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 FOUR

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 2.15 pm

Ms AMANDA FORRESTER
Director of Public Prosecutions, Office of the Director of Public Prosecutions, examined:

Ms KATIE GODDARD-BORGER
Practice Manager, Office of the Director of Public Prosecutions, Children's Court Team, examined:

The CHAIRMAN: Just to do our introductions: at the very start there is Amanda Gillingham, who is our research officer; next is Hon Samantha Rowe; Hon Dr Steve Thomas; Hon Colin Holt; myself; Alex Hickman, who is our legal advisory officer; and Hon Tim Clifford. We will get started. Can we begin the broadcast now, please. On behalf of the committee, I would like to welcome you to the hearing. 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 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. Ensure that you do not cover them with papers or make any unnecessary noises near them. As there are two of you, can you please try to speak in turn so that it does not confuse the poor Hansard people. 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?

Ms FORRESTER: No, thank you.

The CHAIRMAN: Okay, thank you. We have received your submissions, and we appreciate —

Ms FORRESTER: We have not done one.

The CHAIRMAN: You did not do one? There you go. We have not received any submissions from you so, first of all, could we get an explanation of what the role of the Director of Public Prosecutions is with respect to child offending and in relation to the register.

Ms FORRESTER: The DPP, as Katie has just indicated, has a Children's Court team that is responsible for the prosecution of all matters in the Perth Magistrates Court, and we prosecute all matters before the President of the Children's Court in regional areas. The police, as with all prosecutions, lay charges and at one or another point in the prosecution, depending on where it is and before whom it is being conducted, we will take over that prosecution and prosecute it, having regard to the DPP prosecution policy and guidelines and what the evidence discloses. Then we have no role in relation to the register because at the moment the register is automatic upon someone being sentenced for an offence, so in all prosecutions, whether they are adults or children, the operation

of the reporting obligations are consequent upon someone being sentenced, so we have no involvement in that part of the process.

The CHAIRMAN: Okay. Just to confirm, you said that you were involved in all matters before the Perth Magistrates Court, and all matters that are in the regional areas for the Children's Court.

Ms FORRESTER: Before the President.

The CHAIRMAN: The President of the Children's Court. Is that all matters before the President of the Children's Court, or is it only matters that are in regional areas?

Ms FORRESTER: In regional areas, the local magistrate will also be in charge of the Children's Court in that particular region. Those magistrates can escalate matters to the President if they are sufficiently serious or they require a certain disposition. If they go before the President, then we will prosecute them. If they remain before that regional magistrate, the police prosecutor responsible for that particular court will have responsibility for it.

The CHAIRMAN: Would you have an idea about what proportion of child-related sex offences committed by children you would actually prosecute?

Ms FORRESTER: No. There will be something that only the Children's Court could tell you, I would have thought, in terms of statistics—maybe WA Police.

The CHAIRMAN: Do you deal with many cases, or do you deal with a few cases?

[2.20 pm]

Ms FORRESTER: We deal with a lot of cases, but there will be a lot of sex offence cases, certainly at the minor end. I use that word advisedly in the sense that no sex offence is minor. A large majority of them will stay before the magistrate in the particular regional centre, and there are lots of reasons why that would be so. First of all, the disposition might be something that can be accommodated by the magistrate; secondly, it can remain being dealt with in that region in a timely fashion, because otherwise the President either has to come up to the region, or the child has to come to Perth, which is obviously undesirable. Escalating it before the President highlights the seriousness of it, which might not be a particularly good thing for the young person in the context of rehabilitation. The magistrate may well be familiar with that child, so there are a lot of factors that might come into that.

The CHAIRMAN: How many cases do you deal with? Do you know?

Ms GODDARD-BORGER: It is very difficult to give statistics.

The CHAIRMAN: Is that generally?

Ms FORRESTER: Do you mean sex cases in the Children's Court?

The CHAIRMAN: Yes. This is what we are interested in.

Ms FORRESTER: We do not keep statistics by type of offence, because one young person might be in court for a number of different offences. It is published in our annual report how many Children's Court offences we deal with in any given year, but I do not believe we would have the statistics by breakdown on type of offence that we do.

Hon COLIN HOLT: Why is that, do you think?

Ms FORRESTER: It is not unique to the justice sector, but it is particularly an issue in the justice sector because WA police, the Director of Public Prosecutions, Legal Aid, ALS, private lawyers, the Children's Court and the Department of Justice, which oversees the courts, all have different data collection abilities, standards and criteria.

Hon COLIN HOLT: It is too hard?

Ms FORRESTER: It is not very well coordinated. One of the things that the sector is working towards is certainly collecting better data in a cohesive and comprehensible way, because it has become very clear in recent years that we could achieve more if we had better data across the system. At the moment, it is all a bit divided up by office.

Hon COLIN HOLT: Just for clarification, to clear something up for me, in Perth, if a matter is before the Children's Court, the DPP is involved in the prosecution?

Ms FORRESTER: Yes.

Hon COLIN HOLT: But in the regions, if a matter is before the Children's Court, or a magistrate, the police prosecutor takes control of the case?

Ms FORRESTER: Yes.

Hon COLIN HOLT: Do they seek advice from the DPP?

Ms FORRESTER: They can.

Hon COLIN HOLT: Do they always?

Ms FORRESTER: Not always, not by any stretch of the imagination. They can also brief it to the private bar to prosecute, and they do that on occasion, so it is not the police prosecutor but a qualified lawyer. Sometimes the police prosecutors are qualified lawyers as well, but they may well brief it to the bar. But, by the point it is getting that complicated, it is likely to be adjourned to appear before the President. If it is a complex case, you would expect the President to deal with that.

Hon COLIN HOLT: Is most of that just because of geographical issues?

Ms FORRESTER: No. As I said before, there are many issues about putting a matter before the President that are not necessarily congruent with the child's rehabilitation in terms of seriousness, and the time it takes to get the President to that particular region to deal with it. I am sure Katie can assist.

Ms GODDARD-BORGER: Yes. The other aspect is that in the Children's Court jurisdiction, magistrates deal with a lot of offences, which—adults would go before the District or Supreme Courts. That is the case in Perth and in the regions as well. An aggravated armed robbery can be dealt with in front of a magistrate, whereas until recently it would go to the Supreme Court if that person were an adult. The jurisdiction in relation to where a charge goes is largely based on the seriousness of the offence, and the penalty options, which because of the principles of juvenile justice are very different for juveniles than they are for adults.

Hon COLIN HOLT: Two different systems seem to be operating, though, between what happens in the metropolitan area and regionally?

Ms FORRESTER: No. There are number of magistrates in the Perth Children's Court, and they deal with a number of sex offences as well. They would deal with a large proportion of the sex offences in Perth.

Hon COLIN HOLT: Would that be a police prosecutor?

Ms FORRESTER: No, that is us.

Hon COLIN HOLT: That is you guys?

Ms FORRESTER: We deal with all matters in Perth.

Hon COLIN HOLT: So that is a different system then?

Ms GODDARD-BORGER: The person who is appearing is different.

Ms FORRESTER: Yes, the person who is appearing before the judicial officer—that is right.

The CHAIRMAN: A magistrate sitting as the Children's Court constitutes themselves as the Children's Court, and they are obviously a magistrate in the Magistrate's Court as well, so they are wearing two separate hats, for want of a better term.

Ms FORRESTER: That is right, but they have a Children's Court list.

The CHAIRMAN: Yes. So when they are dealing with that Children's Court list, they are applying all the principles that come under the Young Offenders Act, rather than what they would normally do if they were dealing with an adult offender who had committed the same offence, and that sort of thing?

Ms FORRESTER: Exactly the same as a magistrate sitting in the Children's Court in Perth, except for the fact that they have a police prosecutor before them and not a WA prosecutor —

The CHAIRMAN: We have a copy of your prosecution policy and guidelines. What do the police use when they are performing that role?

Ms FORRESTER: They are bound by the DPP "Statement of Prosecution Policy and Guidelines".

The CHAIRMAN: That applies to them equally?

Ms FORRESTER: Yes.

The CHAIRMAN: Can you give us a summary of the objectives of criminal prosecution, especially in relation to children?

Ms FORRESTER: There are a number of objectives and they apply equally to children and adults. The focus or the weight that you give to one factor or another will change according to who you are prosecuting. If there are reasonable prospects of establishing that a person has committed a criminal offence, which is the initial criterion—there has to be sufficient evidence to prosecute, otherwise you would never prosecute a person—then you have to look at the public interest. The public interest factors in terms of prosecuting can vary. There are the ones that apply to everybody, although, as I say, on a different balance. There is retribution or punishment; there is deterrence, both general and specific; and there is community protection. Those matters are tempered in the case of children by any particular vulnerabilities that they might have. Rehabilitation is the priority in relation to children. Preventing them from reoffending in the future is the priority for everybody involved in the juvenile justice system. There are particular factors in the guidelines that relate to the prosecution of young people about alternative means of achieving the aims of the criminal justice system and the level of care, supervision and other factors that apply to that particular young person.

The CHAIRMAN: The prosecution policy and guidelines is obviously under your imprimatur. Would that be correct?

Ms FORRESTER: This one is, yes.

The CHAIRMAN: It does not go before the minister or Parliament for approval?

Ms FORRESTER: No.

The CHAIRMAN: So it is not a form of delegated legislation or anything like that?

Ms FORRESTER: No, it is not, but I am permitted under the act that applies to my office. The Director of Public Prosecutions Act provides legislatively for guidelines to be issued in my name, to be applied across the board in Western Australia for criminal prosecutions.

The CHAIRMAN: Is there a fundamental principle on which you base those guidelines?

Ms FORRESTER: In the sense of criminal prosecutions everywhere, a number of fundamental principles have been developed over the years, and previous directors have published, and then varied, the guidelines. In publishing this particular version of them, we built heavily on the previous set that was, I believe, settled by Robert Cock, QC, but we have made some amendments to modernise them and make them more suitable for current prosecutions, and taking into account what we know about, for example, young people, and people with mental impairments, and we have refined some of the language in particular around those things. The fundamental obligation of the Director of Public Prosecutions is to prosecute fairly and to ensure that we prosecute on behalf of the community and not allow individual interests to impose on that obligation—but, ultimately, every person is entitled to a fair trial.

[2.30 pm]

The CHAIRMAN: Does it create a reasonable expectation amongst the person being prosecuted that you will comply with your own guidelines?

Ms FORRESTER: I would hope so.

The CHAIRMAN: In terms of, potentially, them taking administrative action against you if you did not or something along those lines?

Ms FORRESTER: They would find it very difficult to take administrative action against my office. It is very difficult to review decisions of the Director of Public Prosecutions or its officers, because we are independent of government for a start. Usually they just make submissions to our office, and we deal with them in accordance with the guidelines. We take adherence to the guidelines very seriously; they are the framework by which we operate. That is the reason that they are formally published; it is so that people know that we consider ourselves bound by them and operate according to them.

The CHAIRMAN: I appreciate that. We are not trying to undermine the guidelines or anything of that kind here with our questioning. It is more about the basis on which people might have regard to them. Whenever you put anything in writing, of course, people always argue about whether you are complying with those sorts of things, and there are differences of opinion, and it goes on ad nauseam and infinitum.

Ms FORRESTER: Very much so. There are lots of different opinions about whether something is in the public interest or not or whether there are reasonable prospects of conviction.

The CHAIRMAN: Yes. Ultimately, it is your decision as the Director of Public Prosecutions to determine that public interest test.

One of the questions we have is about clause 18(b) of the prosecution policy that states an objective is —

> to punish those who deserve punishment for their offences;

What does “deserve punishment” mean?

Ms FORRESTER: Again, it is deliberately wide, in the sense that what is deserving of punishment, first of all, is dictated by government dictating itself or Parliament providing legislation. There is legislation that sets out all the criminal offences and that specifies that there is a punishment involved in infringing that particular legislation. That is your first step as to Parliament’s guide or the community’s guide as to what deserves punishment. From there, you look at, again, whether there is sufficient evidence, what the victim’s views are, what community attitudes are and whether the other factors in the public interest, which are set out from paragraph 32 onwards, operate. There is

a fair amount of discretion involved in the job, but what deserves punishment depends very much on the case.

The CHAIRMAN: How do you decide whether someone deserves to be punished?

Ms FORRESTER: It is, first of all, as I say, whether there is evidence that establishes that an offence has been committed. By whether an offence has been committed or whether the evidence establishes it, whether there are reasonable prospects of conviction, because it is not as simple as saying it does or does not enable conviction. Particularly in jury trials but also with judge-alone trials or magistrate-alone trials, there is an issue about whether the evidence will weigh sufficiently to enable the prosecution to establish it beyond reasonable doubt. If there are reasonable prospects of convicting there, then you move to the public interest test. If there are no reasonable prospects, it is not in the public interest to prosecute, even if you might get a conviction.

Then you look at all of the other factors that are involved, as in the trivial nature—if there is a particularly trivial example of an infraction of the law, that would not necessarily be in the public interest to prosecute. If the principles of sentencing will not achieve a particular aim, then you would seriously consider whether to prosecute. If the cost of going to trial on a matter would so outweigh the likely benefit to the community by carrying out that prosecution, then you would seriously consider whether to prosecute. If there is cognitive impairment or things of that nature, which mean that the principles of sentencing, such as deterrence, would not operate in the same way, that would be a factor. Previous criminal history would be a factor. Youth of the accused would be a factor. There are a lot of issues in that.

Hon COLIN HOLT: You would only make that decision after a charge, would you not? There has to be a charge first and then you would go, "What does this mean in terms of?" Going back to my previous example about a police prosecutor, if a charge has been done, would they have to go through the same process of reasonable chance of conviction and follow your guidelines?

Ms FORRESTER: They absolutely do. They have a register that they had to fill in if they do or do not charge. They have a lot of guidelines around how they record that decision-making process so that they make sure that they have done that properly. They are obliged to follow our guidelines; the decision to charge and the decision to continue to prosecute a charge all fall under the guidelines.

Hon COLIN HOLT: Do you have an ability to review your officers if they make a decision on your behalf to say, "We think we'll drop these charges" or "We'll continue"?

Ms FORRESTER: We do. We have an internal review process. There are various levels of prosecutors in our office, only some of them are authorised officers who have the power to make decisions that result in a discontinuance or continuance of a prosecution to the next stage. Only senior state prosecutors and a very small number of the next level down are authorised to make those decisions. If somebody does not agree with that particular decision, then there are consultant state prosecutors, then the deputy and ultimately me. A number of matters will be referred to me throughout any given period for me to reach a final decision on.

The CHAIRMAN: Is that more likely to be ones that involve a decision not to prosecute rather than a decision to prosecute?

Ms FORRESTER: Yes. Although lawyers have no hesitation in contacting me if they think a matter should not proceed.

The CHAIRMAN: I am sure you get lots of those phone calls all the time.

Ms FORRESTER: Not as many as you think. The prosecutors in my office are fairly well versed in the application of the principles and everything has to be documented quite clearly and it goes through

that chain, so most people realise that because it is a discretionary decision, unless it is so obviously wrong, they will tend to deal with those decisions.

Hon COLIN HOLT: Do you have the same oversight for the decisions of police prosecutors? If there was a question mark around their decision in a Children's Court in a regional area, who would question that decision?

Ms FORRESTER: Police always are able to seek advice from the DPP, but they do not have to. If a defence lawyer had a complaint about how a police officer was proceeding, it would not generally come to me unless the police asked. They have an oversight system in the sense that they have to go to their superiors in the police prosecuting division, and there are senior officers there who can deal with it, and there are lawyers who work in that section. Most of the time, if they find that there is a matter that they are unable to resolve amongst themselves, then they are welcome to seek advice, and they do on occasion.

Hon TIM CLIFFORD: When you are looking at prosecuting someone in the circumstance of a 12-year-old who might have been reported, and you are weighing up the cost to the community as to the nature of the offence, what sorts of factors do you take into consideration? Do you take into consideration the holistic view? If there is a successful prosecution of, say, a 12-year-old for an offence, do you take into consideration the reporting circumstances, the direct impact on families and all those kinds of things?

Ms FORRESTER: Financial cost is a very small consideration because justice in the community should not depend on a cost. That said, if all other factors are equal and you are saying, "Should I prosecute possession of one low-level child exploitation image by having a week-long trial with computer crime evidence?", you do have to weigh those things up. There is a social cost.

Hon TIM CLIFFORD: That is what I was getting at—that long-term impact of being on the register.

Ms FORRESTER: We do not take that long-term cost. Parliament has decided that reporting is mandatory, and it is not for me to second-guess that. But we do take into account impact on families and things as part of the broader public interest considerations.

The CHAIRMAN: It is interesting that you made that last comment, because my next question is: why is the prosecutorial power discretionary when Parliament makes the laws, then you have created yourself a space for discretion? You said to us just then that the register is mandatory and that is Parliament's decision, but all laws are Parliament's decision, so why is there prosecutorial discretion? It is not meant to be an antagonising question; it is just understand why that is.

[2.40 pm]

Ms FORRESTER: I certainly do not want to sound like I ever would have the power to disregard the laws, because I do not, but the reason that I have this job and the reason that I am independent of government and Parliament is that I am entrusted with that discretionary power. But the Attorney General does have the power to make directions to my office about how particular matters are being dealt with, and if, under any circumstance, they thought that the Director of Public Prosecutions was not prosecuting matters properly and in accordance with what Parliament desires, then I would be subject to a direction. There are very many contentious examples of laws, and I do not want to particularly choose one, but in the past there have been laws that, through social reform or matters of that nature, Parliament has been behind what the community attitudes are, and it creates a real dilemma for a DPP in those circumstances. Ultimately, though, you have to make a decision as to whether you should be complying with the law, and as a general rule, we do, but we respect that those are the offences that Parliament has determined should be prosecuted if people infringe them, and we take it very seriously.

That is why there is that balancing exercise, and we have to, first of all, look at whether there are reasonable prospects of conviction, and then we look at whether it is in the interests of the community to follow through. Some infractions of laws are very minor or, even though they are not technically excused, one might think that the law probably is in a grey area and it affects the prospects of conviction, and whether you put someone through a criminal trial when you know a jury will not convict them, even if the law might ultimately technically be laid out, is a factor that we have to consider, in all of those things. It is a very difficult decision-making process to say it is not in the public interest to prosecute something that Parliament has said is an offence, and we are very careful of that. It works, first of all, on the basis that you never know for certain whether someone is going to be convicted, because we are not the people convicting them. That is the first principle—we never know whether somebody is guilty or not guilty; we only know the evidence that we have—and then you have to decide whether it is appropriate for the public interest to push ahead with that, and, obviously, the more serious the offence, they more likely you are going to go ahead with it.

The CHAIRMAN: Would you agree with the argument that your enabling act as the Director of Public Prosecutions is perhaps the foundation of your discretionary power?

Ms FORRESTER: It 100 per cent is—everything I do.

The CHAIRMAN: So Parliament has given you the discretion in one respect, in answer to my first proposition that I put you about we create laws that we want to be applied, but then we have also created the law that created your office and your role.

Ms FORRESTER: By creating an independent prosecuting authority, that is the blunt answer.

The CHAIRMAN: Yes, so it is our fault.

Ms FORRESTER: I guess I was just trying to be more fulsome with it, sorry.

The CHAIRMAN: No, that is okay. I think it is important to understand how it is we come to the position where you as the person who holds that office has discretion, and that you are not just some public servant that decides what gets waved through, and what does not, in a sense of that kind of role. Yours is a statutory role that is created by Parliament for that particular purpose, and to take into account that in every case there are circumstances that mitigate for and against prosecution.

Ms FORRESTER: It is important for people to recognise that, and sometimes there is confusion evident as to whether I am the moral arbiter, which I am most certainly not. I am still human, and I have my views about particular social reforms and things of that nature, but it is important that I do not allow my personal views to influence whether a matter should be prosecuted or not. That is actually excluded in our guidelines; that our personal views should not impinge upon the exercise of that discretion.

The CHAIRMAN: What we would like to do now is just work through the prosecution policy to get a better understanding of how some aspects of it relate to children and young people charged with registrable offences. To evaluate whether a prosecution is in the public interest, the prosecution policy outlines a number of considerations that may be taken into account. Is this what defines the public interest?

Ms FORRESTER: It does not define it; it states factors that are included in the consideration, so there may be other factors which are not covered by the list, in primarily clause 32. There may be additional factors.

The CHAIRMAN: In some respects, it is almost an intuitive assessment, is it not?

Ms FORRESTER: It is a bit.

The CHAIRMAN: It is not a science.

Ms FORRESTER: No, it is not, and if it were scientific, it would potentially cause injustice.

The CHAIRMAN: Clause 29(a)(ii) relates to cognitive functioning, linguistic or cultural factors and the reliability of admissions or evidence, and clause 37 states that people with a mental impairment should not be prosecuted for minor offences if there is no threat to the community. The committee has received evidence to indicate that these issues may be particularly relevant to some young offenders suffering from foetal alcohol spectrum disorder, or other conditions, such as autism. In what circumstances, or to what extent, might these factors be taken into account when deciding whether to prosecute?

Ms FORRESTER: They would definitely be taken into account, particularly—both in adults and young people, the problem with FASD is that there are a lot of older people that have it that have never been diagnosed with it, whereas at least now it is coming into the consciousness of the criminal justice system, so that the younger people are having it addressed. Cognitive impairment, mental impairment or any deprivation or impairment is taken into account. There are a number of issues that need to be taken into account. The first thing is that you need evidence that they have such an impairment, because the only time we will ever even see how that particular person is functioning is on a record of interview conducted with police, and it is not always immediately apparent that they have a particular deficit or impairment, so someone has to identify that they potentially have an issue, and seek a report. Regrettably, in our system at the moment getting reports is neither cheap nor swift, and there is a real impediment in the entire sector at the moment around psychological, psychiatric and neuropsychological reports, which is a very real problem.

The CHAIRMAN: To some degree, at the stage when you are deciding to exercise your discretion to prosecute or not, that would really fall on the accused person's legal team, if they have one, to produce that to you. Is it possible that you get along the line too far—you have made a commitment to prosecute, the charges have been laid, you have gone to court and you have gone to argue them, and then all of a sudden this is being raised as an issue after that decision to prosecute has occurred?

Ms FORRESTER: You can never go too far. Until they are convicted—and even then there is an appeal process—we can discontinue a prosecution at any stage.

The CHAIRMAN: Including in relation to young people?

Ms FORRESTER: Frequently, in relation to young people in particular, partly because of the way that the system is structured. Sometimes we do not even get to see matters until quite late, or someone will not have identified until quite late that they have that particular impairment, and then it takes such a long time to get the report that you are a long way through the process. Sometimes you cannot get the report until they are in the process, and a charge has been commenced. Usually, what will happen is that the report will be provided to us or, in the worst-case situation, to the judicial officer, and then we will see it and reassess whether, first of all, there are reasonable prospects of conviction, because, at its height, mental impairment can result in either a person being unfit to plead or being of unsound mind at the time they committed the offence, but then, whether it is in the public interest to proceed against them, given the options that are open at that point. Her Honour the President this morning mentioned the review of the Criminal Law (Mentally Impaired Accused) Act, and that will have a real impact on how we proceed in relation to those people as well.

Ms GODDARD-BORGER: Anecdotally, as well, in relation to children, we have to prove capacity as well, so that is a threshold issue we will have to —

The CHAIRMAN: Between 10 and 14?

Ms GODDARD-BORGER: That is right—between 10 and 14 we have to prove that the child knew, or ought to have known, that what they were doing is wrong. There is a threshold test that they had the capacity to understand that. That is something that we will assess in terms of assessing the prospects, so minds will be turned to that. Anecdotally, in the Children's Court jurisdiction, I am finding, compared to the adult jurisdiction, that we do see a lot of these issues raised a lot sooner than we would for an adult, because the counsel are very good at identifying issues with capacity. We are seeing fitness to plead as another threshold test, and issues with the foetal alcohol spectrum disorder being addressed and being assessed a lot more readily than we are in the other jurisdictions. We do not have a lot of cases where those issues have been raised after a trial has been listed.

[2.50 pm]

Ms FORRESTER: The issue there is that the consequences for adults of being found unfit to plead are usually much more significant than they are for children.

The CHAIRMAN: Yes.

Ms FORRESTER: And their lawyers know it.

Hon Dr STEVE THOMAS: I was just wondering how uniform or standardised the testing is? I mean, they are very hard things to measure.

Ms FORRESTER: For cognitive impairment?

Hon Dr STEVE THOMAS: Well, for FASD et cetera. Are they now a pretty standardised, accepted test or is there still some—it is a difficult thing. All mental health is a difficult thing to measure, so I imagine if it is difficult to get an absolute value as you go forward —

Ms FORRESTER: Well, there is no measure.

Hon Dr STEVE THOMAS: It becomes an opinion.

Ms FORRESTER: It is an opinion. It is always an expert opinion and it is very difficult to assess and it can take many tests. It is not the sort of thing that you can diagnose with one visit. Diagnosis of FASD takes a long time and a number of assessments across a number of different areas. It is very expensive. It is very difficult for young people in the regions, which is where you might expect to see a greater percentage, on occasion, of some of these disorders. It is only becoming better known in the last five to 10 years, and even then it is still a developing area of knowledge.

Hon Dr STEVE THOMAS: Could two assessors assess the same patient and come up with two different results?

Ms FORRESTER: Absolutely, although, that would make that person a borderline case, I think. And we do not usually ask for two different experts to diagnose that because of the very real problems that there are in just getting one person to conduct that assessment. It does not really matter what label you put on an impairment; if they have an impairment, that prevents them either having the capacity to know that they ought not do the thing, or if they do not have the capacity to understand a court proceeding, then we can work on the basis of that report without necessarily it being a diagnosis as such.

The CHAIRMAN: It is interesting, though, after 14—or 14 onwards—the issue of capacity in terms of the burden does not fall on the prosecution anymore; it moves to the defence. Does that change your approach in terms of how you prosecute? In that instance, the first 10 to 14, you have got to convince the court, but 14 to 18, it is the defence that must prove that case.

Ms FORRESTER: Even then when you are proving that particular case in that context, you are talking about what is colloquially known as insanity—not having a particular capacity or fitness to plead. They are two different tests as well. One is about your ability to comprehend the court process and give instructions and things of that nature, and then the unsoundness of mind defence is about whether you knew at the time when you committed the act that what you were doing was wrong, whether you could control your acts and things of that nature. So there is —

The CHAIRMAN: Yes. I was not meaning it terms of insanity because I think the test for capacity for 10 to 14 is a different one to mental impairment, though.

Ms FORRESTER: It crosses over, though. That capacity to know that you should not do the act does overlap at some point with the mental impairment defence under section 27. People do not run section 27 in this context. The juvenile justice system does enable allowance to be made for cognitive impairment in a much more therapeutic way than going straight for a section 27 defence. But you are right: in terms of capacity, the onus is on the young person, or the accused adult, to prove that they are not fit once you reach the age of criminal responsibility or automatic criminal responsibility.

The CHAIRMAN: I guess it is not so much that what we are talking about here, though, is proving that you are not fit; it is really about your discretionary prosecutional policy, about whether or not it is in the public interest to proceed against a person who may have some capacity but is heavily or significantly influenced by their cognitive impairment through FASD or autism or some other type of limiting behaviour. Obviously, children that are affected by those things often have delayed development, so it may be the case by the time they are 25 or 30 that they have caught up with everyone else, but when they are 16, they may have the mental age of a 12 or 13-year-old, or something along those lines. I guess that is what we are interested in, to some degree, is how you exercise that discretion in those circumstances, rather than getting into the situation about the onus of proof and that sort of thing, where you are actually, as the Director of Public Prosecutions, and your team, are making those decisions. What we are talking about in the bigger context of this inquiry is being mandatorily put on the sex offenders' register, and so there is no discretion at the final point. But we are trying to establish how the discretion is exercised up to that particular point.

Ms FORRESTER: The Children's Court practice is very different to the way we practice in the adult jurisdiction, but we still need evidence that someone has a cognitive impairment. If they are over 14, then we need someone to produce something to us that says that they have that impairment, and once they do, we will be able to assess that in the context of what they are charged with. We have an obligation to consult with victims and the investigating officer, and then we can make a decision having regard to our guidelines, but we will always take a cognitive impairment into account in making the decision whether to proceed against any person, but particularly young people. The outcome of prosecuting a person who has a severe mental impairment in particular is likely to be a non-custodial disposition of some description. It is about getting the best support for that child within the framework that they have committed a criminal offence and you have to look at how serious that offence is and whether the community needs to be protected from them, because sometimes people with cognitive impairments can be more dangerous. It depends on their age, their level of family support that they have or other support from particular agencies in government. There are a whole range of factors that we take into account. So, we do not just say it is a cognitive impairment; it is also what is going on in this young person's life.

The CHAIRMAN: Are you aware of cases where a young person with a cognitive impairment has been prosecuted for what could be considered a minor registrable offence—for example, inappropriate touching?

Ms FORRESTER: I am sure they have been prosecuted; whether they have been prosecuted to sentence is another matter. There is a distinction. Whether they have been charged—I am sure there are quite a few that have been. Whether we have prosecuted them to conviction—I am sure there are people with a cognitive impairment; it depends on how severe they are. I could not give you an example.

The CHAIRMAN: One of the issues we have with the Young Offenders Act—and I think the way the children are dealt with—is the issue of accepting responsibility for actions rather than pushing towards, necessarily, a strict finding of guilt, and that if they were to accept responsibility for their actions, they then get, potentially, diverted into other areas of the law, within youth justice teams and things of that kind. But what we find is that if they admit responsibility, they still end up on the register, regardless of those other interventions and therapeutic approaches and things of that kind. So, really, this is where we are trying to get at is that we have an approach that is predicated on the basis that we want to help, whilst punish and deal with the aberrant behaviours, but also to get these young people back on track, and then what we do is we hit a brick wall about a mandatory register in which they go on and which most of the evidence is established as a very serious consequences for them, if not formally a punishment.

Ms FORRESTER: This is the problem with mandatory anything.

Hon COLIN HOLT: Yes.

The CHAIRMAN: Yes.

Ms FORRESTER: It is as simple as that. That is why the justice system does not like mandatory minima. It does not like mandatory consequences of any description, because it prevents you from exercising a discretion in an appropriate way to ameliorate the severe effect on a person who does not merit them.

The CHAIRMAN: I think it would be fair to say that your discretion as a prosecutor is actually reasonably limited. We have talked about a range of other factors, but in most cases, you are prosecuting rather than not prosecuting. It is not that you are exercising a discretion as 50 per cent get through and 50 per cent do not. You are already at the harder point at which—I am not sure at what kind of percentage you would look at—but, overwhelmingly, the public expects that when a crime is brought to you that it is dealt with and prosecuted and that there will only be occasions when you exercise your discretion.

[3.00 pm]

Ms FORRESTER: Discretion not to prosecute at all?

The CHAIRMAN: Yes.

Ms FORRESTER: I am a prosecutor and so are my staff. It is not my job to sentence. I might have enormous sympathy for a person, yet they will still be guilty of that offence. The person who can exercise and provide mercy is the sentencing authority and they have a range of sentencing options open to them. That is where the discretion comes in. The minute you start removing sentencing discretion from a judicial authority, that is where the real unfairness, in my view, starts to operate, because, ultimately, a judge can impose no penalty, unless there is a mandatory sentence that is required. Unfortunately, a number of the offences that young people commit are the same sorts of offences that have mandatory minimum penalties and mandatory consequences.

Hon COLIN HOLT: The same could be said for police with their discretionary powers. Their job is to charge people and protect the community.

Ms FORRESTER: I do not know that they would see it that way. They operate under the same guidelines as we do. We do not even see what does not come before us. I do not inspect their register but it is available for inspection and I understand that the CCC is well aware of it. The police exercise their discretion not to charge in a vast number of cases that I will never see. We are getting only the ones the police first think should result in a prosecution, which means there is a very large number that are diverted or that the police simply choose not to prosecute.

The CHAIRMAN: Lots of people who do something wrong in society will look for excuses as to why they should not be. I think you quite rightly put it; it is actually an issue of sentencing, so it is a mitigating factor that goes to the sentence, not to guilt. That is one thing: you did the thing; you committed the crime. That is it. But, then what the appropriate penalty is, is one that we usually allow sentencing judges to determine and then they take into account those mitigating factors that come into that sort of realm. But as you say, we hit a mandatory something and all that is moved away and we get, potentially, harsh and unjust but, ultimately, lawful outcomes.

Ms FORRESTER: We have discretion as to what sentencing submissions we make as well. But as with the mandatory reporting, it is my view that if Parliament has set a mandatory minimum, I should not try to subvert that by not prosecuting that charge if it is the most appropriate charge. That creates, again, a real dilemma.

The CHAIRMAN: Clause 29(b) relates to the competence, reliability and credibility of witnesses. Are these issues particularly relevant in cases involving young children?

Ms FORRESTER: No; not really. It more relates to the witnesses who are giving evidence against the young person.

The CHAIRMAN: In cases of underage consensual sex, can parental or other pressures influence the evidence given by a young person?

Ms FORRESTER: There are two elements to that: first of all, whether the underage victim—for lack of a better word—or complainant, has been pressured to or not to give evidence to the police in the first place. Then there is a long process between charge and the proceeding, whether it be a sentencing proceeding or a trial that the child can be influenced one way or another. It is one of the reasons why the police now record children's evidence-in-chief at the earliest opportunity, because that prevents issues coming up with their evidence later on by just the fact of loss of memory. There is always a fair number of cases by way of percentage that have some sort of influence involved in them. Whether that is necessarily bad influence is another thing. It is always best to get young complainants' evidence dealt with as soon as possible. If we are aware of parental or guardian or other undue influence operating on the child we try to take that into account in our decision-making process. It is hard to know sometimes.

The CHAIRMAN: When we talk about consensual sex here, we are not talking about legal consensual sex; we are talking about factual, if we can describe it as that.

Clause 32(j) relates to the attitude of the victim. In cases of consensual underage sexual activity, given that previous rider, is the attitude of the parents sometimes or often decisive in deciding whether to prosecute?

Ms FORRESTER: It is never decisive.

The CHAIRMAN: Does the parents' attitude have any influence, given that they are not technically the victim?

Ms FORRESTER: It depends on the age of the complainant. If the complainant is not sufficiently mature either by age or simply emotional maturity to have their say, we will talk to the parents. We

try as much as possible to talk to children, particularly those who are around the 12, 13 or over mark, because it is disrespectful not to give them an opportunity to have their say even if it is not a terribly informed say. In those circumstances, we will also talk to their parents and get a gauge. You can usually get a good idea of whether the parents are coming from the right place in that particular context. But it is never decisive; the view of the victim or the victim's representative is never decisive to whether we proceed or not. We act for the community, not the parents or not the young person either. That said, we get some very forceful expressions and views.

The CHAIRMAN: I am sure you do. The committee has received evidence that boys are more commonly prosecuted for consensual underage sexual activity than girls. Firstly, do you agree with this and, secondly, if you do, why is that the case?

Ms FORRESTER: It is probably true. I have not got any statistics on it. I do not think there have been any studies, but, anecdotally, I would have thought it is because boys are more commonly likely to engage in what is euphemistically called consensual underage sexual activity with younger girls. Girls are less likely to engage in that with younger boys. As a result, the power imbalance can often be weighted more heavily in favour of the older person in that activity. We are very conscious of the prosecutions of young people where there is not a significant age disparity. We take a lot of account of whether there is a power imbalance or an abuse of power between the two that results in the consensual underage sexual activity. We do not really concentrate on the gender thing; it is about the power in the relationship and whether someone has abused it. You will find that there is not a lot of people of similar ages in that sexual activity that get prosecuted if it is as benign as consensual underage activity between two like-aged people. We tend to prosecute the ones where there is something else going on in that particular engagement that results in a wrong. Again, that would be the space where police very regularly choose not to commence a prosecution at all, despite parents' wishes, I expect.

The CHAIRMAN: Are you able to provide from your records figures to us on this issue about how many boys versus girls are prosecuted for consensual underage sex?

Ms FORRESTER: No. We do not record gender. WA Police might be able to because they charge everyone and they have the conduct initially of all prosecutions. We see only a proportion of all the charges that are laid in relation to those matters. So if anyone has those statistics, it will be WA Police.

Hon COLIN HOLT: Do you think one of the reasons could be around the definition of some of the offences, like sexual penetration?

Ms FORRESTER: I do not think so, because sexual penetration can be by either gender. It is just that the way that those activities usually occur, if it is regarded as criminal conduct and if the police have shown fit to prosecute in the first place, there is usually an imbalance of some description, whether it be by reason of age, cognitive impairment, someone using coercion or something of that nature. It is not usually related to which gender it is or who is older or younger necessarily.

The CHAIRMAN: This is a technical one, so bear with me. 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. That means a person who is under the age of 18?

[3.10 pm]

Ms GODDARD-BORGER: No, no immediate cases come to mind.

Ms FORRESTER: We did think about this. So you are talking about a 17-year-old coach of, say, a soccer team or something of that nature engaging in activity with a child who is over the age of 16?

The CHAIRMAN: Yes.

Ms FORRESTER: No, and I would be very carefully looking at any prosecution of a person in that situation.

The CHAIRMAN: Clause 32(a) and (b) relate to maintaining the rule of law and maintaining public confidence in constitutional institutions. How is this reflected in prosecutorial decision-making?

Ms FORRESTER: That is what we were discussing earlier. Fundamentally, criminal offences are prescribed by Parliament and it is our obligation to abide by the will of Parliament and maintain the respect of the community in the criminal justice system.

The CHAIRMAN: This one might relate to something you said before, which relates your discretion. The question is: the justice system evolves with societal norms; is this reflected in your prosecutorial direction?

Ms FORRESTER: Only to the extent that it is consistent with the offences in the Criminal Code. I was talking about this before. Sometimes Parliament takes a little while to catch up to what is a societal norm, and we have seen that in the past. Usually, the legislation is flexible enough to enable us to take account under our guidelines with some of those changes, but you have to be careful to know under the survey what a societal norm is. People think that they know what a societal norm is by what is on the front page of the paper, which is never a good gauge of what actually is correct. So you have to be very careful in assessing what is a societal norm.

The CHAIRMAN: Perhaps I can give you an example. Some statistics show that many young people under the legal age of consent engage in sexual activity. The question then is: how do you balance this reality with the Criminal Code, which makes all underage sexual activity illegal? We had the Commissioner for Children and Young People come in and he is doing a big survey of young people and I think some of that relates to their sexual activity as well. We have a situation where that evidence might, for what it is worth, show us that underage children are engaging in significant sexual activity, but the law says that is illegal.

Ms FORRESTER: Underage children have always been engaging in that activity and it is perhaps that we just know about it more. The Children's Court has always had a sex offence practice, so to speak. The fact is that we are becoming more conscious of it. This is what I mean by assessing what is a social norm. We are just becoming more conscious of that thing as a public. We have known about it for a long time. The guidelines are designed to enable flexibility of dealing with people and not bringing a sledgehammer to crack a problem that does not require something like that in order to address what is going on in that particular case. Criminalising what is normal adolescent behaviour is a sledgehammer and you have to be very careful to concentrate the power that you have in prosecuting someone in the places where it is necessary and not where it is not. That is why I was saying before about similar ages, similar power, even if they are underage. You would be exercising your prosecutorial discretion in that place to try to find a different alternative. I would very much like to see a restorative justice solution being an option in that particular space to enable expressions of remorse or understanding or things of that nature without it resulting in a criminal path.

The CHAIRMAN: There are absolute limits to your discretion; there is no question about that. So perhaps the question should really be asked by you of us as members of Parliament—what we are going to do to catch up with society's norms in the laws. Please do not!

Clause 32(d) relates to the circumstances of an alleged offence. How is this taken into account?

Ms FORRESTER: Again, that is those sorts of circumstances. If you have got two young people who go to school together, go to the park, engage in a bit of consensual activity, there is no alcohol

involved, there is no coercion involved, they are of a like age and they just like each other, that is the circumstances of that offence. On the other hand, you have a party with a bunch of boys taking advantage of a very drunk, although not so drunk that she cannot consent, girl and you look at that in a remarkably different light from the first.

The CHAIRMAN: Yes; I think that is quite clear. Clause 32(f) relates to the circumstances of the accused, including their criminal history. What circumstances are taken into account under this clause?

Ms FORRESTER: If a person has never committed a criminal offence of any kind before, whether or not that has resulted in a technical conviction as a young person, you would consider whether it is necessary to prosecute them in order to attain the aims of the criminal justice system, but it is a very small part because very serious offenders always have a first offence.

The CHAIRMAN: Of course, yes.

Ms FORRESTER: It depends on the circumstances of the offence in conjunction with what their antecedents—their background—are like. If they are a prolific offender, you would probably have to prosecute them again. If they have never done it before, you would look carefully at whether you start them on that path to having a criminal history.

The CHAIRMAN: Do you take into account, for example, if they are in state care, where mandatory reporting requirements are likely to result in a greater reporting of sexual activities that are considered unlawful?

Ms FORRESTER: No. How an alleged offence comes to light is not something that we tend to take into account. I have heard some of the evidence where, unfortunately, children in care are more likely to be reported in the first place. But the idea of mandatory reporting is that they come to the attention of the authorities, when, unfortunately, in a number of other situations, they would not. So we do not take account of that in determining whether to prosecute or not.

The CHAIRMAN: If a young person has a history of non-sexual offences, are they more likely to be prosecuted for a minor offence? I know this is a very general question.

Ms FORRESTER: Not unless there is some other factor in the sexual offence act that warrants it. We do not look at a history of shoplifting and say, "Well, you're an offender; therefore, we're more likely to prosecute you for this sex offence, even if it's minor." No.

The CHAIRMAN: What about the offender's previous good character? Is that taken into account in relation to children or is that not really a factor?

Ms FORRESTER: No; it is taken into account. You have to be careful not to allow a previous good character to be a substitute for privilege. You have to be very careful when you are looking at good character, because a person may have been reported a number of times before but got off or not been prosecuted because they have good antecedents, a good family background and good family support. But, on the other hand, if they have good antecedents, no-one has seen fit to prosecute them for anything in the past and people are presumed innocent. They have probably got better prospects of rehabilitation or not committing an offence again if they have got good antecedents, but good antecedents do not immunise anyone from prosecution, obviously.

The CHAIRMAN: No. Clause 32(h) relates to the culpability of the accused. What does this mean in relation to registrable offences committed by children and young people?

Ms FORRESTER: Very little. Registrable offences are set by the Parliament under the reporting act. The culpability of the accused is about the seriousness of their conduct in an objective sense against the other sorts of offences that can occur under that heading. It is just about moral culpability really.

The CHAIRMAN: You have obviously heard some of the evidence given and there was a reflection made on the importance of the investigating officer's opinion, which is dealt with at clause 32(k), so how much weight is given to the investigating officer's opinion in terms of your exercise of your discretion?

Ms FORRESTER: It depends. You have to be careful. As with parents of young people—complainants—you have to be careful to acknowledge that there can be inherent biases in everyone and that sometimes a police officer who is very familiar with a young person from a remote community who might be seen as a troublemaker or might not have well-developed attitudes towards not sexually offending against much younger people or things of that nature. You have to be careful not to overvalue that opinion. You have to question the officer about the reasons for their opinion. It is not as simple as them just saying, "We should proceed." You have to ask, "Why would you say that?" If there are no reasonable prospects of conviction, we will not proceed, no matter what the investigator's view is. That provision is mainly there because the investigator may well know things that we do not. They may be aware of evidence that we are not aware of. It is always important to check.

[3.20 pm]

The CHAIRMAN: Would that not be their responsibility to brief you to the fullest extent possible?

Ms FORRESTER: It is, but there are always things that we will not necessarily know. It may be that they are aware of something that is coming or they are aware of some other piece of information that might be of utility, particularly in a public interest sense because that is not necessarily evidence in the proceeding but might be information that is available in a public interest issue, like where that child will go on release or whether they will have good family supports or whether there is good engagement with a family member and the police in terms of preventing future offending. On the other hand, as with everybody that you consult as to their opinion, you have to be careful not to allow personal factors to impinge on the decision-making process.

The CHAIRMAN: Clause 32(i) states "the availability or efficacy of any alternatives to prosecution". What are examples of these alternatives?

Ms FORRESTER: Diversion is a principle one. Unfortunately, by the time we get it, diversion is not always available. If there is a diversionary opportunity, that is always good—sometimes mediation. As I said, I would very much like to have a restorative justice option, which would also be an alternative. Sometimes people just want the alleged conduct to stop—whether a restraining order or simply the fact that the person has been charged has caused that conduct to cease.

The CHAIRMAN: That would be relevant to children, though, in those circumstances. The offending would have stopped by that stage?

Ms FORRESTER: Maybe. Sometimes, particularly intrafamilial cases, regrettably it does not. Sometimes it is the actual prosecution that causes it to stop when complaints or something lesser than prosecution has not helped. We might then find that someone has stepped in after a prosecution has commenced and taken control of the situation or the child has been taken into care or the young person is getting the sort of counselling assistance that they need to prevent them committing that offending again. At that point, they might say, "Well, now we're using a sledgehammer when there are other things that are being done that are more productive of rehabilitation", and therefore it is not appropriate to proceed.

Ms GODDARD-BORGER: That is an example of one of the circumstances of the accused which we have seen. As a result of the charging process, someone has got counselling, a period of time has passed and it feeds into the risk of reoffending and their rehabilitation. If the rehabilitative ends

have been met through that counselling, the situation is different and we may take that into account in determining whether we proceed after the relevant consultation.

The CHAIRMAN: Is there a danger that this particular factor might be more favourable to those who have good support structures around as opposed to those who do not?

Ms FORRESTER: Very much.

The CHAIRMAN: I take it that we have (a) to (p), so it is not the only factor taken into consideration but it does seem to me that if you have the misfortunate of birth of being in an abusive family home life, that will not tend to be viewed in your favour because if you have committed an offence and that is the environment you are going back into, you are going to tend to prosecute.

Ms FORRESTER: It is not so much the environment you are going back to. As Katie said, if a person from a more privileged background is charged or investigated for an offence like this, quite often their parents will get them into very proactive counselling, they will get a report, it will be produced in a couple of weeks and all of a sudden you know that that person will be well supported whereas it is not just that we know the person is going back into an unsupportive environment but no-one is doing anything between the charging and the sentencing. If anything, the situation has got worse because they have not received any treatment and things have been allowed to go on in the same vein.

The CHAIRMAN: In that circumstance, successful prosecution may then be the only option for therapeutic approaches, although I note that one of the factors not to be taken into consideration—I think it was the irrelevant factors—is number 35, "under no circumstances should a child be prosecuted solely to secure access to the welfare powers of a court".

Ms FORRESTER: That is not rehabilitative programs; that is care and protection. We should not prosecute someone so they will be taken into care by DCP and brought under the rubric of the care and protection system. If we could get access to programs—you would never charge someone so they would get access to a program but it would be terrific if you could have a situation such as pre-charge bail where you could put them on conditions before they are even charged where they have to go to counselling and then you would consider the outcome of that counselling before you determine finally whether they should be charged at all. We do not have pre-charge bail.

Ms GODDARD-BORGER: The closest we have to that is court conferencing, which is under section 66, which is putting off sentencing and getting the child to abide with certain conditions and off they go.

Ms FORRESTER: But they have already been charged, of course.

Ms GODDARD-BORGER: They have and they are already in the system.

The CHAIRMAN: Clause 32(l) relates to consideration of the expense of a trial if it is disproportionate to the seriousness of the offending. I think we might have covered this to some degree. On what basis do you determine the seriousness of offending vis-a-vis the cost?

Ms FORRESTER: You have to look at a number of factors—the likely penalty. If someone is going to get only a fine and you are looking at prosecuting, as I said, a five-day trial with vast amounts of technical expert evidence, you have to look at whether you are really achieving something that is in the public interest. Obviously we do not spare very much expense when it comes to prosecuting murderers and people who have committed very heinous offences but if it is very low-level offending, you would not spend vast amounts of public money taking up court time. Every system has limited resources and we have to ultimately make a decision as to what is appropriate to spend those limited resources on. It is one of the most minor factors because if it otherwise warrants

prosecuting, we will not say, "Well, it's not worth the money." As I think was pointed out before, sometimes there are other costs and sometimes you should not be prosecuting and instead they should be getting services and counselling and it is the same with custodial sentences. Sometimes it is cheaper to get a person proper support in the community than to imprison them.

The CHAIRMAN: Are any registrable offences committed by children or young people ever considered not serious enough to warrant a trial—for example, a kissing or touching offence?

Ms FORRESTER: Yes, definitely, but a lot of the time they will not even be charged.

The CHAIRMAN: Are you able to provide us with circumstances where the decision was made not to prosecute?

Ms FORRESTER: No. I would be very hesitant to provide examples at all because of the risk of young people being able to identify themselves or by setting a precedent for other people to say that that would mean it is not in the public interest for them to be prosecuted when there are so many factors. I can give you generic examples. As you point out, kissing between a 14-year-old and a 12-year-old would be a registrable offence but the prospects of us prosecuting something like that would be extremely slim and I would be very surprised if the police charged something like that. It is important that we remember that there is a distinction between a decision to prosecute and a decision to continue a prosecution because the police are the ones who make the decision to prosecute in a Children's Court. Every child is prosecuted by a police officer and then we get it and we decide whether to continue it. We very rarely get that kind of low-level material with us. They will be diverted, although they cannot be diverted, I do not think.

Ms GODDARD-BORGER: They can if it is an indecent dealing with the child under 13.

The CHAIRMAN: Clause 32(n) relates to the likely sentence in the event of a finding of guilt. What is relevant here?

[3.30 pm]

Ms FORRESTER: If you are prosecuting someone and you are going to put victims, witnesses and everybody through the ordeal of a trial, and the person who is going to walk out the door with no conviction recorded—mainly this is in the adult context in particular—you might think that the public interest is not really served by having an expensive and time-consuming trial that would be better off being utilised for some other person sitting in custody. It is a factor that will apply in some cases for young people, but the sentencing regime for young people is so different that the likely penalty is rarely detention and is in fact, hopefully, a therapeutic option or something that enables their rehabilitation, so it has less weight in this case.

The CHAIRMAN: We have got to clause 32(p)—we have reached (p). It relates to the operation of the Community Protection (Offender Reporting) Act 2004. How is this a relevant factor?

Ms FORRESTER: I was considering this, because it is my view and I put that in there—it is actually whether it should operate. If you discontinue a charge, that means that a person will not be subject to the particular statutory regime that Parliament has considered to be appropriate for offending of that nature. If there are reasonable prospects of conviction, and I decide that all the other factors warrant me not proceeding, but if I do not proceed, then a person may not be subject to a statutory regime that Parliament has considered appropriate to apply; I need to consider that. It does not mean that I will prosecute it just to get them on a register, but it is a factor. Unfortunately, while many people know that prosecuting a child will not necessarily result in them going to jail, and under that framework parents of complainants still think, "Well, they're not going to go to jail, but at least they'll be on the register", it is a factor that we have to consider. Does the protection of the community require that one of those statutory regimes operates? It is by no means a decisive factor,

and I do not think I have ever had a case where I thought that act will operate—if I drop this, it will not operate; therefore I should proceed. Because of course there are provisions in the other way to say that in terms of sentencing, sentences cannot take account of those acts operating.

The CHAIRMAN: You do not take, for example, consideration of this act in terms of a decision not to prosecute because a person might end up on there. The converse of what you are saying, which is that you might tend to prosecute because the person will be registered? Is the converse true that you might not prosecute because you will give consideration to the fact that they will end up on the register?

Ms FORRESTER: I will never prosecute solely to get someone on a register. If the public interest does not warrant proceeding for another reason, this will not —

The CHAIRMAN: No, I did not mean it in those terms.

Ms FORRESTER: No. But equally, I do not consider it appropriate, as I said before, to subvert the legislation by not proceeding. If it is in the public interest to proceed, and a lot of people make a submission to us that we should not proceed because the register will operate to affect the child's future, my response to that is: that is a parliamentary mandated consequence and it is not for me to go behind that, whether I agree with it.

The CHAIRMAN: We did have another submitter who provided a written submission who made clear that the prosecution policy of the DPP was that it would not take that factor into consideration. You have confirmed that for us in that regard.

Hon COLIN HOLT: That was actually going to be the heart of my question at the end, which is about: would you act differently if there was no mandatory registration? Conversely, if there was no mandatory registration and you really thought they should be on the registry, even though it is a judicial decision, really, would you see that you have a role to play in convincing the judicial that they should be on the register?

Ms FORRESTER: I do have the power to make the application. If the circumstances warranted it, it would be part of our obligation to seek it. It is one of the roles that I am not especially comfortable with, because I do not see it as my role to do anything other than prosecute. Registration and the consequences of it are really something that is prescribed by the executive. It is one of the reasons why with the recent High Risk Offenders Bill the State Solicitor's Office is going to primarily take over that function, if the Legislative Council passes that particular legislation, because it seems to me that my function is to prosecute, and then the executive can make applications in terms of who should be on those sort of registers. That said, at the moment it is my role, as it is my role in the dangerous sexual offenders space. If the evidence supports it and if I have psychological or psychiatric reports that suggest that that person is going to be a risk of committing a sexual offence, then I will make the application and the judge can make a decision one way or another.

The CHAIRMAN: We are getting towards the end here. Clause 34 relates to the prosecution of children. Can you explain how each of the factors listed are taken into consideration? I think you have covered to a large extent most of these. Is there anything additional you would like to add to those particular ones?

Ms FORRESTER: I think I have probably addressed (a) and (c), and (b), to some extent. We are very conscious of the fact that rehabilitation is the primary aim of youth justice. It is more the processes of the court that are counterproductive. Sometimes putting a person through the criminal justice system can itself be counterproductive to a child's future, but we have to be careful because that is the system we have got. It is not really, again, for me to say, "Well, there's a better way, and therefore I am going to choose not to prosecute at all." But how we prosecute, what we do, what

options we submit are appropriate by way of sentencing, or alternative routes are always open to us.

The CHAIRMAN: This might be a loaded question, given they are called the DPP, but if discretion was reintroduced back into the system; I do not know if there ever was any discretion. But if there was a discretion in terms of the register, where do you think the burden should lie to prove that a person be on the register—with the prosecution or with the defence?

Ms FORRESTER: With the prosecution.

The CHAIRMAN: You accept that that would still remain yours? Do you think it that it should be based on an assessment on every case, or any cases where you make a decision that you would like that person to go on the register?

Ms FORRESTER: I do think that the judge should have the capacity of their own motion, but it certainly should only be on the basis otherwise of the prosecution application.

The CHAIRMAN: You would anticipate in those circumstances that there would be cases where there had been a conviction or an acceptance of responsibility, that you would not ask for them to be on the register, and therefore you would save the resources and the time of going through that process?

Ms FORRESTER: I anticipate that there would be many cases where we would not make the application. I do not see many that, in terms of percentage, would warrant it.

The CHAIRMAN: You would suggest that there are people on the register now that do not warrant being on the register?

Ms FORRESTER: Parliament has said they do.

The CHAIRMAN: Yes, okay.

Hon COLIN HOLT: Correct answer.

The CHAIRMAN: Sorry for that last curly question; that was my last question. Would you like to make a closing statement?

Ms FORRESTER: No.

The CHAIRMAN: Okay, excellent. Thank you for attending today, we can now 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. I do not think we had any questions on notice that I can recall, so we do not need to deal with that. If we do have any additional questions for you, we will include them when we send the transcript to you. If you want to provide any additional information or elaborate on any particular points, you may provide supplementary evidence for the committee's consideration when you return your corrected transcript of evidence. I would like to thank you for the job that you do. It is not easy. I think what is apparent from the evidence that you have given today is that while discretion sounds like a wonderful power to have, it is actually a very heavy burden, so thank you for the work that you do and thank you for coming in today and helping us.

Ms FORRESTER: Thank you very much.

Hearing concluded at 3.38 pm

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