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, 4 SEPTEMBER 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 10.05 am

Mr PETER COLLINS
Director, Legal Services, Aboriginal Legal Service of WA, examined:

The CHAIRMAN: We would like to welcome you here today. Today's hearing will be broadcast and before we go live, I would like to remind you that if you have any private documents with you, that you keep them flat on your desk to avoid them being picked up by the cameras.

You have signed a document entitled "Information for Witnesses". Have you read and understood that document?

Mr COLLINS: I have, thank you.

The CHAIRMAN: These proceedings are being recorded by Hansard and broadcast on the internet. Please note that this broadcast will also be available for hearing 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 may refer to during the course of the hearing for the record. Please be aware of the microphones and try to talk near them and ensure that you do not make any unnecessary noises around them.

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 the 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?

Mr COLLINS: Can I first of all start with two points? Can I first of all apologise sincerely to the committee for failing to attend last time. I put the wrong date in my diary and went to court instead.

The CHAIRMAN: We received your correspondence and the committee has accepted your explanation. We are happy to move on from that.

Mr COLLINS: Thank you. The second point I would like to make is to acknowledge the traditional owners of the land on which this hearing is held, the Whadjuk Noongar people, and pay my respects to elders past and present.

In terms of the Aboriginal Legal Service, we are a statewide service which has 11 offices in regional WA from Kununurra in the north of the state, all the way through to Kalgoorlie in the east and Albany in the south, with a head office in Perth. The ALS provides legal services to Aboriginal people in the areas of criminal law, civil and human rights law and family law. The majority of our practice is criminal law. It would comprise about 85 per cent of the work that the ALS does. We appear in every court in WA from the Children's Court to the Magistrates Court, the District Court, the Supreme Court, the Court of Appeal and occasionally the High Court. We act for a lot of children and young people who are charged with sexual offences, and many of them end up on the register. A lot plead guilty. The vast majority come from very disadvantaged and, at times, very dysfunctional family backgrounds where their understanding of the law, particularly in relation to sexual offences, is very limited and sometimes non-existent. It makes it very difficult for them then if they are on the

register—in the case of young people for seven and a half years, and in the case of adults, for 15 years. It makes it very difficult for them to comply with their obligations on the register and, in turn, we act for a considerable number of those offenders who are in breach of their reporting obligations. In the case, predominantly of young adults, some of them go to jail, unfortunately.

[10.10 am]

The thrust of the submission that the ALS made to the committee was that it was of the view that it would serve the interests of justice best if a decision around the registration of a young person or a child on the sex offenders register was made by the presiding judicial officer who sentences them. In my submission, a judge or a magistrate would be best placed to make a decision around the merits of registration. In most instances, children and young adults who are sentenced by magistrates or judges will have been the subject of, at a bare minimum, a presentence report, but in most cases a psychological report, which will refer to a whole raft of matters but, most pertinently, to their risk of reoffending. That can bear then on the issues around registration. For example, there may be a young offender who has never been in trouble before who—this is comparatively rare but it does happen—comes from a reasonably functional family background and has lots of support around them, who engages in an offence of indecent dealing, which may involve willing sexual touching with a female around about the same age. In my submission, rather than them being subjected to mandatory reporting, the best approach would be for the judge or magistrate to make a decision around whether or not they should register in the first place, for how long and the conditions under which they should register. It may be that they reach a decision after appropriate consideration that there is no need for that person to be on the register.

At the other end of the spectrum, the ALS does—again it is a comparatively rare situation—act for young offenders who commit really serious sexual offences. Sometimes they occur in the context of a young offender committing an aggravated burglary and then committing serious sexual offences on the occupant. Sadly, in some instances they involve elderly female occupants. In those instances, it is almost inevitable that a concession would be made if the matter as to registration was to be determined by a judge or a magistrate. The concession would be made that it is inevitable that that person will have to be on the register, for good reason. I have no argument around serious sexual offenders or repeat sexual offenders being on a register. It makes good sense from a community safety point of view that people who commit really serious offences should be on the register so that their behaviour can be monitored and supervised. There is no argument around that. The thrust of what I would like to raise with the committee centres on offenders at the other end of the spectrum—predominantly young people who engage in what might be described as low-level sexual offending. That often involves willing—I will not use the word "consensual" because there is no such thing as consent for underage sexual activity—sexual activity, which, in my submission, might not require them to be on the register for a very lengthy period of time. Again, in turn, my primary point is that that should be the subject of judicial discretion. That completes what I have to say.

Hon COLIN HOLT: You have 11 offices across the state and an incredibly diverse client group, I would suggest. Would you say that mandatory registration is failing many of your clients?

Mr COLLINS: Yes, I would. It is a really interesting question, because to try and answer it as fully as I can, there are a number of layers to the question. If I can respond with a question: is it appropriate to prosecute some types of sexual offences involving young people? In the submission we made to the committee, reference was made to a case involving a young man from a remote community. That was a case that I was involved in. That young man was from Balgo. He had come to Halls Creek for a football carnival. He had been invited by the female complainant to go to the football ground "to be with him". He knew and she knew that that was for the purpose of some sort of sexual

contact. It entailed him touching her on the breasts and her suggesting that she touch him on the genitalia. That was the gist of it. It stopped because he realised his lift back to Halls Creek was about to leave and if I did not get on it, he would be stranded in Halls Creek. The question I pose is: is that behaviour sufficiently serious to warrant a criminal prosecution with a sentence, which could, but would not necessarily, involve a sentence of detention and, in turn, registration? Given the sort of cohort you are dealing with in that situation, I think the answer is no. It would be better served if there were appropriate health and education strategies in place to assist both the alleged offender and the young person offended against.

The other issue for me with mandatory registration is the unintended consequence that it enmeshes Aboriginal people further in the justice system. As I said in my opening statement, we act for a lot of young people who are charged with breaches. Often what happens is that a breach will be dealt with, particularly for young adults, but less so for juveniles. If you are 19, it will be dealt with initially as a fine. But people come back regularly at times, particularly people with intellectual disabilities or cognitive impairment, because they are just incapable of complying with the obligations of reporting, and the fines will get higher. Then the magistrate decides the time for fines has gone and they may end up with a suspended jail sentence. They come back and they get further suspended jail sentences and then a magistrate says enough is enough, and they go to jail. Then it is hard to turn back the clock. Once you have gone to jail for a particular offence, it is often a natural reaction to give another jail sentence if you reoffend. You get a person who may be breaching by failing to report, but there is no other sinister behaviour, let alone sexual behaviour associated with the fail to report, but they go to jail for it. That is not uncommon for young Aboriginal offenders in my experience.

Hon COLIN HOLT: Just to use your example there of the young fellow from Balgo, of course, we would hear evidence probably from the police and the DPP that there should have been some sort of discretion at the time of charging before it gets to the system of mandatory registration. This is difficult, I know, but would you say that that system of discretion—well, that lad probably should never have been charged let alone gone to mandatory registration. Do you have any comment on that?

Mr COLLINS: Absolutely; I could not agree more. At the risk of sounding controversial, the point I have made in other forums about this sort of thing is that if the young person was a 17-year-old non-Aboriginal person from the western suburbs going to a private school who engaged in this sort of behaviour, do you think that they would be charged? The answer is no. In the case of that young man, he was charged as part of a major police exercise in the Kimberley where the first point of reference by investigating police was to access the medical files of young Aboriginal girls in the community. They went to the young girl first and she was asked whether or not she had some sexual partners and what their ages were, and then the police went to them and the prosecutions flowed from there. We know that would not happen —

The CHAIRMAN: Do you think that would ever happen in the western suburbs?

Mr COLLINS: No, never.

The CHAIRMAN: There would be outrage?

Mr COLLINS: Absolutely, yes.

The CHAIRMAN: For this, the police looked at a young person's health records and then asked them about their sexual partners —

Mr COLLINS: Exactly.

[10.20 am]

The CHAIRMAN: I understand from the submission that you made in relation to this matter that he was effectively charged and convicted on his own evidence that was given at the interview?

Mr COLLINS: That is correct, yes.

The CHAIRMAN: The version of events that was convicted was what he gave, not what was complained about?

Mr COLLINS: Correct, and that is not an infrequent occurrence.

The CHAIRMAN: We appreciated that. You have covered a lot of ground. We have questions that are prepared here so if we go over ground that you have already covered, please forgive me. We are just trying to be thorough in our approach.

Can you give us an indication of the types of offences or circumstances that in your experience might result in a court imposing no punishment, a conditional release order or a no-conviction order for a young Aboriginal person?

Mr COLLINS: In the context of sexual offending?

The CHAIRMAN: Yes.

Mr COLLINS: It happens so infrequently to the point that I cannot even bring to mind an example when that happens.

The CHAIRMAN: So, essentially, in most matters involving young Aboriginal people, there is no circumstance where no punishment or a conditional order is imposed; it is always a punishment-based approach?

Mr COLLINS: Not for sexual offending, no. The dispositions that are usually imposed, even for very minor sexual offending, would start off with a community-based order and then progress through, in some instances, to terms of immediate detention. There is a very narrow spectrum of sentencing dispositions that are imposed, in my experience, for sexual offending. Sexual offending by its very nature is regarded as inherently serious. There are gradations of seriousness, but it is never considered to be trivial to the point that you get no punishment, if that makes sense.

The CHAIRMAN: We have had evidence from others that would indicate that sometimes the minor issues—for example, a boy dakking another boy's pants in public, somebody touching a boob or something like that, or sending sexual material by phone—perhaps is dealt with in those circumstances for non-Aboriginal people in that context where no conviction is recorded or there is an admission of responsibility and not a finding of guilt and those sorts of things. But what you are saying in your experience with Aboriginal people —

Mr COLLINS: It does not happen much, if at all.

The CHAIRMAN: You are not even getting into the situation where there is a question about whether or not how risky or common the behaviours are; it is just straight to some sort of punitive approach?

Mr COLLINS: It tends to be that. In defence of the judiciary, I think the approach tends to be at that level not so much around a punitive disposition, but a decision that there is a need for supervision, guidance and direction. That cannot be reflected in no punishment but it can be in something along the lines of a community-based disposition where the young person will be subjected to the supervision and other requirements by youth justice.

The CHAIRMAN: In the Law Reform Commission's inquiry into the registration scheme, it received evidence that the possibility of registration as a sex offender may discourage offenders from entering a guilty plea. What is your experience with this and Aboriginal people?

Mr COLLINS: That is a very real concern. It is a risk in the context of cases that I have acted in and in cases that my colleagues at the ALS act in. It operates on a couple of levels. It means that there is a delay because as defence lawyers, ALS lawyers negotiating with police or the DPP to downgrade charges, to change factual summaries for offending or to discontinue charges altogether. It is underpinned by that concern about registration and, in the case of our clients, the length of time. It is tantamount to a lifetime. I have worked at the ALS for a long time, and what I have found with so many of our clients, particularly young people, is the capacity to consider their lives into the future is almost non-existent—seven years may as well be 70 years. What will happen is that some sort of major event in a young person's life, a crisis—and the committee is well aware of what goes on in Aboriginal communities—death is an ever-present reality, there is suicide in remote communities and all those sorts of issues. Those personal events, and sometimes crises, in young people's lives overwhelm them for the moment such that their obligations on the register just about evaporate; they forget about them. They are not being deliberately devious. They are not reporting or not complying because they are engaged in some sort of sexual activity that they do not want to come to light. It is just that they forget, but they are in breach and they get called up before the courts. We are very mindful of that. We will start the negotiation process with the prosecution. It is always done properly but it causes delays because the prosecuting authorities need time to consider. They often need to consult with victims and they need to consult with their families. That takes time; it might take months. Then, it may get to a point where the advice given is: we cannot resolve this into you pleading guilty to an offence that will not place you on the register, so it is a question for the client but you may wish to consider pleading not guilty and go to trial. That means—best-case scenario—in Perth, from the date of charging to the date of trial might be anything between six and nine months. In some regional courts it could blow out to well in excess of 12 months, and the time frames would be roughly the same in the District Court.

A contested hearing where an accused person pleads not guilty can often be a raffle in this sense: the major witness, the complainant, might not turn up. That happens frequently in the case of Aboriginal complainants for all manner of reasons. If they do not turn up, the case collapses and the person is acquitted so the whole issue around registration falls away. The complainant may come to court but may not wish to give evidence—same thing happens. They may come to court but they have a history of substance abuse. They do not give a coherent, cogent account sufficient for the satisfaction beyond reasonable doubt and the person is acquitted. As I say, it is a mixed bag. You do not know what is going to happen at a hearing. The cards might fall the way of the accused and if that happens, the real benefit is not so much escaping a conviction and a sentence, but escaping going on the register because the consequences of registration far outstrip the imposition of any sentence, and that includes detention.

The CHAIRMAN: One of the issues that we find is that during that period, if there are inappropriate sexual behaviours or conduct, it is not being addressed in any therapeutic sense. No help is being given to put that young person back on track. It sounds to me like even the victim may not be getting the support in some of these communities to deal with the behaviours that are the subject of the criminal charges.

Mr COLLINS: Can I say with respect that is an absolutely critical point. You can put to one side serious sexual offending. It needs to be prosecuted in the usual way. As I said at the start, I have absolutely no argument with that. But there is a considerable range of behaviours where a therapeutic approach has to be the best approach, in my respectful submission. It benefits the community. If you look at a therapeutic model, which changes behaviours, educates people and moves them away from conduct which is concerning, that saves money, and everyone knows how expensive it is for someone to become immersed in the justice system and, in turn, in the corrections system and costs

are exponential and will only get worse if things do not change, but it also makes for safer communities. In terms of the Aboriginal client base that we assist, it assists Aboriginal wellbeing. Communities become more functional and then the flow-on effects come from that.

The CHAIRMAN: Are you familiar with any research in relation to the success of therapeutic approaches in Aboriginal communities for young people?

[10.30 am]

Mr COLLINS: Not specifically. I do not think there has been a lot of research done around therapeutic approaches to sexual offending in Aboriginal communities involving young people, but—this is slightly off topic, but it may be of assistance—the Aboriginal Legal Service has received funding from the state government in the last couple of years to run a diversion program out of the Perth Children's Court. It is called the youth engagement program, and our data, which might not necessarily match the data from the Department of Justice, suggests that it has had real success in things such as reducing rates of offending, re-engaging children in things such as school, helping them comply with bail conditions, helping them comply with court orders and things of that nature. It is a really simple program in many ways. We employ three Aboriginal diversion officers who go to the court every day and deal with the young people who are coming through the court system. They provide a hands-on, culturally secure approach to the issues that bedevil the lives of many of these young people, and that includes things such as—we have 12-year-old kids who have not been to school for four or five years and, in my humble opinion, if you are not going to school at that age, your papers are stamped, especially if you are Aboriginal: you will end up in juvenile detention at some point and, if you end up in juvenile detention, you will end up in an adult jail, and your lives and the lives of your victims will be seriously impacted and potentially destroyed by that fact.

What often happens is, sadly, Aboriginal kids get put in the too-hard basket, and you can understand why to some extent. Their needs are very complex, and their behaviours are very problematic, but the authorities give up. Justice gives up; Education gives up and, perversely, there seems to be this tolerance of them transitioning through the justice system through detention into adult jail. That is okay because the challenges involved in getting them back into school and things of that nature are so enormous.

What our diversion officers do is they go to the education department, they go to the schools and they say, "This kid needs to be enrolled, and they need to start off with a graduated, staggered process of going to school." So, they might go to school two half-days a week for starters, and then that progresses from there. We have had great success in getting young children back into school, learning, behaving appropriately and things of that nature. We do it with sporting stuff. We run a program where Aboriginal kids are assisted to repair bicycles, and we had a young boy last week who had more recently been in a lot of trouble, who was able to get volunteer work at a bike shop and then got some paid work and then got a job. That is the best thing you can do, but it is a really individualised process. Unfortunately, the way that justice is currently geared with these young kids, the individualised process from that aspect does not work.

You will have an Aboriginal kid who has to report to Justice, but in order to report to Justice—they have not got a parent who is going to be able to do that. They might not have a parent who has a licence; they might not have a car; they have to catch a bus for two hours and then a train to get to their appointment, and the appointment might last five minutes. So, guess what happens next time? They do not do it. We take them to the appointment and we sit in the appointment with them and make sure that they do what is required. Now, that is a resource-intensive thing, but it gets results, and the kids love the diversion workers because they are Aboriginal people who can empathise and understand what they are going through.

Hon TIM CLIFFORD: Would you say that the successful program that has been used for kids—from your knowledge, have there been any kids in that program who are on the register; and, if so, have those kids being on the register affected the results? For those individuals on it, has them being on the register worked against any sort of success that that program could —

Mr COLLINS: To be honest, I do not know. If you would like me to take that question on notice, I can make some inquiries.

The CHAIRMAN: We can make that question on notice one.

Hon COLIN HOLT: Do you think that there is a stigmatisation of Aboriginal young people from being on the mandatory registration?

Mr COLLINS: Absolutely.

The CHAIRMAN: Is that even within their communities as well?

Mr COLLINS: It can be, yes. The stigmatisation comes through in areas such as your capacity to engage in employment because for a lot of Aboriginal people, the opportunities for employment fall in the areas of Aboriginal organisations, or government or semi-government agencies providing services to Aboriginal communities. You might want to apply for a job as an Aboriginal liaison officer at a school. You have got to do a working with children check. That puts a line through your name if you are on the register or you have been on the register, I would suspect, so it can be hugely problematic.

The CHAIRMAN: According to your submission, you routinely act for young clients, usually males, who are prosecuted for registerable offences, including what you have described as willing under-age sex—rather than consensual—where the age disparity is minimal, so what are the types of registerable offences that might result from a consensual under-age relationship?

Mr COLLINS: The principal ones are indecent dealings, under section 321 of the Criminal Code, and charges of sexual penetration. They are the principal offences that attract registration where the age disparity is very low, it is willing/consensual behaviour, and things of that nature.

The CHAIRMAN: And in your experience with the ALS, what are the circumstances leading to some young Aboriginal people being charged and not others for these consensual sexual relations?

Mr COLLINS: That is a good question. The best example I can give is 10 years ago police went to the Kimberley in response to media reports about paedophilia, and a very widespread, coordinated police investigation ensued, starting in the East Kimberley, going to the West Kimberley and then to parts of the Pilbara. It culminated in the then Chief Justice Wayne Martin forming what was called the Indigenous Justice Taskforce. It comprised police, Justice, members of the judiciary and ALS, and I was the ALS representative on that taskforce.

We ended up acting for over 300 Aboriginal males and a couple of females but predominantly males, as you would understand. A number of them were juveniles. There were very serious examples of paedophilia prosecuted successfully, and the offenders went to jail for very considerable periods of time, but there were a number of young people prosecuted as well. That came about because of the police accessing medical records and things of that nature, but it also came about because the police were in these communities asking about what was going on among young people. So, we had examples where—one that really sticks in my mind was a young Aboriginal boy, around about 18 years of age, who was in a willing sexual relationship with an Aboriginal girl who was around about 15. She committed suicide; she hanged herself. He was the one who found her body.

The death was investigated by the Coronial Investigation Unit of WA Police, and he provided a statement to the police in relation to that for the purposes of a coronial inquest by the State

Coroner. During the course of that statement, he mentioned the fact that he was in a sexual relationship with the deceased. That then morphed into a criminal investigation where he was interviewed by the police in relation to that comment. He made admissions to being in a sexual relationship with her, and he was charged with having a sexual relationship with his girlfriend. She was dead. In my view, it just should never have happened—the prosecution, that is—and it took some considerable time for us to persuade the DPP not to continue with the charges, but that is what sometimes happens.

[10.40 am]

I think perhaps the more obvious point to make in this context is: Aboriginal young people are much more likely to come to the attention of police than non-Aboriginal young people. The police presence in a lot of communities is very significant, and Aboriginal young people tend to be in settings where they come to the attention of police. For example, I was in Roebourne a couple of years ago, and we were talking to young people out on the street. They were saying that they were often stopped by Roebourne police eight times a day for name checks, warrant checks and things of that nature. So, it is inevitable when you are subject to that level of scrutiny that these sorts of allegations are going to bubble to the surface. That obviously does not happen to young non-Aboriginal people, particularly in big suburban areas like Perth, big metro areas like Perth.

The CHAIRMAN: Yes. Obviously, your service provides services to Aboriginal people across the state, but Aboriginal people across the state are not a homogenous group. There are cultural differences. What is your experience with that in terms of sexual offending?

Mr COLLINS: I think the likelihood of more serious sexual offending perhaps arises more significantly and more starkly in Perth and in regional centres, and that is in large measure due to meth. It is almost inevitable these days that young Aboriginal people who commit really serious sexual offences are under the influence of meth. It is a huge problem. It is a massive problem, and it is contributing to the commission of very serious violent and sexual crime generally amongst the Aboriginal population, and there is a dire need for it to be addressed.

At the other end of the spectrum—and I am probably speculating a bit here, Mr Chairperson—I suspect that the incidence of lower level and consensual—willing, I should say—sexual touching which can result in criminal charges, the incidence of it may be higher in regional and remote communities, and I think the reason for that is a lack of education.

One of the examples cited in our submission involved a client that I acted for who was charged with several charges of sexual penetration of a child under the age of 16. He met the young female complainant, who I think was 14. He was a young male who was around 22, so there was a significant age difference, but he met her on one of those social media websites, I think it was called Divas Chat. He was in Kununurra; she invited him to go to Halls Creek. She told him she was 17 during the course of their social media conversation, and he went down to Halls Creak and over the course of a weekend engaged in several sexual encounters with her. He was prosecuted. Consent was plainly not a defence. He was more than two years older than her, so he could not rely on honest and reasonable mistaken belief in consent. The medical records produced in relation to the young woman indicated that the doctors considered her to look far older physically—she was a very physically mature young woman—than 14.

This young man had absolutely no idea that he had committed an offence. It was asked of him repeatedly during his interview with police, "What do you think about having sex with a girl under the age of …" Sorry, to put it another way, he was asked, "What is the age under which someone cannot give their consent under the law?", and he said 18. He then said 20. He had absolutely no idea that it was 16, and then he entered a plea of guilty because he had no defence. He was in

custody prior to sentencing and he came to court wearing an Essendon football jumper. The first time he appeared in the District Court, he could not bring himself to plead guilty, not because he was being cantankerous or difficult or obtuse; he just could not get his head around the fact that he had done the wrong thing and he was going to be punished.

He spent about 10 months on remand. He ended up getting a suspended sentence, but his level of understanding was absolutely non-existent. He had a partial diagnosis, if you like, of FASD. He was very poorly educated, and he never worked, but he is like so many other Aboriginal people in his situation in regional and remote parts of the state: their level of understanding of these sorts of issues is very, very poor, and I think it is compounded now in the modern era with social media. I do not think that helps things. I think it makes it worse because young women are out there in all sorts of states and make all sorts of comments, and it just adds fuel to the fire in that regard.

So I think, to conclude the point I am trying to make in relation to this, education is incredibly important—education on all sorts of levels, tied in with health. Justice then has a role to play as well, but education—the importance of it—cannot be overlooked, in my view.

Hon TIM CLIFFORD: Have you ever met any of your clients who understood the law and understood what they had done in the eyes of the law was wrong? Any of your clients?

Mr COLLINS: If you are confining the question to clients charged with that lower level sexual activity, very few of them understand.

Hon TIM CLIFFORD: So you would say that it is nearly non-existent.

Mr COLLINS: Yes. And that sort of dovetails into something that is important to me, I suppose. The law talks about general deterrence: imposing sentences that deter other members of the community from engaging in the criminal conduct because you are going to go to jail or whatever. Frankly, it is an absolutely illusory concept in Aboriginal communities. It does not matter how long you go to jail for or for what reason; it just does not resonate because Aboriginal people have not got that level of awareness around those issues as other members of the community have. And so much offending is spontaneous; it is committed on the spur of the moment. A lot of the time, it involves alcohol and drugs, and the last thing someone in that state is thinking about is the possible penalty if they pursue a certain course. It just does not enter their heads. And jail, sadly, is such a reality in the lives of Aboriginal people that if somebody is not around for a couple of years because they are serving a sentence, they are just not there. That is all it means. At some stage, they come back. People do not think—and again, it is not a situation of people thumbing their noses at the system; it is far from it—“So-and-so has done this. They have gone to jail for four years. Therefore, I should not be doing that myself because I don’t want to go to jail.” That is just not part of people’s thinking. So I think, really, the reality of the criminal justice system is that sending people to jail achieves two objectives: it is a form of confinement so they cannot offend, and it is a form of punishment. That is about as far as it goes. General and specific deterrence are not really meaningful objectives in my respectful point of view.

[10.50 am]

The CHAIRMAN: Are there cultural differences in terms of Aboriginal culture about the understanding of when appropriate sexual relations can be engaged in by young people? Obviously, the law as it presently stands is a law that reflects Western values about the age of consent and with the development of a child but in your experience and based on your expertise, is there a different understanding of that among Aboriginal cultures, in particular those communities that remain connected to their more traditional cultures?

Mr COLLINS: I am probably not qualified to answer that question. Some time ago there was a case which generated a degree of controversy in the Northern Territory involving acts of sexual penetration, from memory, by a very mature older Aboriginal male on a young Aboriginal girl, who was a promised wife. I had not come across anything like that in my experience at the ALS and I have been with the ALS since 1995, so 20-odd years. I think those practices in even those communities which are really strongly connected to their culture still, have diminished over time to the point that they are not regularly practiced or, if they are, they do not come to the attention of authorities. Probably the best example I could give would be the Martu community in the Western Desert, the main community being Jigalong community. Traditional punishment—the one that often gets cited—is still alive and well. People do get punished in the traditional way for wrongdoing but as an adjunct to that, I am not aware of sexual activity occurring with underage females as a consequence of someone being a promised wife. I think the fundamental point is that there are varying degrees of understanding dependent upon the nature of the community. The obvious point is that if you are living in an urban area, the likelihood of people having a better understanding is significantly higher than young people living in a very remote community like Ringer Soak, outside Halls Creek in the east Kimberley. That just follows as a matter of logic, I think.

The CHAIRMAN: In your experience, is there a gender bias in the application of the law with respect to sexual offences?

Mr COLLINS: No, I do not think so.

The CHAIRMAN: So you do not think that in a situation where you have a willing relationship, that it is more likely to be the male that gets prosecuted than the female?

Mr COLLINS: From that point of view, absolutely. Of course, every underage female who engages in willing sexual activity arguably commits an offence as well but they are never prosecuted. There is a bias on that level, absolutely.

The CHAIRMAN: I think overwhelmingly the statistics we have seen is that it is males who are prosecuted under these laws yet the examples that are often given involve that willing circumstance and females are not being prosecuted. Where they are being prosecuted it is usually for the transmission of sexually explicit material over a carriage service or something of that kind.

Mr COLLINS: Yes. The numbers of young females prosecuted in that sort of setting is almost non-existent, as I say. In my experience, the only times females generally get charged are when they are party with a male partner to some sort of sexual abuse of a young child. That is where it arises most frequently.

Hon COLIN HOLT: Do you think it is something to do with the definition of some of the laws, including things like sexual penetration—that it is much easier to prove sexual penetration by a male?

Mr COLLINS: Yes, it could be.

The CHAIRMAN: Your submission discusses offences that would lead to registration but involve a low level of criminality and occur in circumstances, and I am quoting you here, "where many offenders do not understand that their conduct breaches the criminal law." You have already given some explanation of that, but can you explain this further for us and the circumstances in which it may occur?

Mr COLLINS: There is probably not a lot I can add to the submission I made a moment ago in relation to this sort of thing.

The CHAIRMAN: I did say we would have questions you might have answered. You were comprehensive in your responses, so sometimes you have already covered it. We are just trying to be thorough here. Your submission contends that young people become registered offenders in the situation where the criminality of the conduct is of a minor order and there are health, cultural and education issues which should not involve the intervention of the criminal law. The committee would like to investigate these issues a little bit further. How do you define "criminal conduct of a minor order"?

Mr COLLINS: In the context of sexual offending, I would regard offending of a minor order involving conduct such as willing touching. We have clients who are charged with indecent dealing when the female may be, say, 12, and they are 14 and they touch the female on the breast, or there might be touching of the genitalia on the outside of clothing. That can be the subject of a criminal charge, and it frequently is, but in my view, depending on the context, in large measure that sort of touching probably should not be the subject of a criminal prosecution. The better approach would be a holistic therapeutic approach.

The CHAIRMAN: Do you get much conduct in the Aboriginal communities that you represent of the sending of sexually explicit pictures and then being charged with that kind of thing?

Mr COLLINS: Yes, it is an increasing phenomenon. Again, they are usually male—sometimes female but usually male—and they have no idea they are doing the wrong thing. Absolutely none whatsoever.

The CHAIRMAN: This is where somebody has sent them a picture and they have then sent the picture on and then they get on the sexual offenders register for that particular reason.

Mr COLLINS: That is right.

The CHAIRMAN: We do not want to cast a blanket over all Aboriginal people, because obviously the experience of Aboriginal communities within the more regional and metropolitan areas is different to those in remote areas as well. But I suppose now the extent of social media, as you talked about, of the internet and mobile phone coverage has extended so far that even those in the remote regional communities have the capacity to send that information out of their device as much as somebody who is standing in the middle of the Hay Street Mall.

Mr COLLINS: There is no doubt about that. I feel like a complete Luddite because there are young kids in Balgo—wherever—who are really savvy around the use of mobile phones and things of that nature. It is an ever-emerging problem. I suppose it gets back to this, from my point of view: if the matter happens to come before court and, say, for argument's sake, the young person pleads guilty, they get whatever disposition is appropriate in the circumstances. But my point is that the judicial officer, from presumably all the information in front of them, and if they need more, they can ask for it—if there are no reports of an expert nature, say there is no psychological report and they feel like they need one, they can order it; psychological reports in relation to sexual offending always talk about risk—could make a reasoned assessment. I think that the whole purpose of a register is to manage risk. They may be a low to medium risk, so a judge or a magistrate can then, firstly, determine whether or not it is appropriate for the person to go on the register, but then say, "This is a low to medium risk. There are these things in place. I'm going to direct that this person be on the register for two years and I want them to do X, Y and Z over the course of that two years." It will be best for Aboriginal people if those requirements were managed and administered by Youth Justice in the case of young people, rather than police. There is that historical antipathy, distrust and fear of police, which, in my submission, makes it problematic for the management of sexual offenders to be under their domain. Justice have the tools as well to provide those extra supports. They can organise counselling; they can organise education. They have that at their

disposal, which would make it a much more therapeutic approach. The legislation could then allow police to come back at a later date and apply for an extension of the registration period and lawyers could act for the young person and say, "Yes, that is agreed to" or "No, it is not for these reasons." Rather than having this blanket situation where you have to get X period of time, you get individualised justice. As a criminal lawyer, we are always concerned about the diminution in judicial discretion. It is capable of causing enormous injustice. When you have got things like mandatory sentencing, the injustices can be extraordinary in some instances.

[11.00 am]

The CHAIRMAN: Would you agree that it also involves, necessarily, an inefficient use of resources as well?

Mr COLLINS: Absolutely.

The CHAIRMAN: Because you end up with people in jail or on registers that should not otherwise be there. The cost for putting them in jail or monitoring them is actually quite high.

Mr COLLINS: Correct. With the greatest respect to police, it is probably not their job. The police are there to investigate and prosecute crime; they are arguably not there to monitor sex offenders. But as I say, the Department of Justice, and in the case of juveniles, Youth Justice, that is what their job is—to monitor and supervise young people who are on community orders or who are on supervised release orders, having been released from detention and all those sorts of things. They have the resources and they are geared up to do this sort of thing. In my view, the system would operate a lot more justly and fairly if judges and magistrates had that discretion.

The CHAIRMAN: Do you think they have those resources in remote and regional areas as well?

Mr COLLINS: Probably not.

The CHAIRMAN: So in those areas, the police would still have a role because they tend to be in communities or around the communities?

Mr COLLINS: Not necessarily. The police still have a role. Youth Justice would inevitably liaise with them in the event that a young person was not complying. Maybe I am wrong there, in the sense that if a young person is on a youth community based order and they failed to comply, it is Youth Justice which institutes breach proceedings. That could occur equally with a young offender who fails to comply with their obligations under the sex offenders register. Youth Justice would then institute breach proceedings, which are criminal proceedings and go before the local court.

The CHAIRMAN: All right. I am conscious that our time is coming to an end, so I just have a couple of very short questions to ask you. If discretion was introduced, where do you think the burden of proof should lie in terms of whether a person goes on the register or not? Should the prosecution continue to carry that burden, notwithstanding that the order to put on the register happens after conviction, or should it be the case that there is a presumption that everybody goes on the register and it is up to the defence to argue that it not happen?

Mr COLLINS: I am a black-letter lawyer. My response would be that the burden should lie with the prosecution. I query whether it should be on the balance of probabilities or beyond reasonable doubt. It is the prosecution which is bringing the application, inevitably, so it follows as a matter of logic, in my respectful submission, that the burden should lie with the prosecution. Again, I say this with respect: it is important not to overlook the fact that in these sorts of settings, there is often an enormous inequality of arms. The prosecution are the ones with the resources. The defence, in the case of what we do—Aboriginal people have very few resources, so it is often a very difficult task to mount a sensible and arguable case to the contrary. But, as I say, a lot of offenders will almost

inevitably go on the register and there will not be any resistance from defence counsel to that effect. You always have to be sensible; you have to be reasonable. If an offence is so serious that, for example, a young person is sentenced to a two-year detention, it would be an act of lunacy, almost, to say that they should not also be on the register.

The CHAIRMAN: But you will get judicial guidance over time as well as to what is an appropriate case and what is not an appropriate case.

Mr COLLINS: Absolutely.

The CHAIRMAN: I suspect, then, that the lawyers on both sides will realise that this is one that is worth arguing about and this is one that is not worth arguing about.

Mr COLLINS: That is right.

The CHAIRMAN: Of course, the benefit then would also be that the police would not have to monitor people on the register who are inappropriately there.

Mr COLLINS: That is correct.

The CHAIRMAN: One of the issues for this inquiry is that it talks about young people. For example, in most instances we talk about minors—people under 18—and above. Do you have a view, if there was a discretion introduced, as to where the limit might be in terms of age? Should it be only for those below 18 or should it be up to 25 or something along those lines? I am sure what you will probably say is that a discretion should exist for judges for everybody, in all circumstances, but we are primarily interested here in the effect of the register on young people in those circumstances.

Mr COLLINS: It is a very good question, if you do not mind me saying. I think the higher the age limit for Aboriginal people, the better, because what you find is that most young Aboriginal people—I am referring here not only to people under the age of 18; I am referring to people who are older than that—do not have the level of maturity and sophistication that their non-Aboriginal counterparts often have. You are right: I would say that the discretion should be an open one in every case. But if the law were to change to allow discretion to a certain age limit, I think 25 would be a sensible limit. I do not agree with it, but I can understand the argument.

The CHAIRMAN: I appreciate your candour in relation to answering that, because that is what we are really looking for. Do you think also that if discretion is introduced for all prospective cases, that there should be some mechanism to deal with retrospective cases, where people have been put on the register as a matter of the mandatory nature of the law?

Mr COLLINS: I think that would be a very sensible idea.

The CHAIRMAN: And do you think that it should be the case that a person who is on the register must make that application, or do you think it is the case that all people who are on the register that were young people, the position should be reviewed and a decision made?

Mr COLLINS: I am not sure how you would do that logistically. If I can answer it this way: the difficulty for Aboriginal people is they are unlikely to be the initiators. They are unlikely to make the application. The problem that we face as a legal service is that once you are sentenced, we pretty well lose contact with you. So you go to jail and our services, in essence, finish. The only other contact we might have with a sex offender is if they come back before the courts on a breach. We are absent in between. We are not assisting people to comply and we are not monitoring whether or not the requirements are appropriate—none of those things. In effect, we lose contact with them. I doubt very much whether young Aboriginal people, especially, again, people from regional and remote areas, are going to be savvy enough to be able to initiate proceedings on their own behalf.

It may be out of fairness that there is an overall review done and some sort of process undertaken to identify, at the bare minimum, the suitable ones for a review.

The CHAIRMAN: Perhaps we can put that as a question on notice for you to give consideration in more detail as to what you would propose would happen to Aboriginal people in those circumstances, because I think your points are well made that as they are not likely going to be the initiator, that any retrospective review of their registration is not likely to happen and the problems you have talked about in terms of breach will actually continue to happen.

Mr COLLINS: Are likely to be ongoing; that is correct.

The CHAIRMAN: That is right. And the court's time, the police time, the ALS time is going to still be invested in actually dealing with breaches rather than dealing with the circumstances where they can make an application to be removed because they are no threat to the community or the threat is so low it is not justified by the expense that is being put into it.

There are some other questions that I have before me but we have not had a chance to get to. Our staff will review those in the context of the overall evidence you have given and we may put further questions to you that we have not quite had addressed. I think that unless anyone else has any more questions, that does bring us to a close on this. Is there a closing statement that you would like to make?

Mr COLLINS: No, thanks.

The CHAIRMAN: You have been thorough, and we really appreciate that and also your candour. Thank you for attending today, Mr Collins. Can we please end the broadcast. 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. When you receive your transcript of evidence, the committee will also advise you when to provide your answers to the questions taken on notice. If you want to provide 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.

I thank you for coming in today. As I said, we are not concerned about the hiccup that we had. We were very, very keen to hear from the Aboriginal Legal Service, because your experience in this area is very particular and it would be fair to say that your organisation would have to be the experts in this area. I am not sure what your ethnic background is, but I do note that none of us here are Aboriginal people, so, again, I do lament the fact that we are talking about Aboriginal people and Aboriginal people are not talking about themselves. That is not a reflection, Mr Collins, on your evidence, but it is one of those things where, you know, us whitefellas are all engaged in this—and ladies—and that we want, really, for Aboriginal people to hopefully engage and have those opportunities. Thank you, Mr Collins.

Hearing concluded at 11.11 am

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