

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
MONDAY, 26 AUGUST 2019**

SESSION ONE

Members

Hon Matthew Swinbourn (Chairman)

Hon Colin Holt (Deputy Chairman)

Hon Tim Clifford

Hon Samantha Rowe

Hon Dr Steve Thomas

Hearing commenced at 10.01 am**Ms SALLY DECHOW****Solicitor, Youth Legal Service, examined:****Mrs DEBORAH DONOVAN****Solicitor, Youth Legal Service, examined:**

The CHAIRMAN: Some brief introductions before we formally start: on your far left is Amanda Gillingham, who is one of our research officers; to her left is Hon Samantha Rowe; Hon Dr Steve Thomas; the Deputy Chair, Hon Colin Holt; myself, the Chair; the legal advisory officer, Alex Hickman; and Hon Tim Clifford. Thanks for joining us today. Today's hearing will be broadcast. Before we go live, I would like to remind all parties that if you have private documents with you, keep them flat on the desk to avoid the cameras picking them up. Please begin the broadcast.

You will have signed a document entitled "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 this broadcast will 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 not make any unnecessary noises, such as shuffling papers, because it can make it difficult, and try to speak in turn so that it does not overwhelm the system. 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 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?

Ms DECHOW: I think the questions will be based on the report that we submitted. We did refer to a number of cases. In respect of answering questions about those cases, obviously, we cannot give too much detail without sort of —

The CHAIRMAN: Yes; we appreciate that.

Ms DECHOW: I think that is it.

The CHAIRMAN: Perhaps if you can give us a summary of the work that the Youth Legal Service does. Obviously, this is being broadcast, so people who may be following may not be familiar with your work, and it would be helpful to the committee if you can give us an idea of the kind of work you do and your interest in the subject matter of this inquiry.

Ms DECHOW: The Youth Legal Service is a community legal centre. We have been in existence for about 34 years. We are part of the National Association of Community Legal Centres Australia-wide. We do legal services really for anyone under the age of 25 but, of course, there are not many of us.

What we always have done is criminal representation in the Children's Court. We do a bit of Magistrates Court. We have a bit of a civil section where we do a lot of criminal injuries compensation for victims and one-off telephone advice in most areas. We have young people calling up throughout the day with legal issues.

The CHAIRMAN: How do people get to know of your service? How do young people become aware that you are available to help them?

Ms DECHOW: Most people, it seems, find us on Google or referrals from DCP or police. It seems from our research that most people find us on Google now.

The CHAIRMAN: Not all community legal services do representation through the whole legal process. Your service provides that service in a criminal law jurisdiction all the way through to sentencing and that sort of stuff.

Ms DECHOW: Yes, that is right.

The CHAIRMAN: So it is not just an advisory service.

Ms DECHOW: No, it is more than that; we do represent people.

The CHAIRMAN: In your submission, you say you represent on average four clients a year in the Children's Court for registerable offences. Given the small number, I do appreciate that you have to be very careful about the details you provide for the risk of identifying them, and the committee is aware of that. But can you give the committee a sense of the types of cases you deal with, the ages of your clients, their circumstances and the nature of the offences?

Ms DECHOW: Yes. The ages will vary, but, funnily enough, 12 seems to be a particular age. For instance, one client I had last year came in with his mother and his stepfather and he had been charged with sexual penetration of his cousin, who was a six-year-old. If anyone is between the ages of 10 and 13, as a lawyer, you always have to look at the issue of capacity, and that is set out in section 29 of the Criminal Code. Obviously, if someone is under the age of 10, they are not criminally responsible; they would never get charged. There is this little hurdle you always have to look at. Of course, when they are charged with offences of this nature, you always have to explain to the parent, "Well, if he is convicted, then he is going to go on the register; there is nothing we can do about that." Most people are completely unaware of this. Funnily enough, that then becomes the major focus, avoiding the register, not looking at, "Well, let's get this over and done with quickly" or "What can be done?"

The CHAIRMAN: Do you think that is an impediment to dealing with the offending from a therapeutic approach —

Ms DECHOW: Absolutely.

The CHAIRMAN: — that it then becomes an issue about defending the legal position to avoid the register, rather than trying to get acceptance of responsibility, and then growth and development.

Mrs DONOVAN: It is a very significant delay often, is it not?

Ms DECHOW: Yes. If an offence like that has happened out of the blue, really, ideally, to deal with it quickly and get the young person into some form of therapeutic intervention where you have got your counselling—just because the focus should be on, "Okay, what's done is done; let's make sure it doesn't happen again."

Hon COLIN HOLT: Just on that, would you have any idea or stats or anything—it might be difficult—on how much extra time is consumed by the courts or your own services in actually shifting the focus from getting on with the job of rehabilitation to trying to avoid the mandatory registration?

Ms DECHOW: It is huge. Not only that, the emotional stress, because as lawyers you are dealing not only with the child but you are dealing with parents. The emotional stress on the parents is huge. The Children's Court is all about dealing with offences in a timely manner, because children have got a different sense of time, so it might be dragged out for six months or a year, as opposed to being over and done with in six weeks.

[10.10 am]

The CHAIRMAN: And if you are a 12 or 13-year-old child, six months to a year is a very long time.

Ms DECHOW: You will not even remember what happened half the time.

Mrs DONOVAN: And the stress is they try to forget it as well, as quickly as they can.

Ms DECHOW: But I know with a lot of kids at that age, so much goes on in their life anyway that, after six months, they cannot remember really what happened—what they are doing there anyway.

The CHAIRMAN: In terms of your clients, are they overwhelmingly male?

Ms DECHOW: Overwhelmingly.

Mrs DONOVAN: Yes.

The CHAIRMAN: Have you dealt with any female clients?

Ms DECHOW: A few, but that is only in the context of sexting. For instance, one client had lent her phone to a friend who was 12 and had given a 17-year-old a head job and he had filmed it on her phone and she gave the phone back and then the friend sent that image to some other kids, so she was charged with transmitting child exploitation material.

The CHAIRMAN: Did she end up on the register?

Ms DECHOW: She did not. That would have been an exception. With the Young Offenders Act, if you have not got a record, and it is not a scheduled offence in the Young Offenders Act, you can be referred to the juvenile justice team. She was lucky because she accepted responsibility for it and the magistrate referred her to the juvenile justice team. A referral to the team without a plea of guilt avoids the automatic registration.

The CHAIRMAN: Is that very common for that to happen?

Ms DECHOW: We are always trying to do that.

Mrs DONOVAN: That is what we try for, yes.

The CHAIRMAN: But how successful would you say you are?

Ms DECHOW: If the child has no record and it is an offence that they can go to the team on and it is just one offence, not like three that have occurred over a period of a month or more than that, and you get the prosecution to agree, you have a good chance.

Mrs DONOVAN: But that is often a process of negotiation. Often if you contact the investigating officer, which delays things as well, we find that is a good process—if you speak directly to the investigating officer—because you can get further detail and essentially get their view in relation to a referral to team as opposed to having it dealt with by sentence at the court.

The CHAIRMAN: We have had some evidence or submissions that indicate that the DPP does not take into account in its prosecution policy whether a child would or would not end up on the register as a matter of discretion for the kind of charges that they would —

Mrs DONOVAN: It is not an issue in sentencing before the court. The court cannot take it into account in sentencing.

Ms DECHOW: Yes. They say, “We can’t take that into account”—the fact that they will be registered. I think there is case law on the fact that going on the register is not a punishment as far as sentencing goes, so you cannot make the sentence lighter, because they are going to be reporting for the next seven and a half years.

The CHAIRMAN: Do you deal with the children after they are put on the register?

Ms DECHOW: Only to the extent when the parents ring up and say, “This has happened and this has happened; what can we do?” No, basically. Or if they have breached.

Mrs DONOVAN: If they breach.

Ms DECHOW: If they have breached, we will.

Mrs DONOVAN: That is a big issue if they are an adult, because if they breach as an adult, that is then an adult offence, so that has implications.

The CHAIRMAN: Do many of the clients that you deal with come with cognitive impairments or are they affected by things such as foetal alcohol spectrum disorder, autism and those sorts of issues?

Ms DECHOW: Yes. Obviously, if they have got those sorts of issues, before you even get to the offence, you have got the mentally impaired accused act and you have got to make sure that they are fit to plead. You go off on another tangent there where you have to get your expert reports and the psychiatrist determines whether or not they understand what is going on.

The CHAIRMAN: Is that what is going on at the time of trial or what went on at the time of the offence?

Ms DECHOW: Whether they understand —

Mrs DONOVAN: To advise that you have got to —

Ms DECHOW: It is set out in the mentally impaired accused act whether they—can you remember? Can they select a jury or —

Mrs DONOVAN: Yes, there is a whole list.

Ms DECHOW: Do they understand the plea of guilt, understand the nature of a trial —

Mrs DONOVAN: We would get a special psychiatric report done if we were concerned about those sorts of issues.

The CHAIRMAN: Yes. I guess our concern in this area is that children already have a diminished decision-making capacity and ability to understand the consequences of their actions. Is this being compounded by some children being affected by cognitive impairments that do not fall under the mentally incapacitated act, so you have this compounding effect, and therefore children whose actions are being criminalised are then put on a mandatory register? Are we getting children who should not really be getting captured because they do not fall under the mentally impaired act, because obviously autism or foetal alcohol spectrum disorder does not necessarily amount to a mental incapacity, but it does affect decision-making? Delayed development is a common issue but that is not a mental incapacity.

Ms DECHOW: If they are borderline—they can read and write a bit and they can talk, so they have just got borderline intelligence—that is like a cognitive disorder. If you have got an extreme cognitive disorder, you are probably better off because you will always probably have a support worker or you will not get to the stage where you are committing an offence; or, if you do, you will have a support person for reporting.

Mrs DONOVAN: Yes, the issues would arise with reporting. It is much more challenging.

Ms DECHOW: Borderline intelligence.

Mrs DONOVAN: All those sorts of issues obviously are very live sentencing issues for a court if the child has a degree of impairment. That is a very important factor in sentencing.

The CHAIRMAN: Yes, but the point here is that being put on the register is mandatory, so it does not have any regard to those —

Ms DECHOW: Yes, there is no discretion there.

Mrs DONOVAN: There is no discretion at all. Those people would have greater difficulty in challenges in terms of requirements of reporting.

Ms DECHOW: But I think that the act does make some allowance for people.

Mrs DONOVAN: There is some allowance for that, yes.

Ms DECHOW: Obviously, children always get accompanied by a parent or a guardian, but for people with cognitive disorders, there is something in the act which allows a support person to take them or be their communication with the police.

The CHAIRMAN: So in your experience do young people have an understanding of the legal concept of consent?

Mrs DONOVAN: Not really, no.

Ms DECHOW: No. We do education programs frequently and most young people are really surprised when they hear that the law in Australia sees that if you are under the age of 16, you cannot consent to sexual behaviour, so anyone you have sex with commits an offence.

Mrs DONOVAN: They view consent as being non-consensual in the sense of forced sexual intercourse. That is all they view it as, and when you try to explain the concept that you cannot consent under 16, young people find that very hard to understand.

The CHAIRMAN: Regardless of the willingness of the other party, even if the other party instigates it, if you are older than 16 and they are under 16, it is effectively an offence.

Mrs DONOVAN: They find that very hard, in our experience.

Ms DECHOW: Even if they are both 15. It always leaves them really confused.

Mrs DONOVAN: They are always mystified by that, yes.

The CHAIRMAN: In your experience, do the guardians and parents often struggle in terms of understanding the specifics or the technicalities of those issues of consent as well?

Ms DECHOW: Yes. I cannot say most parents, but some parents feel, "I would rather my young daughter had sex with her boyfriend in my house because I know they are safe" and they might only be 15 and they might be underage. That is an offence in itself by the parent.

Mrs DONOVAN: That is an offence of itself.

Ms DECHOW: There is like a liberal attitude to sex out there, but as far as the Criminal Code goes, there is a lot of ignorance of the law in our opinion.

[10.20 am]

Hon COLIN HOLT: I know you mostly represent defendants, but understanding that people do not quite understand the consequence of reporting an offence, do you come across people who regretted going down the line of reporting someone?

Ms DECHOW: It is mandatory. The person I started talking about in that case study, six months later, the young person who had been sexually penetrated started acting sexually at school. The aunty

said, “That’s probably because this happened by his cousin”, so the school made a mandatory report and that is how he came to be charged, even though the family had dealt with it months ago. Everyone had got on with their lives and suddenly he was charged.

Hon COLIN HOLT: Sometimes it is completely taken out of their hands.

Mrs DONOVAN: Yes. They do not necessarily understand that.

Ms DECHOW: I have heard of 14-year-olds who have snuck into their 19-year-old boyfriend’s bedroom at night, and they have had sex and the parents are saying, “No, we will not report it because we do not want him to be registered as a sex offender.” It is usually, obviously, the victim or their parents who will make the report.

The CHAIRMAN: Can I just clarify something. You are the Youth Legal Service. What is the cut-off age for your clients?

Ms DECHOW: It is under 25.

The CHAIRMAN: At law, 18 is the age of adulthood or however you want to describe it. Do you have a view as the Youth Legal Service as to how appropriate that age is in terms of these sorts of things? One of the questions for the committee, in looking at this, is whether we should look at only below 18 or, if a discretion was introduced, should it apply to people beyond the age of 18?

Ms DECHOW: I think yes, definitely young adults. The whole issue with the sex offenders registration is that it aims to prevent recidivism. If you have people who have done something once and made a big mistake and are never going to do it again, why devote all the resources to them reporting for the next 15 years or something? Is that protecting society? The police obviously have the statistics, but how many people on the register reoffend?

Hon Dr STEVE THOMAS: It is a very good question. Do you have any statistics on that?

Mrs DONOVAN: We do not have any.

Ms DECHOW: We were talking about this the other day. Deb has been doing Children’s Court criminal law for over 20 years and she cannot remember ever having a client come back.

Mrs DONOVAN: I have never had a repeat client on release.

Ms DECHOW: I have had one. He offended when he was 12 with another 10 or 11-year-old—he had sex with her—and then a few years later, he came back and he had been charged with quite a serious offence, anal penetration of a young child, but he was already on the register. The fact that he was on the register and reporting did not prevent him. I do not know. I think the police would have those statistics. I do not know how effective it is.

Mrs DONOVAN: A provision is put in place by the court. In sentencing in the Children’s Court, a child is put on a supervised order. There is often a therapeutic aspect to that in terms of counselling and everything. They are all made conditions of the order itself. So, that is a hands-on approach in terms of the child being supervised. It is a therapeutic process that is put in place. Being placed on the register as such and reporting to a police station, I do not see, other than the child being tracked, obviously, in terms of—but it is not a therapeutic approach. It is a very blunt instrument. How appropriate is that for a child? If you are talking about intervention to address issues, that is addressed by sentencing in the court with the benefit of a report. For offences of this nature, they would always have a psychiatric report. They would have a full youth justice report. That child’s entire background and everything is addressed by the court. The court puts things in place. In some instances, the report may say there is no need for therapeutic intervention: “This is a one-off incident. There is no further risk.” The expert report may say that or it may say the child would benefit from something else. It is a very sexualised society and lots of the younger kids really need

education as to what is and is not appropriate, because it would appear that many young people have access to really inappropriate behaviours in terms of access to porn and things on the internet. There is no guidance in relation to that, and what is right and wrong about that.

Ms DECHOW: They are not sexually experienced so they think, “This is how you do it.”

Mrs DONOVAN: They think that is normal. That normalises really aberrant behaviours for them. Education of those young children and awareness of the fact that that is not normal behaviour addresses the issue directly for them.

The CHAIRMAN: You have covered some of my next questions already. I will go to them anyway, in case you want to add anything more specific. In your submission, you point out that children will automatically go on the sex offenders register in the same way as an adult, noting that obviously the reporting requirements in terms of time are halved for children. If they are sentenced for a regional offence, what are your concerns about this? You have already touched on a number of those. Can you be more specific about the concerns about the mandatory nature of the register?

Ms DECHOW: I suppose it is not consistent with a child’s sense of time. It is not consistent with rehabilitation. It stigmatises the young person for life, really, because they are on the register for life. They have just got the reporting requirements, which the commissioner apparently can suspend, but he can reinstate them at any time.

The CHAIRMAN: Have you had any experience with the commissioner suspending reporting requirements?

Mrs DONOVAN: I have not had that.

Ms DECHOW: I have been told by the DPP that the police suspends them after a while because they are only kids, but not personally.

The CHAIRMAN: But they still remain on the register, of course.

Ms DECHOW: Yes, they remain on the register.

Mrs DONOVAN: That is an ongoing issue in terms of their future employment. If you are talking about rehabilitation, employment for young people going into adulthood is key. What is the point of further education and training if they cannot then gain the employment they want because the bar to that is registration as a sex offender?

Ms DECHOW: A working with children clearance obviously is slightly different, but my understanding is that if you have ever been on the register, you are never going to get clearance. A working with children clearance seems to be required by so many different occupations. One previous client was doing an apprenticeship—I think it was an electrical apprenticeship—and he needed to get a working with children clearance because they were working on sites in hospitals. He could not do that, so he had to leave his apprenticeship. It impacts quite heavily on all aspects of young people’s lives, even if they do not want to go into an occupation involving children. My understanding is that the only clearance they will get is if they have children of their own and they might get clearance to go on a school camp with their child, but that is it.

The CHAIRMAN: And this is in the absence of any evidence that they are actually a threat in any meaningful way to the community.

Ms DECHOW: Yes, and they have done something when they were 12. The impact is quite severe.

The CHAIRMAN: They have done something and been caught. That is the key here. I suspect there are a range of children out there who engage in behaviours that never become part of the system at all.

Ms DECHOW: Yes. I think it happens all the time, and it does. It is either a mandatory report that comes to the attention of the school or the girl or the victim's parents say, "This is outrageous. I am reporting this to the police."

The CHAIRMAN: Do you have much experience dealing with the parents of victims and victims themselves?

Ms DECHOW: We do because we do criminal injuries compensation. We get two sides. They are obviously upset and outraged and they want to see the offender punished in the harshest possible way. The victims do have ongoing psychological PTSD as a result of what has happened. We cannot downplay the victim's role, but the punishment or the rehabilitation is the priority, and that comes from the sentencing, not from being placed on the register.

Mrs DONOVAN: Part of the therapeutic model in the education and counselling of the child is about appropriateness of behaviours. Part of that therapeutic process and their education and counselling in terms of their behaviours and the wrongfulness of their act should include the impact that that has had upon the victim. That should be part of what is explained to the child.

The CHAIRMAN: I understand that part of the sentencing or the youth justice approach is the views of the victim themselves.

Mrs DONOVAN: Absolutely—the victim is the key role. Referral to a team process in any offence in the Children's Court that is referred through the juvenile justice team process is a diversionary process. There is a key role of victim. Only if they wish to, but a victim can play a part in the team process in terms of an apology, in terms of general offending. There can be mediation where the victim actually meets the offender. That is obviously different in terms of sexual offending.

Ms DECHOW: It does not really happen much with sexual offending.

[10.30 am]

Mrs DONOVAN: No. With sexual offending, that is very different. The child being made aware of the impact—in terms of accepting responsibility for their behaviours, part of that is understanding and, hopefully, getting the young person to understand the impact of their offending upon a victim. In general offences, in a juvenile justice team that can involve meeting the victim. Obviously, in sexual offending it is very different. That is part of the therapeutic process through that team referral. That is part of the process.

Hon COLIN HOLT: I know it is difficult to talk about specific cases, but in your work on compensation, do you work with compensation in this context of sexual offences?

Ms DECHOW: Yes.

Hon COLIN HOLT: Can you give us a sense of the lower level versus the more serious level of offending? We talked earlier about no understanding of consent, even though it might be consent. It is difficult to say low level as well, but has any of that sort of offending been subject to criminal compensation cases, or is that sort of just been left and then the most serious ones come back to compensation?

Ms DECHOW: If someone has been convicted, or even if they have not been convicted, the victim is always entitled to apply. I am just trying to think of low-level offending.

Hon COLIN HOLT: They might not ever come across your desk.

Ms DECHOW: No, it does not, really.

Hon COLIN HOLT: The serious ones would.

Ms DECHOW: Yes, the serious ones where we have had young people. It also becomes clear when you do those applications too, that, you know, the perpetrator had committed previous offences so he was obviously on the register, and there he is, he has done it again and gone back to jail. So how has the register protected the new victims anyway? No, we have never had your low-level offending.

Mrs DONOVAN: No, they would be high-level offences.

The CHAIRMAN: Would it be fair to summarise, from what I am hearing from you, that, first of all, you seriously question the mandatory nature of the register and, secondly, you have questions about the efficiency and effectiveness of the register in itself to protect people or victims from further offending in your experience?

Ms DECHOW: Yes. I mean, as I said in the report, I can see obviously it is great for the police to know where all these people are at any given occasion.

Mrs DONOVAN: Yes, it is a forensic instrument. That is good.

Ms DECHOW: If there is a complaint made, they can act really quickly. If it was brought in to stop recidivism, where is the evidence that that has happened? They might have evidence; I have just not experienced it.

Mrs DONOVAN: Yes, we do not know.

The CHAIRMAN: In your experience, why are some young people prosecuted for registerable offences following consensual underage sex and not others?

Ms DECHOW: Usually it is the victims—one of the parents.

Mrs DONOVAN: The insistence of the victim, perhaps. The victim's parents. It is within the discretion of the investigating officer, so my best guess would be the insistence of the victim's parents and perhaps—yes, I think that would be —

Ms DECHOW: I think there is a lot of discretion that goes on when it is, say, two people of similar age and they have had sex and the parents made a complaint. I think the police do seem to have quite a discretion not to go ahead, or sometimes if the perpetrator—if you can say who is the perpetrator when they are both consenting and they are both underage, but it is usually the boy—can get a direct referral to the team from the police, and it is just raised as a matter that can go to the team.

Mrs DONOVAN: It depends on the charge, yes. They get more scheduled.

Ms DECHOW: Yes, I think a lot of that goes on. So the police are —

The CHAIRMAN: It sounds a bit like a lucky dip to me.

Ms DECHOW: Yes, that is right.

Mrs DONOVAN: That is just our best guess. We would not really know, but that would be our best guess.

The CHAIRMAN: But is that not the case? Where discretion is being exercised, that we should have an understanding of the circumstances and why it is exercised in favour of one and not another?

Ms DECHOW: That is right. Yes, of course.

The CHAIRMAN: And what circumstances give rise to the exercise of discretion from the point of the police, who are the investigators, I presume? Then, if it goes to the DPP, why are the DPP exercising discretion? Is there cultural or gender biases in the exercise of that discretion?

Ms DECHOW: I think, from my experience, you can write these submissions. Can you change the charge or drop this or that? They will always bring the victim, or the victim's parents, in and say,

“This is what they want. How do you feel?” If the victim says no, and the victim’s parents say no, then they are not going to, you know —

The CHAIRMAN: Pursue it.

Ms DECHOW: They are not going to downgrade it or change it. If the victim agrees, though, and is quite happy, it can get changed. In one case, with one victim, he felt he was pressured to agree, so the charge got changed from an aggravated sexual penetration to an assault occasioning bodily harm. Nothing to do with us, just something that someone told me about.

The CHAIRMAN: The key here is this inquiry is not so much not interested, but we are not dealing with what these offences are; they will remain offences. What we are talking about is the fact that when you have been found guilty or accepted responsibility, that you are then mandatorily put on a register. There are a whole heap of things that are happening here before that happens where some people, you know, might have quite serious arrangements where they are not doing that, because the victim does not want to pursue it, or the victim’s parents do not want to pursue it. Then others who do, or because of mandatory reporting requirements, they end up on the register, and it is a question then about the efficacy of the register in terms of what its stated purpose is, which is to protect the community. There is a whole range of things going into all that sort of stuff.

You submit that males get charged for offences related to consensual underage sex more than females. What is your experience in this regard?

Mrs DONOVAN: If it is consensual and they are both under 16, in our experience, the people we have represented have all been young males. It is the boys who are charged, not the girls.

The CHAIRMAN: Notwithstanding that there may be equal culpability for what happened, you are saying that the system effectively criminalises the male behaviour but not the female behaviour?

Ms DECHOW: It does.

Mrs DONOVAN: That is in our experience.

Ms DECHOW: And in fact, I know one lawyer, who is not at the Youth Legal Service, and she constantly rings up the police and says, “Well, are you going to charge her? Why have you charged him and not her?” I think it is just the definition of sexual penetration in the criminal code. I am not sure.

Mrs DONOVAN: I do not know, but in our experience we act for boys.

Ms DECHOW: Never.

Mrs DONOVAN: We have never acted for a girl when it has been under 16 and consensual.

The CHAIRMAN: What you have said in relation to the discretionary exercise of police and victim, if that comes into this conversation, you are talking about two children under the age of 16 engaged in what was in fact consensual, but at law it can never be consensual.

Mrs DONOVAN: Yes, factually consensual, not legally consensual.

The CHAIRMAN: And the views of the victims are important, but the males end up getting prosecuted routinely consistently instead of the females. There are some major concerns surely about the fairness of our justice system with respect to that.

Ms DECHOW: Yes, because we think: we do not know how much our society is looking after boys in this respect, you know? Also, it is quite traumatic for young boys to be charged with an offence. They go to the police, they are interviewed, the police talk to them—they are doing their job, I appreciate that—about their erections, how many times they masturbate —

Mrs DONOVAN: It is quite explicit, the way they are interviewed.

Ms DECHOW: Then they go to court. I mean, the shame is enormous and they go through this system and come out the other end as a registered child sex offender.

Mrs DONOVAN: That is what we are talking about with the stigma of it, because they are then a registered sex offender, and they only quite young boys. That is a huge stigma to attach to a young boy.

The CHAIRMAN: This is a long question, so I will say it slowly. Are you aware of any cases involving a young person in a position of care, supervision or authority, such as a sports coach or a tutor, being charged or prosecuted for a class 1 offence of sexual offences against a child over the age of 16 when the relationship was consensual?

Ms DECHOW: The coach is under 18?

The CHAIRMAN: That is right.

Ms DECHOW: So both—no, never.

Mrs DONOVAN: No.

The CHAIRMAN: It is a very specific question that one. That is why I am very careful when I ask it, because I get confused as I go along myself.

Your submission discusses the delays involved with a child, and you have mentioned this, from when they are charged with a registerable offence, and including the defence trying to negotiate with the prosecution from an amended charge that is not registerable. How often does this delay occur?

[10.40 am]

Ms DECHOW: Every time. We usually will do everything we can to see if we can get the charge amended. That is the thing—you are not amending it because of the penalty or the sentence; you are trying purely for the kid's future, so that they are not registered.

Mrs DONOVAN: That becomes your focus, essentially.

Ms DECHOW: Yes. They are not going to get a sentence of detention if they have got no record unless it is —

Mrs DONOVAN: Unless it is very, very serious.

The CHAIRMAN: Would you say that the most punitive part is actually being on the register?

Mrs DONOVAN: Yes, absolutely.

The CHAIRMAN: The register is not meant to be punitive.

Ms DECHOW: No.

Hon TIM CLIFFORD: You mentioned sexting before. Have you had a case where someone has turned 19 or 20 and they sent a message when they were 16 and then someone has come back? Is there a way of them being charged in that sense of sexting three or four years before?

Mrs DONOVAN: Yes, potentially.

Ms DECHOW: There is no limitation period on when someone can be charged.

Hon TIM CLIFFORD: I am thinking that with technology and everything, it might become a more common thing. In some cases, it might be for revenge.

Mrs DONOVAN: Yes, that could potentially happen.

Ms DECHOW: It is so common. Again, I think police really use their discretion and do not charge, because they would be charging every child at school. I think at one school, all the girls had sent the boys pictures of their breasts. All the boys had all the girls' pictures of their breasts on their phones. That is absolutely commonplace. I think discretion is that these people do not get charged. They cannot be registered. Provided it is one offence, they will not get registered.

Mrs DONOVAN: Provided it is one offence; that is the exception as well to registration.

Ms DECHOW: But if you have got it on your phone and you have sent it to a couple of friends over a few days, that means you could still potentially be registered.

The CHAIRMAN: Just going back to my previous question about negotiating with the defence, how successful are you in terms of being able to negotiate with them to get the charge amended so that it is not registrable?

Ms DECHOW: I have had one success.

Mrs DONOVAN: Also, even if it is an offence that the scheduling is such that you can be referred to team, it is a big part of negotiation to see if the investigating officer is willing to accept that a team referral is appropriate, where there is an option for the court. There are offences that can be referred, subject to the court exercising their discretion to refer. You can negotiate with the arresting officer to find out what their attitude is and they communicate that, obviously to the DPP if it is the big main Perth court or, if it is a metropolitan court or a country court, it is the police prosecutor. I have certainly done that and that has been very useful as well, because you can discuss with the arresting officer the detail of the circumstances. If it is towards the lower end of the scale, like in one instance at the end of last year, the investigating officer essentially was very interested in what would happen in the team referral process. Part of that was going to be education for this child on the appropriateness of his conduct—that sort of thing. The investigating officer thought that that was a good process, so they did not object to the matter being referred by the magistrate, and the magistrate agreed with referral to the juvenile justice team. Because that had been negotiated, he indicated that to the prosecutor—it was in a metropolitan court—the prosecution did not object to the referral and the magistrate agreed with it. So that was a good process. That was a matter where there was a discretion available to the court. That is part of our negotiating process as well.

The CHAIRMAN: And largely that is all predicated on trying to avoid someone being on the register?

Mrs DONOVAN: Yes, because he was referred to team; he only admits responsibility, because he has to actually plead in order to trigger the register. If you admit responsibility and are referred to team under the court's discretion, then you have not triggered registration. Certain offences can be referred to team. For example, in indecent dealing, the court has the discretion to refer that to team. That was an instance of somebody going to team.

The CHAIRMAN: It sounds like a lot of work to get to that point.

Ms DECHOW: It is a lot of work.

Mrs DONOVAN: Yes, it is a lot of work. It takes a lot of time, because you have to obviously discuss it in detail with the child and have the child's clear instruction that they wish you to discuss it with the investigating officer to that extent. It is problematic, because it is up to the discretion of the individuals.

Ms DECHOW: It can take a few adjournments in the court.

Mrs DONOVAN: Yes, so you adjourn it through the court to allow that to happen. But the court would be aware of why you are doing that. There are reasons behind what you are doing.

The CHAIRMAN: If registration was discretionary, do you think that is where all that work would be happening, or do you think that it would be proceeding with the charges to be dealt with —

Mrs DONOVAN: That would be part of the sentencing process—the exercise of discretion.

The CHAIRMAN: — at the other end, when sentencing occurs, and there is an application by the police or the prosecutor to put the person on the register, and you would then do that work if necessary, rather than trying to do it all at the front end?

Mrs DONOVAN: Yes. And then it is part of the sentencing process. The exercise of the court's discretion would be supported by detailed reports—expert psychiatric reports. That process would be before the court and would be done in an appropriate way in terms of sentencing principles. I think that would work well.

The CHAIRMAN: Okay. The Law Reform Commission inquiry into the registration scheme 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? Essentially, the process is that people are not pleading guilty or accepting responsibility at an early stage because they go to trial because they do not want to be on the register. Do you have experience with that?

Ms DECHOW: Yes, because they are entitled to have the prosecution prove the case against them beyond reasonable doubt. The longer it is delayed, particularly if it is a young victim, their memory is not going to be as great.

Mrs DONOVAN: You would have nothing to lose by testing the prosecution case. If it is mandatory registration on proving of guilt, you have got nothing to lose by requiring them to prove the case against you.

Ms DECHOW: Certainly in the Children's Court. I mean, in the adult court, of course, if you put them through a trial, that is an aggravating factor, so you would probably get a sentence, but in the Children's Court, you would do it. It would be more likely that you would take it through trial if there was a chance that your client would be found not guilty, rather than just accepting it and getting it over and done with and dealt with in the next couple of months.

Mrs DONOVAN: Because the implications are just so enormous.

The CHAIRMAN: And the offender is not on the register for that entire period that that trial is underway?

Mrs DONOVAN: No.

Ms DECHOW: That delays it. It is only after they have been found guilty.

Mrs DONOVAN: It has to be triggered by them being found guilty.

The CHAIRMAN: I understand that. The point is that if we had early acceptance and responsibility, then that would be dealt with as therapeutically as possible from the earliest stage.

Ms DECHOW: Yes, that is right.

The CHAIRMAN: But people do not plead guilty because they would want to roll the dice as to whether they will end up on the register. Therefore, we have the time and resources that go into trials and the trauma of a trial, because I am sure it is traumatic for the offender but also the victims and their families. We get to the end of that process, which I think would be six or 12 months down the track. The register is supposedly there to protect the community. They are not on the register. You do finally get to the point where they are found guilty and then you have a whole heap of other issues that have happened. I suspect from the point of view of psychologists, psychiatrists and social workers, they would then have to deal with a whole heap of other negative issues that have arisen

as a consequence of that process, because we have mandatory registration for children who engage in sexual offences against other children.

Ms DECHOW: Yes.

The CHAIRMAN: You have already talked about how registration might affect the long-term future of children and young people. Is there anything more you want to add to that at all? We talked about job prospects. We have not really touched on the impact it might have, for example, on their social life and their social development in terms of being able to be involved in sporting clubs with other children and things like that. Have you had experience with the impact that those sorts of things have?

Ms DECHOW: Certainly if a child gets charged, the school is notified, regardless of whether it occurred at school or at home. The schools certainly then put in a safety plan, which may mean that the child can only go to a different toilet escorted by the teacher. If the teacher steps out of class, the child has to be taken out of class and must sit there until the teacher comes back. They put in these stringent conditions, which alert everyone to the fact that there is something going on with this child and they must be a sex offender. It does not take long for word to get out. Of course, even though they are kids, they get called paedophiles. We have had children who have had to be taken to safe houses because there is such a risk.

Mrs DONOVAN: That their identity will be identified.

Ms DECHOW: But that is before they are registered.

Mrs DONOVAN: That was someone awaiting trial who had to be taken to a safe house.

[10.50 am]

Ms DECHOW: Once they are registered—I am not sure.

The CHAIRMAN: What legal basis do the police have to inform the school of the pending charges against a child?

Ms DECHOW: There is something—I think there is. Maybe it is a bail condition—they will put on a bail condition not to mix with children.

Mrs DONOVAN: There might be protective conditions on bail.

Ms DECHOW: What happens is parents will not send their kids to school; they will keep them at home. That is another thing; the young person misses out on a lot of school. But that is not really registration; that is just one of the impacts of what happens because of this nature of offending. It seems you can go out and do 100 burglaries, or an aggravated robbery, but it does not create the same stigma.

Mrs DONOVAN: Offending other than sexual offending, you have the benefit of all the principles set out in the Young Offenders Act in terms of the sentencing of a child, so you are the beneficiary of that. But then if you have a compulsory sex offenders register, that completely abrogates that.

The CHAIRMAN: Do you support a right of appeal or review mechanism for people currently on the register?

Mrs DONOVAN: Yes, if it was to be removed, definitely.

Ms DECHOW: Yes, if the system were to change, absolutely.

Hon TIM CLIFFORD: If there were changes to the legislation, do you support looking at the retrospective?

Ms DECHOW: Definitely; yes.

The CHAIRMAN: Your submission points out that the Children’s Court considers a youth justice report and other relevant reports prior to sentencing, and is therefore well placed to determine the risk of reoffending. With regard to judicial discretion, do you have a view whether the onus should be on the prosecution to convince the court that registration should occur if it was discretionary or that the defendant has to convince the court that registration should not occur? It is where the onus of proof lies; for example, if you contemplate that discretion has been introduced, there could be different forms. Discretion might be a rebuttable presumption that you go on the register, therefore, the burden must be on the child and their team to prove that they should not go on there; or should it be the case—these are obviously people who have already been found guilty or accepted responsibility for their crimes—that it is still a matter that the police or the prosecutor should have the burden to prove that that person ought to go on the register? Where does that lie, in your view? Who should have that responsibility?

Ms DECHOW: Obviously, that is going to be based on a specialist or a forensic psychological report.

Mrs DONOVAN: As defence lawyers, we would prefer prosecution.

Ms DECHOW: Well, both parties —

The CHAIRMAN: But if we consider that there is a spectrum of seriousness in offending—we cannot just look at a particular offence without regard to the circumstances. I guess the point is that currently one of the defences the police has said about the mandatory nature of the register is that it is administratively easier for them to manage because they do not have to question whether or not somebody should be or is not on the register; they are just on the register. But, for example, if we contemplate that if the onus is on the prosecution to prove that they would not be making applications of registration in clear circumstances where it was not appropriate—therefore, the sentencing would be dealt with by the court in its ordinary course of events, and registration would not come up because the prosecution knows that the case just does not present in terms of a justification—or if the burden is on the defence to then say put them on the register, then every case, of course, will be dealt with as a question of registerability. As you said, you are defence lawyers so your preference would always be for the prosecution, but in terms of the proper outcome, should it be that in every case that question should be asked about whether it is appropriate to be on the register, or is it only the cases that truly deserve it, then there can be arguments and, of course, then we argue about those matters that are in margins?

Ms DECHOW: I think probably, you would have to look at each individual case rather than blanket applications to go on the register for each child to be determined.

Mrs DONOVAN: I would have thought logically, if you are talking about time and expense, use of resources, I would have thought that if the onus is —

The CHAIRMAN: There is also an issue of risk as well.

Mrs DONOVAN: If the onus is on the prosecution to choose the instances in which they apply to the court to make application that the child be registered, because in their view the seriousness of the circumstances warrant that; whereas, in other cases they believe they are towards lower end of the scale and do not warrant registration. Make it a positive thing. Unless the prosecution apply to the court, that would seem to be a better use of resources. The prosecution has the role of identifying what they view as more serious than those warrant the court’s consideration for registration.

Ms DECHOW: It is a different consideration. It is not the seriousness of offence; it would be the risk of reoffending. Just because you commit a really serious offence, does not increase the likelihood of you doing it again. I do not know if anyone can accurately—of course, they cannot accurately

predict, so it would have to be a balance of probability; although, I am not sure how you would. You would have to get information from a forensic psychologist who knows about sex offending.

The CHAIRMAN: Yes, but risk is already taken into consideration in sentencing in any event, so that issue of the risk of reoffending would be something that a magistrate or a Children's Court judge would take into the account when they are dealing with these things.

Ms DECHOW: They are doing that every day with everyone who appears before them, being convicted anyway—you know, the risk of them reoffending—because that is what the whole sentencing process is all about. It is all about rehabilitation and making sure they do not come back to the court. I think the statistics with children are of the 100 per cent that appear before the court, only 10 per cent will come back, and of that 10 per cent only five per cent go on to be hardcore offenders. I think that is basically what the stats are with children and offending.

The CHAIRMAN: Yes. Your submission suggests the establishment of a juvenile justice team special diversionary program for first offenders upon them accepting responsibility. Can you explain that to us?

Ms DECHOW: I think it is just because our experience is that when children get charged with this sort of offence, they really do become like victims themselves. The idea is if you do not want that young person to reoffend, or if they have started to develop some sort of strange tendencies, get them into a program as soon as possible. I know that Victoria has a therapeutic diversion service for children 15 years and under, whereas, if they go and do this therapeutic program—I have no idea what it involves—they will not necessarily be charged. I think it is probably worth looking at their system, what that is all about, to see whether we could do it here. You already have the discretion to refer matters to the team. You would have to remove all the schedule 1 and 2 offences from the act to do that, but, yes, definitely. To me, you would be dealing with the risk of reoffending more appropriately using that sort of diversionary program rather than going through the sentencing program, getting put on a sentence, and then being registered as a sex offender for years.

The CHAIRMAN: My final question is: are there some circumstances where a child or young person should be mandatorily registered, that there should be no discretion?

Ms DECHOW: I would say no. But I do not think—each child —

Mrs DONOVAN: Each child should be viewed individually.

Ms DECHOW: I could not—I would never say. Obviously, if they have had all their counselling and been put on a sentence and they come back to court a year later and they have committed exactly the same sort of offences against other children—so, you know, maybe you are looking some sort of —

The CHAIRMAN: Pattern of behaviour.

Ms DECHOW: Pattern of behaviour—yes.

The CHAIRMAN: But that would still remain within discretion?

Mrs DONOVAN: But it would still lie within the sentencing discretion of the court.

Ms DECHOW: Yes.

The CHAIRMAN: Do you have any further comments to make or would you like to make a closing statement?

Ms DECHOW: No.

Mrs DONOVAN: We have probably said everything.

Ms DECHOW: If you have any other questions, we are quite happy to answer them at a later date.

The CHAIRMAN: I appreciate that. Thank you for attending today. Please end the broadcast.

A transcript of this hearing will be forwarded to you for correction. If you believe that any correction 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 questions on notice, so we do not need to deal with that. But if you want to provide any additional information to the committee 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 both for coming in today and sharing your experiences and expertise with us; we all greatly appreciate it.

Hearing concluded at 11.00 am
