want to talk about it honestly because we have to give them full legal advice. Once they hear about the register, they are less likely to want to be frank in their instructions and it is more likely to result in a trial. So, there is that aspect of it as well.

**The CHAIRMAN:** I think the police have defended the mandatory requirement for the register on the basis of the administrative burden that would be placed on them if there was discretion. Do you think that that to some extent is counterbalanced against the fact that we are having cases that go to trial, and full trial, that might otherwise have been dealt with at a much earlier stage and with much lower levels of cost and investment?

**Ms DEWSBURY:** I agree with that. I also think that there is another cost to the community generally. Following on from Claire's comments about intra-familial sexual offending with young people, there is a huge cost to the community; it has a ripple effect. I think it is unseen and it is not necessarily quantifiable, but even economically you have a much greater cost in the long run if we cannot resolve these issues with young people being properly rehabilitated and having proper therapeutic treatment. I also think as a result of mandatory reporting it is vital that we then encourage disclosure and encourage frankness. That can be done much more readily if there is not the spectre of the mandatory registration.

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**Mrs ROSSI:** What it also does is label particularly a young child. They see themselves then as a paedophile going forward. If they are 12 or 13, they are developing sexuality, but now they have a label as a paedophile. They do not want that label, so they are not going to come and plead guilty. If we give them pre-police interview advice, they are much less likely to say anything in an interview. Why would they say anything that might help the police with a conviction?

**Ms DEWSBURY:** Many parents have said to us, “We wish we’d had legal advice before we gave that interview”, because they were encouraging their child to tell the truth and be open and frank. They have gone through the court experience alone, but subsequently when they find out about the register that is the thing that they find really difficult to cope with. They feel that they should have dealt with it in an alternative manner, when they are being up-front and honest about their child’s actions; they are not trying to minimise them.

**The CHAIRMAN:** That is the intersection that we have here. We have the principles of what would be a good way of defending yourself against the actions of the state to prosecute you for your crime as opposed to the behaviours of young people which we would like to address in a constructive way to help them to develop and mature past some of the issues that they have. It seems to me, the fact that we have this significant consequence of being on the sex offenders register hanging over you, those things will remain. Your advice to your clients must be, “Don’t speak to the police.” But that is the starting point for growth in terms of the behaviours that everyone wants to have positively addressed.

For our benefit, can you give us some information about the criminal age of responsibility in Western Australia?

**Ms DEWSBURY:** At the moment under our Criminal Code, section 29 of our Criminal Code deems a young person below the age of 10 has no criminal responsibility. Between the ages of 10 and under 14, the state must prove that the young person has the capacity to know that they ought not to do the act. Over the age of 14, criminal responsibility is presumed. Western Australia is the same as Queensland; we are both code states. The interpretation of section 29 in Queensland and Western Australia has been set at a very low threshold. The High Court had a decision, RP, at the end of 2017. In December 2017, the High Court interpreted the common law position to be that the child must know that the act is seriously morally wrong. That does not apply in Western Australia. That has not been interpreted as applying. In Western Australia, they merely have to have the capacity to know that they ought not to do the act. How that has been interpreted in Queensland has been very, very strict in the sense that the bar is so low. In essence, it is almost if you have the ability to know that you ought not to do it, then capacity can be established. Whereas, the common law states—New South Wales and Victoria primarily—have followed the High Court position in RP. I am sorry, I do not have the citation readily available.

**The CHAIRMAN:** That is okay. You can provide it to us later, if you like.

**Ms DEWSBURY:** That is a much higher standard even though the age is the same.

**The CHAIRMAN:** Is it an objective test or a subjective test?

**Mrs ROSSI:** It is really an objective test for the court to determine whether the child has the capacity or not.

**The CHAIRMAN:** In their particular circumstances, with regard to their individual upbringing and all those sorts of things?

**Mrs ROSSI:** Yes.

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**The CHAIRMAN:** This idea of capacity, it obviously does not necessarily have any bearing to the reality of that child's actual understanding of their actions or their actual understanding of the criminal law structure that we have in Western Australia about when criminal culpability arises. It strikes me as being highly problematic on a number of levels. If the state fails to educate particularly vulnerable people as to their responsibilities, is that taken into consideration in determining whether this child had the capacity to understand their guilt?

**Mrs ROSSI:** It is very difficult to run a capacity defence. Capacity is an element of an offence for a child under the age of 14. It is an element of the offence that the state must prove that that child has the capacity to know that they would not do what they are charged with. The difficulty is how you go about defending that. The state would rely on schoolteachers, school reports or a prior record to say that that child has been told before that they should not do this, and therefore they have capacity. You cannot lead evidence that goes to ultimate issue in terms of an opinion, because that is for the court to determine, so it is quite hard to show that a child may not have had capacity.

[9.50 am]

**The CHAIRMAN:** You gave the example earlier of a child that was being prosecuted at the age of 16 for an offence that happened at 12. They determined the capacity of that child based at the time that they committed the offence —

**Mrs ROSSI:** In that particular trial, the state led with evidence from a social worker that she had said to the child, "You mustn't do that." There was no evidence to say, firstly, she had any qualifications — that he understood that. She was not a psychologist. There was no evidence to suggest she was trained in child development in any way. It was simply, "I had mentioned to him and I had spoken to him about this sort of behaviour." Despite any objections defence might make, the court still found that that child had capacity at the age of 12, notwithstanding it was four years later.

**Hon TIM CLIFFORD:** Does that also go back to the bar being set so low that in that initial interview with police when they committed the offence, they found out it was something that they should not have done? Before that initial interview with the police they have already spoken to their parents who have said, "Be as honest as you can be", and then in the interview with the police they say, "You did something wrong", and the child says, "Yes." Is that the point at which they decide that yes, they actually did know that they did something wrong?

**Mrs ROSSI:** Absolutely. By the time the child is being interviewed they know that they are in a lot of trouble. In the example I have given, the child was not interviewed in relation to that matter until he was 16, by which stage he did know that it was all wrong and he should not have done it, but there was nothing to say that he knew it at the age of 12, which is obviously contrary to the court's finding. But in terms of what the police ask, they will ask all sorts of things about what is right, what is wrong and, "You know that this is very serious don't you", and the child says, "Yes, yes, yes."

**Ms DEWSBURY:** A child may know that it is wrong to steal. They may know that it is wrong to hit someone with a stick. They may not think it is wrong to push their brother over. They may not think it is wrong to watch pornography and act out what you have seen because they do not necessarily think that that is the wrong thing to do. It is a question of education. You are quite right, by the time they are interviewed by police, they are overwhelmed quite frequently with being told how bad their behaviour is, first of all by the parents and then through the whole police interview process. It is quite overwhelming for them.

**Mrs ROSSI:** These are often children who have been abused themselves by familial adults.

**The CHAIRMAN:** And then you have a range of issues with the child's relationship with authority. You also probably have parents or guardians stepping over them saying, "You need to tell them what

happened. You need to admit to this sort of thing”, and not understanding the consequence of that, and then, of course, it is all recorded on the police video and used as evidence.

**Hon COLIN HOLT:** It is a very good example—you know it is not right to hit someone with a stick because it has been reinforced through education. But when it comes to sexual activity, you actually see it in adults, potentially, and you think that is actually normal activity, even though you are a child. You do not make the separation because it is not necessarily reinforced when you are a 14 or a 12-year-old.

**Ms DEWSBURY:** I think we live in a highly sexualised society where pop videos and all sorts of things are quite sexualised. They might not depict actual sexual acts but there is a lot of activity there which children can act out, which they would not necessarily think was wrong. As Claire indicated at the outset, pornography is really widely accessible to young people and they often act out what they have seen without understanding that they must not.

**Hon TIM CLIFFORD:** I guess that also goes back to the subject being pretty taboo and some families might not discuss it as openly as other families, so then the thresholds are all over the place depending on which family you are talking to.

**The CHAIRMAN:** I am conscious of the time and we have another group of people to come through here. We do have some questions in here that we just will not get to. What I will flag to you is that we will put those questions to you on notice, but we still have a little more time. For the benefit of our staff though, we might skip over questions and put them to you afterwards.

Are you aware of any cases involving a young person in a position of care, supervision or authority such as a sports coach or tutor being charged or prosecuted for a class 1 offence of sexual offences against a child over the age of 16?

**Mrs ROSSI:** As a juvenile in a position of responsibility?

**The CHAIRMAN:** The young person is in a position of care, supervision or authority, and they have been charged or prosecuted for a class 1 offence against a child over the age of 16.

**Ms DEWSBURY:** I will just consult with Claire.

The only one is the one mentioned in the submission where a young person was convicted after trial of an offence, was on the register and was then in a sexual relationship with a young woman, she was pregnant, it was with the approval of all the parents—he was 16, she was 15—but, otherwise, no. I think you are getting at something a little bit different. I have not had experience with that.

**Mrs ROSSI:** No, we have not had any.

**The CHAIRMAN:** With that one, you can come back to us on that if you can think of something else. We may clarify the question a little bit more also.

Can you give us some examples of aggravating factors that might be taken into account in relation to registerable sexual offenders?

**Mrs ROSSI:** Do you mean in terms of the nature of the offence?

**The CHAIRMAN:** Yes. My notes say section 113 of the Criminal Code, if the offender is in company with another person, does bodily harm and acts of those sorts of things. What are those aggravating factors that might result in not being put on the register, because that is mandatory, but are involved in sexual offences?

**Mrs ROSSI:** If there was violence or coercion involved in that, that would impact—are you asking whether that will impact on the sentencing, for the purpose of sentencing?

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**The CHAIRMAN:** Yes, because it does not have any impact on registration, of course, because it is mandatory.

**Mrs ROSSI:** The main aggravating features would be if there was violence or coercion involved, forcing the young person —

**Ms DEWSBURY:** Obviously, in the course of any sort of home burglary or in the course of another serious offence, anything like that would be treated extremely seriously by the court.

**The CHAIRMAN:** I suppose we are really interested in whether or not some factors that might be considered aggravating might actually just be factors that would normally be associated with young offenders in any event, so they get treated as aggravating but in fact they are just the circumstances of being a young person. For example, with these offences age is a consideration but it is almost always an age difference between the victim and the offender.

**Ms DEWSBURY:** That is common and it is not just with sexual offences that an aggravating circumstance is committed in the presence of a child. On occasion, the prosecution notice has indicated that the victim is the child, which makes it aggravating, but of course they are a child, and they have two children playing together or doing whatever—being together and then the offence occurs. Children, as Claire indicated, initially offend against other children.

**The CHAIRMAN:** Yes, which are their peers.

**Mrs ROSSI:** Or younger family members because they are readily available little cousins and siblings.

**The CHAIRMAN:** Yes, and it is the idea that because their victim is a child that it is paedophilia but that is not actually the proper way to characterise offences in relation to young people. It is not an absolute rule obviously because if the offender was 17 and a half and the child was six or seven and there was a history of that, then that obviously would be considered in those circumstances. But as I understand it, the vast majority of offence in these areas there is always an age difference—almost always—but it is not to be characterised as paedophilia in that sense, notwithstanding the victim is a child.

**Ms DEWSBURY:** That is correct. I think we did not initially understand the questions.

**The CHAIRMAN:** That is okay. I am trying to move through them quickly. Your submission states that numerous young people have become registered offenders for less serious offences that do not result in a conviction. How common is this?

**Mrs ROSSI:** It is common in respect of charges of indecent dealing or the low-level indecent assault charges. Obviously, if there is penetration involved, that takes it into a different level of seriousness. But for indecent dealing charges—pinching breasts, pinching bottoms, dakking or pulling somebody's shorts down in the playground; that sort of an offence—that is not uncommon.

**Hon COLIN HOLT:** I notice in your submission you talk about other jurisdictions and their approach to this issue. Do you have an opinion on which one would be a better model if Western Australia was going to decide to take a different approach?

**Mrs ROSSI:** I think Victoria because, firstly, under their Sex Offenders Registration Act 2004, sections 11(2) and 11(2A), if you are found guilty the court “may” order, so it is not automatic and it is then at the discretion of the court, which is what we are suggesting is appropriate. Secondly, subsection (2A) says “on an application of a police officer” and that relates to foreign jurisdictions. But we have had young people charged with a federal overseas sexual offence because they have gone to Bali on a big family holiday, they have had sex with a minor, they have come back, and mum or dad have found out and that has been reported to the Australian Federal Police and the young person has

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been charged with an overseas sex offence. That does happen from time to time—not frequently I am pleased to say, but it has happened.

**Ms DEWSBURY:** But the situation you are talking about was not one of paedophilia. It was not one where you were going to a child sex tourism type of thing.

**Mrs ROSSI:** No, it was just two families going away and the boy and the girl having sex and then they come back and it is all disclosed. I think probably Victoria, because of the word “may”, which seems to me to allow the court to have discretion.

**Hon COLIN HOLT:** Even though they still talk about class 1, class 2, class 3 and class 4?

**Mrs ROSSI:** Yes.

**Ms DEWSBURY:** I think we could devise a better model than any of them. We would prefer that the court hear any application and that expert evidence is provided as to future risk and the court is able to make a proper appropriate determination on application. I do not necessarily think any of the models are ideal. I think that is the basis upon which Claire was responding; that is, out of all of the models that are there, probably Victoria still provides for discretion.

**The CHAIRMAN:** Let us say we have discretion reintroduced, who bears the onus to prove that you should or should not be on the register?

**Mrs ROSSI:** I think it should be the state, similar to section 126 of the Young Offenders Act, which is where the state can ask for an extra year to be added onto a sentence. They have to make the application and show that that would be an appropriate thing to happen.

[10.00 am]

**The CHAIRMAN:** What criteria, because currently we have mandatory, so there are no criteria? If we have a discretionary register, what criteria should be taken into account to be on the register?

**Mrs ROSSI:** I think you could take into account similar criteria to section 126. Obviously, that would really involve a reconsideration of the principles of juvenile justice and all the factors relevant to the young person, but also take into account protection of the community.

**Ms DEWSBURY:** I think that we have also indicated the age and maturity of the child, the circumstances of the offence, the educational level of the child, any mental health considerations, any treatment options and whether or not the child themselves has been personally subject to sexual abuse and what that poses. I think there would need to be some form of expert evidence in that scenario as to future risk of offending, and expert evidence in the form of, at the minimum, a psychological report.

**The CHAIRMAN:** In the circumstances of the state having the onus and the court having to make consideration, do you think that will impose a whole new set of burdens on the court and the prosecutor, or do you think that there is already a lot of this stuff that could already overlap with that area?

**Ms DEWSBURY:** I think a lot of it is already before the court at the time of sentencing because for the more serious level—well, really for most sexual offences, virtually all of them—a psychological report is called for anyway for the purpose of sentencing. There is usually some sort of assessment in that report about the nature of the child’s future risk and any history. They are usually very detailed reports, and they are in addition to the usual youth justice reports, setting out family circumstances and background and things like that.

**Mrs ROSSI:** If the child is in care, there is usually a report from the Department of Communities to outline any safety plans or measures put in place to prevent offending.

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**The CHAIRMAN:** I am going to ask you to speculate here, I guess. Do you think that the prosecutors in every case would be making that application or do you think that they would start to retreat back to those cases that genuinely deserve consideration for being put on the register?

**Mrs ROSSI:** I suspect it would retreat back to the more serious cases. I do not think they would ask for that for every child.

**Ms DEWSBURY:** I think the state would be wary of not making the application where they felt there was any risk to the victim or to future victims, and I think the state, maybe out of an abundance of caution, might initially at least be prepared to make the applications quite frequently, but I think that most of the evidence would already be before the court.

**The CHAIRMAN:** Under the act, it is not meant to be treated as a punishment, but do you think, in effect, that registration acts as an additional punishment to people?

**Mrs ROSSI:** I think it does. I have a young man who was convicted of consensual—well, I say “consensual”—when he was 17 and the girl was 13, but she came to him to engage in sexual intercourse, so although she could not consent, there was no coercion and she wanted to engage in that. He said that the thought of being labelled a paedophile and being on the sex offender register made him suicidal. I think it is an additional punishment because it just carries on. He never gets rid of that; it goes with him forever. Also, it is a label. For young people, you talk about their behaviours, not the child. You do not label the child, but you need to label the behaviours.

**The CHAIRMAN:** Yes. In terms of who should manage the register and the reporting requirements, currently it is the police. Do you have a view as to whether or not that continues to be appropriate or whether or not another agency like Justice, for example, should be managing the register with respect to children?

**Mrs ROSSI:** I think it would be helpful to have an agency like Justice co-manage or have a voice in the management of children on the register, yes, because they come from a therapeutic disposition, and I think that needs to be considered as part of the overall management of a young person.

**The CHAIRMAN:** We have a number of perhaps more technical questions here, which we will put to you in writing to get your views on them. I am sorry that we did not get a chance to get to them. You may have covered some of them in some of your general comments in any event. We will review what we did not get to ask, and then put those to you. Would you like to make a closing statement?

**Ms DEWSBURY:** I would like to ask if there were any legislative amendments or changes to this, that there be a provision for retrospectivity so that young people would have an opportunity to take themselves off the register by some mechanism. There would have to be some form of notification, and this may well be a similar mechanism to other legislation that has been reviewed. There would have to be some notification to all people who are on the register that they would have a mechanism to apply to take their name off the register. At the moment, while anyone can apply to the Commissioner of Police to have their reporting obligations suspended, they cannot take their name off the register, and this has caused a lot of trauma for a lot of people. If they had some prospect of knowing that their name was no longer going to be on that register, it would be wonderful, and the scenarios that we have been talking about just highlight that children, in our opinion, should not be mandatorily subject to the register.

Thank you for the opportunity to have us speak to you today.

**The CHAIRMAN:** Thank you. I will go through my closing statement. Thank you for attending today. Please end the broadcast.

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A transcript of this hearing will be forwarded to you for correction. If you believe that any corrections should be made because of typographical or transcription errors, please indicate these corrections on the transcript. Errors of fact or substance must be corrected in a formal letter to the committee. We have not given you any particular questions on notice, but we probably will send some additional questions to you. When you receive your transcript of evidence, the committee will also advise you when to provide your answers to the additional questions that we may send to you. If you want to provide any additional information or elaborate on particular points, you may provide supplementary evidence for the committee's consideration when you return your corrected transcript of evidence.

Thank you for attending today. It was greatly appreciated.

**Hearing concluded at 10.08 am**

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