

STANDING COMMITTEE ON ENVIRONMENT AND PUBLIC AFFAIRS

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



**TRANSCRIPT OF EVIDENCE
TAKEN AT PERTH
WEDNESDAY, 14 AUGUST 2019**

Members

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

Hearing commenced at 9.07 am

Mr COLIN PETTIT

Commissioner for Children and Young People, examined:

Mrs PATRICIA HEATH

Director, Policy and Research, Commissioner for Children and Young People, examined:

Mr LYNTON BENNETT

Principal Policy Officer, Commissioner for Children and Young People, examined:

The CHAIRMAN: Good morning, and thank you for coming in. I will just do some quick introductions before we get formally underway. Sitting over there is Amanda Gillingham, our advisory officer. Sitting next to her are Hon Sam Rowe; Hon Colin Holt, the deputy chair; myself, the Chairman; Alex Hickman, our legal officer; and Hon Tim Clifford. I will go through the formalities first. Today's hearing will be broadcast. Before we go live, I would like to remind all parties that if you have any private documents, you need to keep them flat on the desk to avoid the cameras. Also, the ABC is in here to get some footage. They will not be recording any sound, and they will leave in a couple of minutes after they have got what they need. I presume you do not have any issue with being on the telly, although they have not guaranteed we will get on!

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Would you like to make an opening statement this morning?

[9.10 am]

Mr PETTIT: No; thank you, Chair. I think we will go straight into it.

The CHAIRMAN: We have received your written submission, and we appreciate that. We have a number of questions that we would like to go through with you. The first is that your submission outlines your statutory role and responsibilities, but we would like you to explain why we need a Commissioner for Children and Young People.

Mr PETTIT: Thank you, Chair. As you saw in the correspondence that I have, we are a statutory independent office. We have been established for the last 12 years, with a view that we represent the best interests of all children in this state under the age of 18. Given that all children under the age of 18 cannot vote, they certainly need a voice from somewhere, and previous governments, and

this existing government, have determined that my office is that person, if you like. I have been in the role for almost four years and have a range of functions under the act, which were identified in the correspondence. The bulk of that is subject to the UN Convention on the Rights of the Child, making sure that we adhere to all those rights that are signed up to by the Australian government.

Underneath that, a range of functions have been determined in the act. There are about 15 of those functions. They can be, I suppose, summarised in six points. The first is to promote the best interests of children and the value that they provide to our society now and into the future. To do that, we have to consult, which is our second function. We do that in a broad range of ways, including direct conversations with a range of children across the state, and by surveys and a number of other instruments. The third is to advocate for children and make sure their voice is heard. We do that in a range of ways, at both a government level and society level. The fourth is to research as much information as possible to effect information that will improve their lot into the future. We do that through a very small team. The fifth is to do inquiries. We have done a range of very low-level inquiries on topics that affect children and young people. The last is to monitor the outcomes for children and young people, and we are moving into that space around the wellbeing framework, which I am happy to expand on.

They are the key ones. However, under the act it is made very clear that we have to make sure that vulnerable children, and children from Aboriginal and Torres Strait Islander backgrounds, are looked after in a way that is needed to make sure their vulnerability is supported.

The CHAIRMAN: Thank you for that. Just with regard to your role to monitor and review laws affecting children and young people, what requirement, if any, is there for the government to take account of your advice, or take into account your advice?

Mr PETTIT: Good question. At this stage, there is no direct requirement, but of course successive governments have indicated that my office is an important object in this process and have articulated inside my legislation that we should monitor the role of laws that affect children. From that perspective, we would assume that governments would want to listen.

The CHAIRMAN: Just in terms of your role, you said it is for children under the age of 18. Your title is Commissioner for Children and Young People. Do you take any consideration of people who might say that you should perhaps push beyond that to, say, 18, 19 and 20-year-olds as being young people? I know that might not be quite within your statutory responsibilities, but is that a hard and fast line or it is a bit grey?

Mr PETTIT: It is a hard and fast line in terms of the legislation, but of course what we do is that in a number of consultations we often will go to people beyond 18 to reflect on their life as they grew up, so their response is very, very important. Of course there is always confusion with state and federal governments, who view young people as youth, and sometimes it is interpreted as up to 25. We do, in fact, talk to and engage young people up to that age, but more as a reflection of what happened to them as they were growing up so that we can learn from that.

The CHAIRMAN: I want to get a bit off the topic, but have you considered changing the parameters of your bailiwick in terms of up to the age of 18 to perhaps create a bit more of a buffer around that area?

Mr PETTIT: We are not restricted to talking only to children and young people up to the age of 18. Of course if government saw fit that it wanted to include a youth strategy that included children and young people up to the age of 25, there would be some logic in having a look at that. But, at the moment, the legislation is pretty clear.

The CHAIRMAN: All right. Can you please explain to us the developmental differences between a child, a young person and an adult that might be relevant to this inquiry?

Mr PETTIT: I think one of the obvious things that we need to put inside this inquiry is that every individual develops at a different rate, and that is whether it be physical, emotional or mental. There is no one line that any child or young person follows, and you would know that from your own experience. What we find, though, is that there are developmental stages for young people—the medical profession will have a much different view on some of these—but broadly it is birth to five at the preschool area. In terms of society, we have lumped most of those children into that category, so we say that at preschool there is a range of things that we want children to do as they develop from birth to about their fifth birthday. We also know that in that space, their brain development is quite significant. There has been a lot of research of recent times, led by Telethon Kids Institute and others, around how that develops over time. You then move into the schooling phases of primary and secondary, so you have a natural cut-off, if you like, from about ages five to 11, and then 12 to 18. We as a society have made those constructs. When you look at the children in those areas, on average they develop at similar rates, but there are outliers, both positive and negative, inside that, so we cannot blanket all children by saying just because they are eight, they all look like an eight-year-old, for example, whether it be height, whether it be capacity, or other. Then as they age, we know that through the teen years, from ages 12 to 18, the brain development for girls and boys is different, and their responses are different. There is a lot of research around the way boys often do not think in terms of reacting to things and do not analyse the consequences of their actions, and sometimes do not even understand the consequences of their actions even when they have done it. There is a lot of evidence that boys and girls of that era, in the early and late teens, develop very, very differently. In the context of your discussion today, in having a blanket rule that will apply to all those children and young people, it is almost impossible to be quite confident that it would be fair to all.

The CHAIRMAN: In your view, are there other issues that may delay development as well; for example, social issues, or health issues like— I am going to get this wrong, but foetal alcohol—I am sure you know —

Mr PETTIT: Foetal alcohol syndrome.

The CHAIRMAN: Yes—how that would affect the development of a particular individual vis-a-vis someone who is not affected by that?

Mr PETTIT: Absolutely. That is for a small percentage of our society, and unfortunately it is growing in number, so we need to continue to monitor that. I think it is a reflection more broadly of the environment in which every child is born into and lives in and then grows and develops in. We know that things like poverty and lack of opportunity will affect the way a child grows, not only in a physical capacity but also in a mental capacity. That does not mean, though, that because you are born poor, you cannot think for yourself, and we have to be careful about that, but it does mean that you are more restricted in opportunities, and therefore your development is restricted. Again, there are always outliers where people overcome the odds, but they are few and far between, so we need to accommodate that as well.

In terms of medical positions, obviously foetal alcohol disabilities all impact on the mental growth and development of young people, in various ways. Some it does not impact, and others it impacts quite dramatically.

[9.20 am]

The CHAIRMAN: Is there always a correlation between physical development and emotional development? You might have a person who is physically matured, but emotionally or cognitively they have not kept up with each other.

Mr PETTIT: I do not think you could definitively say that as you grow you get smarter. Unfortunately, not many of us are in that space. No, there is not a direct correlation in terms of just because you are ageing, you are actually maturing both physically and mentally. We see that with young people who grow at various stages. Just talking about the physical development, some people are very late maturers. It is the same with their mental development as well. We could actually anticipate that laws that we make can actually accommodate that in a way that is fair to all.

The CHAIRMAN: In your view, this part of the growth of a human, those years, is it replicated at any other stage in the life cycle as much as it is for children and young people?

Mr PETTIT: Late research—it has only been recent—certainly through Telethon Kids and others, is indicating that there was a view that once you hit around your early 20s, growth in terms of your mental capacity almost reached its full point. However, there are indications that you can continue to grow, with the right opportunities and support, right through to your late 30s. I think some of that early or recent research needs to be tested. We need to test it. In fact, what happens beyond those sort of ages? Does it deteriorate or remain stable or whatever?

The CHAIRMAN: I guess my question was more about the fact that we have that age group that is 12 to 18 or beyond. Is there a comparison at any stage in the life cycle when a person develops as much as during that particular period? Is there ever as much going on physically, cognitively and emotionally than at any other stage in their life?

Mr PETTIT: Certainly, the research says the cognitive development from birth to two is the most significant in terms of brain development. But in terms of what happens to a person's body completely around puberty is quite dramatic, and as we have seen that, all of us go through it. Some of us are lucky to go through it in a stage, when in others almost overnight, so it does impact on a range of people. It is probably not until you get to the very end of life when your body often then changes and shuts down in a really quick way. There is no other place in life where that happens.

The CHAIRMAN: Developmentally, when does somebody become an adult?

Mr PETTIT: It is a great question. I know governments around the world have always struggled with that, and even in our society, which I think is very brave on a range of things. We say you are an adult to drive a car at 17, but you are not an adult to drink until you are 18. You can join the army at 18. There are sort of mixed messages all the way through. Then we have strategies for youth, which says you go up to 25, so there is a confusion around that. That is purely because just because you turn 18 does not mean you are suddenly wise. It is something that we all grow into. For some of us it takes a lot longer than others.

The CHAIRMAN: It would be fair to say that the correlation between becoming an adult, in a developmental sense, and a legal adult are not necessarily aligned.

Mr PETTIT: That is exactly right. If you overlay that with medical conditions like FASD, as you have indicated, then some people will never have the cognitive development of an adult, even if they are 40. Again, it is a construct that society needs for various items, but it is not necessarily applied to everyone fairly.

Mrs HEATH: Maybe if I can expand a little bit on what the commissioner has been saying, I think that in terms of the issue before the committee in regard to sexual offending, there are a couple of areas where we know development is particularly challenged. Some research has indicated that people who commit sexual offences as children tend to come from three particular groups. They

tend to be children who have experienced abuse in the past. It is part of a general pattern of delinquent behaviour or it is part of a pattern of impairment where there is some foetal alcohol spectrum disorder or some other neurological disability as part of that. They tend to be things that also delay the maturing of the brain. As the commissioner was saying, we have learnt a lot more about the brain in relatively recent times because we have been able to study it without taking it out of the body, which has been helpful. We can see sort of lived experience brain development as opposed to what a damaged brain looks like later, so we can compare. I think with that emerging research, we are learning a lot more that there are conditions that will impact on people moving through those developmental stages, either delaying it or permanently impairing it. I think that is something that the committee is going to have to wrestle with. Some of those children who commit sexual offences may never be able to control some of those issues as their development progresses. But many of them may well be and that is where we need to have some comprehensive assessment about what is sitting underneath these offences, how that is impacting on their development and whether it is something that is likely to be permanent or whether it is something that is going to respond to a therapeutic intervention.

Hon COLIN HOLT: That is really interesting because I have another thought in my mind. You are talking about sexual offences, yet in some of the evidence we have received or submissions we have received, actually normal sexual behaviour of young people in some legislation is seen as a sexual offence, which is a problem. It has nothing to do with a developmental thing. I guess the question is: would you expect normal young people behaviour to experiment in a sexual activity that could get captured under existing legislation, that is a problem?

Mr PETTIT: That is the fear of the legislation, or any legislation that is mandatory. You do sweep up other elements of society that in the past may have been considered in a different light, so we need to make sure that that opportunity is not on the table.

Hon COLIN HOLT: Would you have any idea from some of your research about the activity in a sexual way of young people in our society? I guess it may be different across cultures as well. Some of that information would be useful, I think.

Mr PETTIT: I do not have it on hand here. We have not gone out just yet, other than with a survey, which I will talk about in a moment. But there is a number of research items around Australia that indicate how active young people are and at what ages. I think the public would be quite concerned if they saw that it was actually younger than they probably thought it was. In terms of our research, as of tomorrow we will have completed a survey of nearly 5 000 young people across the state. Almost half of them are secondary students. We did ask what activity they are involved in in sexual activity, so we will have some information. It will be limited in that space.

The CHAIRMAN: I have received that survey at our house, or the request for participation in it, because I have a couple of young people who live with me. I am not sure if they filled them out or not. Did you say you are going to publish those results tomorrow?

Mr PETTIT: No, we are in our final school tomorrow and we will be publishing in the first quarter of next year. It is quite a heavy data set, so we want to make sure that we capture the voice of all children in that space. It is the first time it has been done in Australia. Obviously, for Western Australia, it is unique, and that information should provide us a really different snapshot of how young people are thinking and feeling at the moment.

The CHAIRMAN: In what respect are the rights of children and young people different from that of adults?

Mr PETTIT: As I outlined in the beginning, one of the things that is really crucial is the fact that young people do not vote; therefore, they need to have special consideration on a range of things. We as a society have accepted that and joined the UN Convention on the Rights of the Child, and those rights are very specific, but are in many cases similar for adults, but there are some specific things inside that that you would want for young children in particular; and that is to make sure that we acknowledge the fact that in their growth period, as we mentioned earlier, that society respects that growth period in a way that understands that there will be mistakes made, and we need to look at how do we support them to make those mistakes in a constructive way. When those mistakes cross the line for our society, we need to look at how do you help rehabilitate those people in a way that is constructive and does not ruin their life, given that many of them are very, very young and many of them, as we have already expressed, do not actually comprehend the full responsibility or outcome of their actions. As Trish has already indicated, it is often because of historic things that have happened to them that they are replicating behaviour and, therefore, we have to try to break the cycle. To do that in a mandatory way is a really heavy-handed approach and has shown pretty much around the world that it does not work as effectively as perhaps the public think it does.

[9.30 am]

The CHAIRMAN: Are you able to give us a summary of the general principles regarding youth justice and how there is a different approach to children within the justice system to adults?

Mr PETTIT: Sure. And what we would like to see for all of our young people obviously is that the UN convention is embedded into the Young Offenders Act here and so those real principles making sure that we actually acknowledge the difference in terms of the person's offence around their age and maturity, and that means that the judiciary need to have some flexibility to account for that. The second one is that, in some way, we have to believe that we can help these young people rehabilitate in a way that we want them to contribute back into society. In making mandatory responses to that, you actually almost breach that approach. We can mandatorily apply therapeutic support if they are not going to go to it, but to mandatorily put them on a register is not actually changing their behaviours and so we need to look at how do we actually support their behaviours while also supporting the community more broadly.

Hon COLIN HOLT: It happen might change they were behaviours for the worst.

Mr PETTIT: Absolutely. Some of the research that we have—and I think we put into some of our earlier correspondence—is that you stigmatise young people very, very early. They have a confusion about their role in life. They are often ostracised from education because of it and, as a result of that, the spiral begins in a downward trend and we end up with not only a person on a register, but a person who now becomes more disengaged from our society to the point where perhaps their behaviour is less than what we would want in normal circumstances.

Hon COLIN HOLT: It could have the opposite effect to rehabilitation, too, potentially.

Mr PETTIT: It could do, and that is what the evidence has shown.

The CHAIRMAN: The sex offenders register is sold essentially on the basis of protection for the community. Are you saying it could almost have a counterintuitive effect of increasing the risks to the community by characterising young people's behaviour, casting them into that system and then them having a negative response to it?

Mr PETTIT: I think you need to clarify—you know, it is unfortunate that we are always going to have some people in our society, whether they be young people or adults, who will do the wrong thing and we need to make sure that we look after our society. However, given all of the information that we have around child development and young person development and the UN convention, we

need to have an approach that is actually with a view that, can we support society in the way of protecting it while at the same time rehabilitating a young person. If we do not do that, we are actually not applying the UN convention in the way it was intended. By applying a blanket rule of mandating that every person should go on a sex offender register, you actually label that person without giving the judiciary the opportunity to say: is it age appropriate, has the child involved had maturity, did they know what they were doing, is there an element of remorse and how can we support that et cetera. I think taking those tools away from the judiciary will inhibit outcomes for not only our young people but also our society into the future.

The CHAIRMAN: Any sexual behaviour with a child under 16 years of age, or 18 years of age in some circumstances, is potentially subject to mandatory registration as child sex offender. In your view, can the current system of registration be reconciled with immaturity, normal sexual development and experimentation by young people?

Mr PETTIT: I think if the judiciary had that flexibility, it could be.

Hon COLIN HOLT: As opposed to?

Mr PETTIT: Sorry.

The CHAIRMAN: No, no, do not apologise; we want your unadulterated evidence!

Indecency offences are various and range in seriousness. An act of indecency is generally accepted as behaviour that breaches a normal standard of propriety. Is this something that a child or young person would necessarily understand?

Mr PETTIT: Again, this will vary from child to child. It would be rare that most would understand the full comprehension of the responsibility that has just happened, and we know that from particularly boys who have been caught up in things like Banksia Hill, who will often tell us they understand why they got there, but they are not sure what happened. We need to have a look at how do we accommodate both maturity and age in that space. It needs wise heads to do that and I think we need to value our judiciary or empower them to make those decisions.

The CHAIRMAN: I think it would be fair to say—and I think we have got this from your evidence already—that children and young people from disadvantaged or abusive backgrounds have less ability to understand propriety and, conversely, inappropriate behaviour.

Mr PETTIT: That is correct. When it is modelled in some cases, it is pretty hard to understand that it is not right.

The CHAIRMAN: Yes. We are not saying that in every circumstance of disadvantage that that will be the outcome; in fact, overwhelmingly it is not, but on a trend-type basis we see people from those backgrounds over-represented in these sorts of areas.

Mr PETTIT: We certainly see groups that are over-represented, but I think it would remiss of me to say this is just about being a disadvantaged community. This is an issue that goes across our society and regardless of socioeconomic position. We see it happening right through. There are different ways of dealing with it when people have money and skills and so it is not as prevalently reported, if you like et cetera. We just need to make sure that while unfortunately there is more opportunity or chance to happen for those from disadvantaged backgrounds, it does happen across our society and I would hate to pigeonhole one group over another. We need to make sure our laws can cover all those children.

The CHAIRMAN: Do we often see a different criminal justice response to the background of the person who is alleged to have committed the offence?

Mr PETTIT: I do not have any evidence to that right at this point in time. I could make a guess but that would only be a guess.

The CHAIRMAN: Would it be an educated guess?

Mr PETTIT: No! Not for the record.

Hon COLIN HOLT: An unqualified guess!

The CHAIRMAN: According to your submission, you believe that judicial discretion in the registration of juvenile offenders will balance the best interests of offending and non-offending young people. Can you elaborate on that for us?

Mr PETTIT: Yes. The evidence is showing that by putting a child on a mandatory report, the notion behind it is to support the society, particularly those children who are non-offenders or victims. The evidence is showing that in most cases that is not true where there is good therapeutic support and where there is good, obviously, counselling and other things that arrive with that. If the premise is that we are going to lock people up in a mandatory way to support those children who have been affected or may be affected, then it is a false premise and we need to look at what the evidence is showing. In some cases that is true and that is where the judiciary need to assess—does this child or young person pose a threat to others in our society? If they do, we need to look at what other actions we need to take. But not all children are in that place and so that freedom, I suppose, for the judiciary to weigh that up and really talk to all the young people involved would make a huge difference.

The CHAIRMAN: We have got this special area for sexual offending, which is mandatory registration, and so we have got a different response to that offending in the way that it is dealt with in the courts to other forms of offending. Do you think there is any justification for treating sexual offending—I am using it very broadly; there is obviously a spectrum of seriousness—in such a different way to how we might treat violent offending amongst young people or property-related offences amongst young people or any other kind of offending with young people, to deal with sexual offending in such a different way?

Mr PETTIT: I imagine if we had our way in terms of our society, we would want to make a legal system judge every case on its merits, so to pigeonhole a particular action with another particular action I think would be irresponsible for us. What I would like to see is that all of the facts and figures are put in front of the judge so that they can make an informed decision on how they can, first of all, obviously deal with the issue and protect society, but also value that young person who has made the error in a way that can respect them and help them develop into the future. That may be that that they are placed on mandatory registration, but it is not for all of them and we need to have that opportunity for the judges to make those decisions.

[9.40 am]

The CHAIRMAN: Do you have a view as to where the burden should rest in terms of whether it is the prosecution or the defence who has to make the case about registration? Should it be the prosecutors or should it be the defendants? Should the presumption be you go onto the register and then you can rebut that presumption, or should it be that the police prosecutors, or whoever the prosecutors may be, must make a case for you to go on the register?

Mr PETTIT: I still believe in the fact that every person is innocent until proven guilty, so in that case I would think the prosecution should have to present a case as to why they would want some sort of action, which they do with all other cases. But they would also need to be cognisant of the UN Convention on the Rights of the Child and how that plays out in terms of what they are asking.

If that can be placed in front of a judge, then I think that would be a much more balanced way of doing things.

The CHAIRMAN: What are the circumstances that should be taken into account more specifically in assessing risk for the purposes of registration as a sex offender?

Mr PETTIT: It is a vexed question, is it not? It is really about the individual, so starting with the individual, looking at what environment they have come from or would be going to, because, obviously, the environment contributes somewhat—that is, their family background and so forth. Then it is about the severity of the case at hand and then about how can we support that person to develop, but, equally, having an eye on the victims in this space—making sure they feel like they are part of the solution.

Mrs HEATH: I think it has to be more than a guessing process or a single process. I think there are a number of elements that have to come together in risk assessment, but it has to have a lot of information about the nature of—I think as I said before—the circumstances of the individual, the developmental stage of the child and the context of the offending. I think regarding your comments in relation to the type of behaviour that might get caught up in some sexual offending behaviour, one of the things I think has happened is the community has moved on in terms of the availability of sexual information and sexualised imagery. I am old enough to remember when it was a bit impolite to advertise toilet rolls on the television. We have sort of moved on in the context of that time and the access to imagery and sexualised behaviour, so when we are looking at sexualised behaviour in children, you have to understand where that behaviour has come from. As I said before about the three categories of people who tend to get caught up in sexual offending—type behaviours, the exception a little bit to that is where it has been in relation to technology, and children are creating images online or sharing images online. Those categories do not seem to apply to those children who are getting caught up in that, and I think that is about access and other issues that are going on. They are not children who typically come from some of those areas where there is a pattern of offending or inappropriateness to their behaviour, and it is putting it in the context of that continuum of what is sexualised behaviour. Is it normal and completely appropriate to the developmental stage of the children who are undertaking that behaviour? Is it a single episode of inappropriate—type behaviour that might be motivated by something they have just seen on the television because they have been up a bit late at night, or they have been having a sleepover with other children and they are mimicking or copying, but really for that child they do not understand the meaning of the behaviour that they are undertaking—it is something that is completely out of context, really, to something that is deliberate or a pattern of repeat behaviour where there may be something further underlining it. All those things need to be looked at in terms of assessing what the likelihood of risk to that child is as well as the conditions into which that child is going back to live in the community.

The CHAIRMAN: What are the potential impacts of registration as a sex offender on the wellbeing and rehabilitation of children and young people?

Mr PETTIT: The impacts of mandatory registration, you are saying?

The CHAIRMAN: I suppose it does not really matter whether it is mandatory, just the impact of registration in general. Clearly, the current state is mandatory, but I suspect the impact on a child, whether or not it is mandatory, is really what we are interested in. When the original mandatory regime was put in place, it was described as an administrative function rather than a punitive one. What we are really interested in is: What is the impact? Is it, in effect, an additional punishment on a young person to be put on the register?

Mr PETTIT: There are a couple of things. As I said earlier, the research is showing that by placing a child on a register at a very young age—a young age is under 18—without a lot of support or therapeutic development, we end up seeing that, from around the world, these young people become quite stigmatised, and then we start that spiral of poor education outcomes, poor health outcomes and a disconnect from society. They end up being labelled within the community, and that is the evidence from around the world. In terms of whether it would help other young children, the evidence on that is: no, it does not in the most part, because in the most part it is about how does that child become rehabilitated inside their community. The other children move away from them, so they are ostracised et cetera. So there is this growing pattern, if you like. Having the registration is one thing. What goes before and after that in supporting both the child who has been deemed to be the perpetrator and then the victims themselves, is really crucial.

The CHAIRMAN: At what age should a young person be treated the same as an adult in regard to registration, in your view?

Mr PETTIT: If you are asking me as a commissioner, I would say post-18, because it is pretty much proven that before the age of 18 almost all those children and young people do not have the capacity to fully understand their actions. Now, as I said earlier, there will be outliers to that and there will be people who will do things that they are very much aware of what they are doing et cetera, and that needs to be handled on a case-by-case basis. But for the most part, it is about reflections of what they see in society and it is also reflections of attitudes that they pick up in various communities. We need not to punish them in a way that is reflective of what they believe, but really look at how we support them to change and be significant members of our society.

The CHAIRMAN: I note you prefaced your response there as commissioner for young people, but do you think there is a justification for continuing discretion past 18 years of age, because obviously 18 is a line in the sand, as such? It is a point that society has picked. We have talked about the individual circumstances. Do you think discretion should be for 19 or 20, and perhaps a bit older?

Mr PETTIT: I think with all legal process there should be discretion that is based on a range of factors. You identified earlier that we have some in our society—there are very few in terms of the total number—who have FASD, for example, and their cognitive development will never go beyond a certain age, even if they are 25. So we need to make sure the legal system has the capacity to accommodate some of those people in a way that we have not done in the past.

The CHAIRMAN: Do you have a view about an appropriate cut-off age?

Mr PETTIT: No, I do not. I can only talk at the moment for those who are 18 and under. I think it is like everything we do. The minute we draw a line in the sand, there will be people who meet that line and others who will not reach it. We know that. We say that at 17 you are capable of driving a car, yet not everyone gets their licence, so we need to have the same process when we look at any legal process going forward.

The CHAIRMAN: Is there any age disparity that would indicate a power imbalance or grooming behaviour in relation to these things? For example, two years or three to five years? I mean the power imbalance issue is something that the committee has discussed in terms of, one, is age a reliable predictor of a power imbalance; and, two, is there a period of time at which we would say there is definitely a power balance between young people, so a victim who is 13 and a perpetrator who is 16, that sort of thing. There are a couple of questions in there.

[9.50 am]

Mr PETTIT: There is. Power imbalance comes in a range of ways—age is certainly one of them. But, again, it is not clear because we do have some older young people who do not have that power

imbalance even though they are older, so that would certainly be one that you would have to consider. There is no age differential that you would definitely say, “Oh, if they’re one year older or two years older” because of the maturity of both individuals in that case and we need to have a look at that. But there are lots of other imbalances like male/female size, so to just pick age, I think, would be difficult. However, if you look at the reports that we have noted in our submission, they do say that power imbalance is one of those things that needs to be considered.

The CHAIRMAN: Because it is not a rule that just because you are older that you have this power, but the criminal justice response tends to be that the older person commits the crime. Notwithstanding that, as I say, there is a relationship, I think, and there is also a propensity that it is the male that commits the crime, the older male, in the circumstances, but, developmentally, girls develop quicker than boys at a certain stage of puberty, and so we do not necessarily have the correlation between age and power.

Mr PETTIT: No.

Mrs HEATH: I would just add one thing: I think that, again, it is about that there is the propensity to suspect males and that is really a bit unfair in that regard. But looking at the circumstances and the context of the behaviour is much more important. I think the only issue that I would add to that is some of the issues around looking at whether there is actually an interest in the person in prepubescent children which indicates a more serious line of offending, I suppose. That is possibly one of the context that you want to be assessing for. That is a difference.

The CHAIRMAN: Yes. Obviously, most of the stuff is predicated on male and female relationships, but we do not really often talk about same-sex relationships in this context. Are there any views that you have in relation to the way the law or this criminal justice system approaches that sort of thing at this stage?

Mr PETTIT: I think all children should be treated equal in that space. So it is not male/female or female/female or whatever—it is around what are the actions that have happened and how we do then address that.

The CHAIRMAN: You have indicated that you think judiciary discretion is effectively paramount in most of these circumstances, but are there any circumstances where you think there should not be judicial discretion in relation to some offences?

Mr PETTIT: I think in the research it does say that when you get into harmful sexual behaviours that are violent and aggressive, then we would need to have a look at what it is that is causing that. That, again, is not a blanket rule; it is something that needs to be part of the consideration for the legal process to be worked through.

The CHAIRMAN: Yes. I note that with registration it is a matter that follows the conviction for the offence. So in that instance, it is really more about sentencing principles and guilt or otherwise. I think that is an important distinction to understand. We are not talking here, or inquiring, about changing any of the actual offences in themselves, just the judicial response at sentencing stage. Can you outline for the committee’s benefit the work that your office has undertaken in regard to harmful sexual behaviours?

Mr PETTIT: We had worked with the Royal Commission into Institutional Responses to Child Sexual Abuse, and obviously they had identified, in volume 10, that harmful sexual behaviours were a significant part of our society that needed to be addressed. And, in fact, if you read volume 10, it actually has quite significant amounts of support in two directions that states could actually move forward to. So as a result of that, our officers had worked with the royal commission on what those issues were. With harmful sexual behaviours, we felt that we needed to take a lead on that, and so

we produced a range of papers. One was through the Australian Centre for Child Protection, which we have in our documentation, and that documentation outlines pretty clearly the issues that are part of the problem in terms of the continuum of responses and would be a fair guide, I think, to complement the work from the royal commission. Based on that, we have actually also done a couple of seminars and brought over a number of people who are deemed to be experts across Australia in that space from South Australia, Victoria and New South Wales. We hosted a seminar for about 150 service providers and agencies and have worked with them in terms of how they are starting to address this issue. From that we developed a discussion paper, which, again, is in your commentary, in which we had full recommendations.

The CHAIRMAN: Do you work with the Department of Communities, Department of Health and Department of Education in trying to, perhaps, help them to coordinate their responses to these things? Because, obviously, they can sometimes be siloed in the way that they deal with things, but the constant is the children and the young people.

Mr PETTIT: Yes. One of the courses of action that we did do is see each of those agencies through a reference meeting and they have been working alongside us and working with us in terms of how they are addressing these things. We are also in the process of discussions with them as to where they are at and how far they are going. Just recently, I sponsored several people to attend a conference in Queensland around this issue and we now have a group of experts—near experts—within Western Australia who are going to start working across the number of agencies and we met together only last week to work that through. From that, we are looking at further actions that we will take in the space. It is a more open educative role that we are taking, and predominantly with agencies both government and non-government, because this affects wherever children are and we need to make sure that agencies who deal with children and young people actually understand it and then know how to deal with it.

The CHAIRMAN: In terms of harmful sexual behaviours, do you have a view about whether the prevalence is increasing and that the nature of the harmfulness is increasing?

Mr PETTIT: Yes, it is a difficult question to answer in that we do not actually have research on that specific topic. However, looking at research that is available from round the traps, certainly, police are indicating that in terms of harmful sexual behaviours, or issues related to that, it is about 70 per cent of children who are involved in that—not 70 per cent of children; of the cases, 70 per cent are children so we need to have a look at what is causing that. We do know, as Trish said, that our society is changing quite dramatically. We need to make sure that we support children in that place. We also need to support families and communities so that they understand their role in supporting children.

The CHAIRMAN: What differentiates between what is a normal adolescent sexual behaviour and a harmful sexual behaviour?

Mr PETTIT: The paper that we have had is very explicit about the fact that harmful sexual behaviour has a range of factors, particularly around how violent or how aggressive, whether there is an age difference and all of those sorts of things. So it is quite explicit in the paper.

Hon COLIN HOLT: Can I just get clarification. You said 70 per cent are involved in harmful sexual behaviours—

Hon SAMANTHA ROWE: Seventy per cent of cases.

Mr PETTIT: Seventy per cent of cases.

Hon COLIN HOLT: Is that as a perpetrator or a victim or is there no distinction?

Mrs HEATH: Can I clarify?

Hon COLIN HOLT: Yes.

Mr PETTIT: Yes.

Mrs HEATH: The numbers are notoriously wobbly in this area, because one of the issues is we have not really kept very good data. The figure of 70 per cent was the information that was reported in the royal commission's report. It relates to 70 per cent of the cases that were audited by the royal commission's research team for police in WA—70 per cent of the persons of interest in that offence was another child. So that was the figure. I think the police have come back and said that that data might have been a bit wobbly, but that was the data that was obtained through there. We have reported that in our discussion paper that we put out previously. The figures range from 30 to 60 per cent of sexual offences reported where the perpetrator—and I use that term loosely—is actually another child; the person of interest is actually another child. So it is actually quite high. That 70 per cent figure was actually about where it had occurred within the context of an institution as well, so it was not looking at familial responses.

[10.00 am]

Hon COLIN HOLT: And then it comes back down to the definition of what is a harmful sexual behaviour versus normal sexual development.

Mr PETTIT: This is a problem with the research, and that even the royal commission had trouble getting that information. It was not just in Western Australia; it was across the board, because it is information that is either collected in different ways or not collected at all. As Trish said, while those figures are alarming, we certainly would not want to use them as the benchmark. But it just shows you where things are at the moment.

Hon COLIN HOLT: It is not black and white; it is a bit grey.

Mrs HEATH: It is very grey, I think. The continuum of behaviours that you will see, from appropriate to abusive—and it is set out in the documents that we have written that the royal commission has put out in their reports as well—is generally agreed upon, but there is grey in that area. Things like, for example, an appropriate behaviour could be considered socially acceptable behaviour within a peer group, so what is socially acceptable within a peer group can vary.

Hon COLIN HOLT: And maybe culturally?

Mrs HEATH: And culturally in those issues—absolutely. It is actually quite challenging to then look at that and also at what is socially acceptable within the communities these days; depending on who you ask, you would have very different standards. For example, for some people, any sexual activity between two young people under the age of 16, which is the age of legal consent, is considered inappropriate. But we know that developmentally, as the commissioner has already said, we have been surveying children and young people, and a lot of children and young people may well be having some sexual activity at that age that would be considered by other people as inappropriate. So it is actually very grey as to what that is.

Hon COLIN HOLT: We have plenty of teenage pregnancies, do we not?

Mrs HEATH: Well, actually, teenage pregnancies have been going down —

Hon COLIN HOLT: I am sure it has not disappeared, though.

Mrs HEATH: — as have abortion rates as well, so they are all good signs that children and young people, in some ways, are managing their sexual behaviour appropriately, at least in the context of preventing pregnancy. Some of these sexually transmitted diseases have been going up, so that is a

concern. It is actually quite a complicated area in terms of data. I think whilst we have probably seen the community move on in terms of what is acceptable to be exposed to in relation to sexual activity and sexual behaviour, I do not know that our sexual education has actually kept pace with that, either within families or within schools, which is mainly where that happens.

The CHAIRMAN: We have explored that area quite a bit. I have a number of other questions, so I might accidentally cover some additional ground that we have already covered, but just bear with me. How do you distinguish between normal sexual development and harmful sexual behaviours?

Mr PETTIT: As I say, I point you to the paper that we put into the submission, which is really clear on that.

The CHAIRMAN: Is there a distinction between immature or inappropriate behaviour and harmful sexual behaviour? So, we have got normal development, then we might have what we call inappropriate or immature behaviours, and then harmful sexual behaviours. There are no clear boundaries between them, is there?

Mr PETTIT: No, there is not. As Trish indicated, what we may consider inappropriate, various peer groups would see that as normal practice.

The CHAIRMAN: Yes, and that leads to my next question: do children know the difference? Us adults cannot necessarily define where boundaries start and finish. How can we expect children to be able to understand that?

Mr PETTIT: I think there are some good indicators that young people are taking more information in, in that, as Trish said, there has been a reduction in teenage pregnancies and abortions and so forth, which means that somehow the education process is starting to have an effect. It is a long-term issue and we need to actually look at do we need to invest more in young people understanding what is happening to them and how it happens and then how they behave to each other.

Hon TIM CLIFFORD: Were there any questions within that survey that you circulated out to the 5 000 people that might have asked or indicated whether they were aware of the legalities around what they might be doing?

Mr PETTIT: No. We did ask about what education information they had had, so it was around that more than anything else.

The CHAIRMAN: In terms of children and young people that demonstrate harmful sexual behaviours, is there anything you can tell us about that group of people? Are there any characteristics that are similar amongst them? I think we have talked about poverty and socioeconomic circumstances and those sorts of things. Is there anything else, beyond that, that would identify that group?

Mrs HEATH: I will just add a bit to what the commissioner was saying in terms of the continuum of behaviours. Whilst there is a grey area between normal and the different stages, there are some really good indicators about what you would use to look at within each of those things—for example, distinguishing between problematic and abusive behaviours. There are some clear things that we would be looking for in terms of levels of coercion and victimisation and things like that, as opposed to where the behaviour was problematic more to the individual. Where it was compulsive—obsessive or inappropriate and maybe actually causing them some physical harm, that would be a problematic behaviour, but it is not abusive in terms of it is not victimising somebody else; there is not a great disparity of power. So I think there are some clear indicators about what we should be looking at, and it is then a process of us becoming more educated and indeed finding ways to educate children and young people about this information, too.

I think in terms of the sorts of things that we see where people are moving up that line in terms of moving into problematic, abusive and violent behaviours, the categories children or young people in that space were generally falling into were either where they had a history of abuse themselves, and so it was acting out behaviours that they had been exposed to as a process of that and also some of the trauma and developmental issues that go with that sort of abuse, or children who had a general pattern of delinquency or were engaged in other types of offending behaviour, often at quite a young age. Again, I think that is part of a pattern of behaviour and family disadvantage and poverty and some of those other issues that often come with those children and young people. Then there were children where there was a level of a learning disability or impairment—so some disability in cognitive understanding and impulse control and those sorts of behaviours. So they were the core areas.

The CHAIRMAN: Is there a typical victim in these sorts of situations?

Mr PETTIT: That is an interesting question. We do not have an answer to that.

The CHAIRMAN: In your view, are child sex offenders—not child sex offenders; let me rephrase that. Are children who commit sexual offences likely to be repeat offenders?

Mr PETTIT: There is certainly strong evidence that if a child has been interfered with at a young age—they are all of a younger age—they will move on to that and do the same behaviours themselves. However, where we started was if there is a clear view of how do you rehabilitate that young person, we should all hope that that would break the cycle.

The CHAIRMAN: Is there any indication of the success of those rehabilitation-type programs?

Mr PETTIT: I would have to go and have a look.

Mrs HEATH: The evidence has been fairly poor because we have not gathered it, so I think we need a lot more evidence before we can actually be clear about that. So that is what is really important. I think in Western Australia, we are in a developmental place with the recommendations from the royal commission being implemented, and the work of the commissioner's office with the other departments to look at how we build better—really, what the royal commission found is in Western Australia we have a very, very poor therapeutic-type of response here. We just do not have the skills and expertise—or they are very isolated. And so we need to do a lot of work to build that therapeutic response and to understand. I think there is some good evidence starting to come from countries and jurisdictions that are more advanced than us where they are getting good responses. But I think there is a lot of work to be done in this state in that regard.

The CHAIRMAN: Leading on from that, is it possible to determine from the nature and circumstances of an offence whether a young offender exhibits harmful sexual behaviour? Let me reread that again: is it possible to determine, from the nature and circumstances of an offence, whether a young offender exhibits harmful sexual behaviour as a continuing issue?

[10.10 am]

Mr PETTIT: Yes. If you look the research and at the continuum that has been developed, you can actually plot where the young person would be.

The CHAIRMAN: Likely to be.

Mr PETTIT: Correct.

The CHAIRMAN: In that circumstance, if we are talking about giving the judge the discretion, will there be sufficient evidence for the judge to form a fairly strong view about the likelihood or the risk of re-offending? The justification for mandatory is that everybody goes in, and, therefore, we do not have to worry about risk at all, whereas if we go to discretion, the judgement will have to be

made. Can we be fairly assured that that judgement will be reliable in the overwhelming majority of circumstances because there is a process that has led to us being able to predict future behaviours?

Mr PETTIT: Certainly based on the early research, it could be developed, but as Trish has already indicated, this is fairly new ground, and we need to make sure that if through legislation we are going to leave the mandatory approach and give the judiciary the opportunity to make informed decisions, we need to also build that platform so that they can assess it against that.

Hon COLIN HOLT: At the moment, they do not even have to think about that, do they?

Mr PETTIT: That is correct.

Hon COLIN HOLT: Even the police prosecutors who are building a case do not even have to do that.

Mr PETTIT: And, because of that, the rights of children are not being upheld in WA.

Mrs HEATH: I think there are some very clear indicators that will tell you, if we did good assessments of young people, that, for example, if what is sitting behind a young person's behaviour is a level of cognitive disability that is permanent—for example, a FASD-type disability—and the trauma and behaviour that is associated with whatever that child's experience has been takes them into sexual offending behaviour, I think because you are not going to be able to address that basic underlying impulse control-type deficit, you are always going to have somebody who is at risk there, but for other children and young people, that would clearly not be the case. I think there are some indicators, and there are probably some very clearly likely to not offend again, and likely to offend again, and then a mixture of grey areas, which again goes to that judicial discretion that is required. That is the framework for assessing that.

The CHAIRMAN: There is always the question: Does being on the register actually result in less offending? Is it actually protecting the community in any meaningful way?

Mrs HEATH: I think that goes to how much effort is required to then provide supervision to that person, and who provides that supervision, and the burden to police in having to track and monitor people's behaviour when they actually pose very little, if at all, risk. The principles of the Young Offenders Act, all those things, say that safety of the community is still a very important element. It is not saying that it is not. Certainly protecting other children and young people from people's sexual offending behaviour, regardless of whether the person perpetrating the offence is a young person or an older person, should be an enormous priority for our community.

The CHAIRMAN: I appreciate that judges during sentencing will make determinations about an appropriate sentence based on the propensity for re-offending, so general and specific deterrence in individual circumstances. So while we say that making a decision about whether or not someone should go on the register is mandatory, judges are already making determinations when they sentence about the likelihood of re-offending and putting them through other rehabilitative programs or jail terms and those sorts of things as well. I think judges are already in this space in any event, and we are not asking necessarily for them to perhaps extend that any further, but giving consideration to them being mandatorily put on the register.

Mrs HEATH: I think there has been some good work done around risk assessment. It is bit more rigorous than just somebody saying, "I do think" or "I do not think" that is the case. I am not suggesting that is what happens, but there is a process for us to be able to build an element of legal understanding to help make better judgements in that regard.

The CHAIRMAN: I am conscious of the time, and I understand you time is precious. I have a couple more questions. Can the possibility of registration or mandatory reporting by health professionals,

and others, be a disincentive for young people and their families to voluntarily seek help if harmful sexual behaviour is being demonstrated?

Mr PETTIT: The short answer is yes. The longer answer is: how do you get around that?

The CHAIRMAN: Yes.

Mr PETTIT: As you said, one, you have to protect society but you also have to look after young people. So just because it is difficult or may cause a barrier, we need to look at what are the strategies that can work around that, because it is an important part of life.

The CHAIRMAN: Do you have a view about Victoria's integrated therapeutic justice response to children and young people prosecuted for what would be or harmful sexual behaviours in WA?

Mr PETTIT: We have one briefing only on the Victorian model, and on the surface it does look like it is a very good model to have a look at, and their evidence is suggesting that it is starting to make a difference. All of that is off the back of one briefing, so I would not want to sit here and say that is the best model, and maybe it is something that needs to be explored into the future.

The CHAIRMAN: Okay. But would you advocate for us to look at a similar type model here? Trish is nodding her head!

Mr PETTIT: Absolutely! In terms of what is happening around Australia, it seems to be the model that has had the most impact. But what I am saying is we just do not have the evidence to sit here and definitively say we should look at that one. They are different in every state, but certainly we have invited Victoria here to work with us on that, but it has only been on the one briefing.

The CHAIRMAN: It must be a path that they have started and progressed. The question is do we start on that path and start progressing it as well.

Mr PETTIT: I think if there is a model out there that is showing signs of doing what we think it should do, we should look at it and see if we can either model it or improve it.

The CHAIRMAN: Okay.

Hon COLIN HOLT: Just quickly, and you may not be able to answer this, but I note that in your submission you talk about although there is mandatory registration, the police commissioner has the ability, under section 61, to suspend the reporting obligations. Are you aware of that ever occurring?

Mr PETTIT: Not in the children's space.

Hon COLIN HOLT: You are not aware of whether the commissioner has exercised section 61?

Mr PETTIT: Not personally, no, but that does not mean it has not happened.

Hon COLIN HOLT: That is probably a question for the police commissioner. But you have not come across it?

Mr PETTIT: No.

The CHAIRMAN: We just have a couple of questions that we have not got to, but we will put those on notice for you and send them through. We have reached the end of our questions. Are there any other comments you would like to make?

Mr PETTIT: No. Thank you, and we wish you well with your deliberations and hope that it is in the best interests of children.

The CHAIRMAN: I would like to thank you, commissioner, for coming in today. I would also like to thank you and your staff for the valuable work that you do for children and young people in

Western Australia. I think we are certainly a better place for that work and that effort that you do. I just have to read through my final little script here, if you will bear with me.

Again, 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 corrections should be made because of typographical or transcription errors, please indicate these corrections on the transcript. Errors of fact or substance must be corrected in a formal letter to the committee. We have a couple of questions that were taken on notice, so we will forward those 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. Once again, we thank you for your time today and your appearance.

Committee concluded at 10.17 am
