

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 TWO

Members

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

Hearing commenced at 11.17 am**Judge JULIE WAGER****President, Children's Court of Western Australia, examined:**

The CHAIRMAN: Today's hearing will be broadcast. Before we go live, I would like to remind you that if you have any private documents, to make sure they lay flat on the table, because the cameras can sometimes pick them up. Please begin the broadcast. You will have received a document titled "Information for Witnesses". Have you read and understood that document?

Judge WAGER: I have.

The CHAIRMAN: These proceedings are being recorded by Hansard and broadcast on the internet. Please note that this broadcast will also be available for viewing online after this hearing. Please advise the committee if you object to the broadcast being made available in this way. A transcript of your evidence will be provided to you. To assist the committee and Hansard, please quote the full title of any document you refer to during the course of this hearing for the record, and please be aware of the microphones and try to talk into them, ensuring that you do not make any loud or unnecessary noises near them.

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

Would you like to make an opening statement to the committee?

Judge WAGER: No, I think the material I have provided sets out the matters I consider to be relevant.

The CHAIRMAN: We have a number of questions to work your way through as best we can over the time we have. As we have noted, you provided us with a broad outline of responses to the kinds of questions we were going to ask, but we will work our way through that material as well, so apologies in advance if it seems a little bit repetitive. We just going to work through the process.

Can you give a description of what the age of criminal responsibility is in WA?

Judge WAGER: The age of criminal responsibility is 10, so a young person who is aged under 10 is not criminally responsible for any act or omission. That is in section 29 of our Criminal Code. After the young person is 10 years of age they have to have capacity to understand that they ought not to have done an act or made an omission, and that stays in place until the young person is 14. But the reality is that 10 is the age of criminal responsibility.

The CHAIRMAN: How does our age of consent compare to other jurisdictions in Australia?

Judge WAGER: The rest of Australia is now going to 10 or has gone to 10. Other countries have it as a significantly older age—12 in some countries, 14 and others. We have been 10 for a long time. It flies in the face of some of the international studies, but it is the age that is there by legislation, so the age I comply with.

The CHAIRMAN: You may not know the answer to this one, but does the age of consent have any connection with our UN obligations in relation to children?

Judge WAGER: I would have thought that any UN convention would have an older age, but I am not able to clarify that.

The CHAIRMAN: Perhaps if I can just drill down on this little bit more. You seem to be suggesting that perhaps 10 might be a little bit too early. Is that based on your experience dealing with children over the age of 10 and the degree to which they can accept culpability for their actions in a criminal sense?

Judge WAGER: I think we all know children who are 10, and 10 is very young. If you put into that equation a young person who has had a very difficult upbringing or who may have an impairment, so would be less mature and less capable of maturity and physically very tiny, 10 becomes smaller and smaller.

The CHAIRMAN: How does the age of criminal responsibility apply to children between the ages of 10 and 14?

Judge WAGER: Basically, if the child aged 10 to 14 is aware generally that what they have done or what they have not done is a serious thing, they would be criminally responsible. They do not have to know that what they have done precisely was a criminal offence. They have got to know that what they have done is something that is seriously wrong. It is not enough if it is something that an adult is just going to get cross about, because adults get cross all sorts of things and that does not necessarily make it criminal, so it is an understanding that is beyond that. It is often difficult to quantify and difficult to prove. That might come from school reports or teachers talking about a child's understanding of what is going on; sometimes it can come from the evidence if matters are defended. For example, in a sexual context if one child says to the other, "Don't tell anybody or I'll bash you", or if that child takes another child to an isolated location, that's the sort of thing that may lead to some inferential reasoning that the child understands that what they are doing is a bad thing, but it is a very complex area. Often, too, with young people in the criminal justice system you have got problems with foetal alcohol spectrum disorder, autism spectrum disorder, other forms of impairment or other forms of disability, so it may be that the court has to act on the expert report to determine whether or not the young person would have the capacity to understand the serious nature of the offence.

[11.20 am]

The CHAIRMAN: We have had evidence previously about the mentally impaired—I am not sure of the full title of the act, but, would that be the source to go to if you were dealing with cognitively impaired children, or is it always still a consideration in the determination?

Judge WAGER: It is always still a consideration. The first thing is, if the child is under 14 but over 10, do they have capacity to understand that what they have done has serious consequences, so that the doing of the act ought not to have been done. The fitness to stand trial issue—that is the Criminal Law (Mentally Impaired Accused) Act—can come in at any stage, so it applies for all young people and it applies for all adults. The difference is the criteria. I have set out those criteria from section 9, which really is a guide for the areas that an accused needs to be on top of in order to be fit to stand trial. When you are dealing with a young person, I suppose some of these issues become more apparent—for example, not being able to understand the nature of the charge. It sounds like there is a doubling-up, but it is a different test, bearing in mind that the capacity one for ages 10 to 14, the prosecution has the burden of proving that beyond reasonable doubt, whereas fitness to stand trial is basically an inquiry for the court.

The CHAIRMAN: In terms of when capacity is assessed, is that at the time of the offending or at the time of coming before the court?

Judge WAGER: At the time of offending. That can happen where there has been a delay in charges being brought. The young person may indeed be an old person by the time they come to court, so it will still be up to the prosecution to prove that, at the relevant time, they had capacity. That is when they tend to use that inferential reasoning or call an ex-teacher to speak about why various disciplines or reports had occurred.

The CHAIRMAN: Particularly the longer ago the offence was, being able to assess that capacity reliably must become increasingly difficult. There must be instances where you must have serious concerns about the reliability of what is brought before you in those circumstances.

Judge WAGER: Because it is something that the state is required to prove on evidence, it is simply like every other element or part of a charge. If it is not proven beyond reasonable doubt, it is not proven.

The CHAIRMAN: Mental impairment, as you said earlier, can come into effect at any time during the course of the proceedings. Somebody may have had capacity at the time of offence; let us say they had a traumatic brain injury which means that they are no longer capable of being mentally competent. That is actually always an ongoing issue. Would that be a correct way of characterising that?

Judge WAGER: Very much so. The Criminal Law (Mentally Impaired Accused) Act is being looked at. I am not quite sure where that is at. One of the bad things about the current legislation is that it is sort of all-or-nothing. Either the matter is dismissed or a custody order is made. If a custody order is made, the reality is that for impaired young people or old people, that impairment is not going to get any better in terms of the ability to do something once the custody order is made in relation to having the person in the community. That is always difficult. If it is dismissed, then of course there is no supervision. At the moment, if a young person has foetal alcohol spectrum disorder or other difficulties, ultimately they are not going to be fit to stand trial with a condition that is clearly not going to get better, and if the matter is dealt with by way of dismissal, there are always going to be concerns about what support that person will be getting in the community. I understand that all of that is going to be addressed by legislation in the future.

The CHAIRMAN: We will see when that happens; hopefully. Can you give us a summary of the role of sentencing in the youth justice area? Is it punitive, is it for deterrence—those sorts of things.

[11.30 am]

Judge WAGER: It is all set out under the Young Offenders Act, which is the act that basically includes sentencing of children in this state. It is very much weighted towards rehabilitation and community protection through rehabilitation, through engaging family, through keeping the young person in education, looking at community and looking at family. But coupled with that, of course, are areas where the act starts to get more punitive if the young person commits very serious offences or reoffends. All magistrates who sentence young people—when they preside in Children's Court—have to follow the Young Offenders Act, as indeed do I. Rehabilitation will be the thing that is looked at first, following the principles and objectives, and, after that, things can move into a category where the reoffending is such that deterrence and protection of the community starts to take on more importance. It would be wrong to say it is a sliding scale, because of all of the factors involved in the maturity of the child, but age is an important consideration and it is one that is recognised legislatively. That is not only in terms of the sort of punishment that is imposed, but also the length. I think we all remember that when we were seven years old, school holidays seemed to take a year and a half, and, when you are 17, they are not quite as long.

The CHAIRMAN: No. I think when you become a parent, they seem to take an inordinately long time as well!

Judge WAGER: For different reasons!

The CHAIRMAN: Yes. Would it be fair to say that the risk of reoffending, which I think comes within deterrence as well—obviously the deterrence factor is more important if you think there is a high risk of reoffending—is part of those sentencing considerations as well?

Judge WAGER: Yes.

Hon COLIN HOLT: Judge Wager, how are you?

Judge WAGER: Okay.

Hon COLIN HOLT: You say in your original submission that the reporting and registration requirements are inconsistent with the principles of juvenile justice that are set out in the Young Offenders Act. That is a fairly strong statement, I think. Would you like to expand on that a bit?

Judge WAGER: Okay. That was in the context of the repercussions of being on the register, and being on the register for up to seven and a half years. The Young Offenders Act sets out things like we have to look at the age, the maturity and level of functioning of the young person before placing them on an order or giving them a term of detention. So, anything that is a mandatory period means that you do not have the ability to do that assessment. When you look at things like a young person being relieved of a conviction, with the understanding that if they have complied with the order and have done the programs and are going well in the community, that it is an imposition that is not going to enhance their chances in terms of education and reintegration into the community, if it is seven and a half years, it will basically be the whole of their childhood and into their adult years. So that is an issue. Then when you look at things like ensuring that they do prosocial activities with same-aged peers, putting an emphasis on education, vocation and training, when there are restrictions on who they might mix with and in what circumstances, that can also be counterproductive. The comment was made in that context,

Hon COLIN HOLT: Thank you.

The CHAIRMAN: You used the term “prosocial”. That is obviously a technical term. Can you give us an understanding of what that means?

Judge WAGER: Sure. It is not a very technical term. I think we all know that young people do things that are pretty antisocial sometimes. These days, that can include just being attached to a screen in the bedroom 24 hours a day rather than being out and about. If they are out and about, they can end up also doing antisocial things—hanging around with the wrong peers, being on the streets and taking drugs and using alcohol and that sort of thing. Prosocial activities are ones that are basically mixing with other people, but in an appropriate and happy way, so team sports, going to clubs and involving themselves in physical activities with other people would all be seen as being prosocial activities

The CHAIRMAN: Family activities as well?

Judge WAGER: Family activities, definitely.

The CHAIRMAN: We are talking about sentencing here. Your submission explains that the court obtains expert specialist reports prior to sentencing. Can you give us an indication of what types of specialist reports you might consider?

Judge WAGER: Sure. Before sentencing a young person, we have to get a youth justice report. That is prepared by a youth justice community corrections officer, and they are attached to the

Department of Justice. Those reports will set out the young person's history, so a bit about the family, what is happening with schooling, what they like doing, what is going on in the future, what is wrong, and what, in the view of the officer, would be assisted by counselling supports, that sort of thing.

The CHAIRMAN: Just for clarification, do these youth justice officers, as I think you called them, have special qualifications for the roles that they have?

Judge WAGER: Their qualifications are basically the same as for a community corrections officer. They used to be called probation officers or parole officers. They tend to be people with social work qualifications, they might have qualifications as a psychologist, that sort of thing. With young people, these days they are likely to have qualifications that specialise in dealing with young people. Once they are employed as a youth justice person, they of course do on-the-job training.

The CHAIRMAN: I interrupted you with the kinds of specialist reports that you were talking about.

Judge WAGER: That is fine. We get a youth justice report on every young person who is going to be sentenced. That also has agendas attached to it. The judicial officer can say, "I am only interested in placing this young person on a youth community-based order", or, "I might be interested in any of the options, so I want an all-option report that would cover everything from detention through to a youth community-based order." That will then have what the young person would be required to do. It will say they will have to attend this school; they are going to live with this particular parent or relative, or in this environment; they are going to be encouraged by a mentor to re-engage in football; they are going to do one-on-one psychological counselling; or they are going to go to supervised sessions with their officer. The youth justice team will work with the parent or person who is taking responsibility for the young person. That is the sort of thing that will be in a report. These days, with more complex matters—sexual matters are always more complex—more reports are requested. The judicial officer has the ability to request basically any specialist reports that will be of assistance. A psychological report these days is pretty much the norm for sexual offences. I have provided you with the information, I think, about the number that have been provided through youth justice services.

The CHAIRMAN: yes.

Judge WAGER: That is something that will usually happen. There may also be other specialist reports. Foetal alcohol spectrum disorder reports are becoming far more regular. There might be reports in relation to autism spectrum, there might be reports from a psychiatrist, or anything else that appears to be required.

The CHAIRMAN: So it would be fair to say that the sentencing is very strongly evidence based?

Judge WAGER: Yes.

The CHAIRMAN: It sounds like a process that you go through and that may take some time to come to a conclusion. A child may accept responsibility or plead guilty to the offence, but then the sentencing process sounds very involved and detailed. Would that be a fair thing to say?

Judge WAGER: Yes, it is. A lot of it happens simply because of the acknowledgement that the reports have been obtained and read, rather than in front of the young person, because sentencing will occur in the young person's presence. I have on occasion conducted court at the start in the absence of the young person, where for the child to hear the information would simply be damaging. Then the offending child will be brought into court and I will deal with the sentencing at that stage.

[11.40 am]

The CHAIRMAN: Does it include victim impact statements and things of that kind as well?

Judge WAGER: Yes. The DPP will request victim impact statements. There are also options of victim mediation. If there is court conferencing, which is dealing with things at a lower level, there will usually be victim mediation involved in the court conferencing process as well.

The CHAIRMAN: I am not sure of your previous history outside of being a District Court judge and President of the Children's Court, but how would you say this compares with adult sentencing in the same sort of context; would you say that the level of investment in the sentencing decision is the same or much greater for children?

Judge WAGER: It is much greater.

The CHAIRMAN: Is this a reflection of the therapeutic and rehabilitative response that we want on child offending and those sorts of circumstances, as opposed to adult offending, when we take the view that the dye is set in many regards?

Judge WAGER: Once again, it all goes back to the Young Offenders Act, because if you are sentencing under the Sentencing Act for adults, then there are factors to take into account but deterrence and punishment are the big ones there; whereas, with the young person, because of all the objectives that need to be considered, we really need the reports. I think the more research that is done, the more apparent it becomes that you need to get these reports. For example, the Telethon Kids Institute doing their FASD studies about five years ago at Banksia Hill, reaching findings that nine out of 10 of the young people had some form of neurological deficit and one out of three, I think it was, actually could be diagnosed with FASD, which remains a fairly low figure because they need to have confirmation that the mother was consuming alcohol during the pregnancy. If mum is not in a position to comment or if mum does not want to make an admission of that type, for whatever reason, the diagnosis will not be one of FASD.

What follows from that is, of course, there are then findings that these young people have language impairment, particularly, and some cognitive deficits that make communication a little bit harder, and so there has been a greater role for speech pathology, working out, "Okay, not much is going to necessarily stay on a face-to-face discussion, so how do we do it differently?" and those sorts of things. Clearly, when you are looking at deterrence and getting through to the young person that what they are doing is not the right thing to do, having the expert reports is the only way to go.

Hon COLIN HOLT: Obviously, the expert reports are for you to weigh up and balance the need for a therapeutic approach as well as protecting the community.

Judge WAGER: Yes, definitely. Because we are dealing with children, the therapeutic approach is vital to protection of the community; you cannot have one without the other.

The CHAIRMAN: If we can bring this back to the topic of the inquiry, which is the mandatory sex offenders register, would it be fair to say that if the register was not mandatory, there would not necessarily be an additional workload imposed on the court or the prosecution, because you are engaging in much of the work to assess risk in any event?

Judge WAGER: Yes, I would agree with that. Clearly there are no figures on this, it is anecdotal only, but the fact of registration means that, I think, more matters do proceed to trial. That is particularly so with historical offences. It is something that is quite unusual that there can be charges that arise, say, when the young boy was 12 to 14 and the young victim was six to eight, but the victim has not made a complaint until he or she is age 16 to 18, so all of a sudden everybody is in adult. And so, the repercussions of conviction and being placed on the register are repercussions that, in my view, lead to more trials, more cross-examination of complainant victims, more court days and all of that.

The CHAIRMAN: The sentencing principles that are in the Young Offenders Act, do they apply to adults who come before the court?

Judge WAGER: Yes. It is a complicated one because in fact once someone is over the age of 18, they have to be sentenced under the Sentencing Act, so they have to get adult penalties, but in doing so you have to take into account all of the factors of the Young Offenders Act. You have to sort of sit there with a big adult across room you, thinking, “Hang on, I’ve got to sentence you bearing in mind where you are at and what you are thinking, and how life was for you when you were 12.” It may be in that situation that an adult who by the time they have come to be sentenced is 25 will get something like a community-based order—the requirement being to ensure through psychological counselling that whatever was going astray then has been sorted—rather than a more punitive disposition.

The CHAIRMAN: Yes. Particularly in the absence of any evidence of reoffending.

Judge WAGER: If they have not reoffended, then a community-based order would probably be the way to go.

The CHAIRMAN: Again, they are put on the mandatory register.

Judge WAGER: Then they are on the mandatory register. Also, under the Young Offenders Act, because after the two years, a conviction is basically expired and cannot be used, excepting those sort of situations like—well, it is still in the register. With adults, it may be that for example I put them on a 12-month, community-based order, but with a spent conviction order so that if they complete that order successfully and do all the psychological counselling, they will not have a conviction, but of course there would still be on the register.

The CHAIRMAN: And that would prevent them, say, for example if, by the time they came to you, they were a teacher or working in a hospital and coming into contact with children—that would then change their lives.

Judge WAGER: Even if that is not their jobs, if they are doing—once again I will use that term—“pro-social” things with their own kids, involved in scouting, training T-ball or whatever, clearly they may be restricted in that way, too.

Hon Dr STEVE THOMAS: Can you give the committee a general view on recidivism rates and the impact that the register has particularly in relation to young people; is it seen to be a preventative measure or is it in effect not making much difference to recidivism?

Judge WAGER: It is hard to say, but I think what has been demonstrated with children and young people is that if you can get them involved—in many ways it is common sense. If you can keep them at school, get them involved in activities where they are doing things with people their own age, if they have had some distorted thoughts or done distorted acts, they have spoken one-on-one with a psychologist about that and they have got that a little bit organised and they might have a mentor, then you are in the best position, probably, to get them straight for the future.

Now that does not apply to everyone, and I think that is why I have included that there are some offences that are just so serious, that quite frankly they should be on the register regardless of age. But, for the majority of them, if they are doing all of those things, life is good.

If they are on the register, they are in danger if they do not report appropriately or if they are highly mobile of getting into trouble, because they have not then complied with what they have to do. There are always going to be difficulties about: Can they play footy with these kids or not? Can they umpire kids who are younger than them? If they are going to a particular school, what exactly are they allowed to do; is that going to be okay or not? There is also the labelling of them, because obviously they wear the badge of being a reportable offender, in many cases for seven and a half years.

If you look at things like, in the Children's Court the only specialist type of court we have is a drug court. We have that because young people can then go to drug rehab and live in there and they come and do various therapeutic activities to try to change their lives and do happy things without drug misuse. But we do not have a list for intellectual disability or one for mental health, whereas adults do. The reason why we have chosen in the past not to adopt those sorts of courts is because you do not want to label kids too young. You do not want kids who are not travelling too well psychiatrically to be labelled as having a particular psychiatric disorder when they are very young, because things may change. You do not want them to be wearing their badge of, "I'm intellectually disabled, so I go to the intellectual disability court", when they are very young, because it may be that there are other ways that they can do great things even with their disability. We provide services but would have them still in the mainstream court, and I think the register is that labelling of young people and restricting what they can do and also how they may perceive themselves.

[11.50 am]

Hon Dr STEVE THOMAS: Thank you for that. I guess what I am looking for is: is there a definitive body of research anywhere that we could look at?

Judge WAGER: Certainly not that I am aware of, no.

Hon Dr STEVE THOMAS: That would be the easy answer to everything, of course.

Judge WAGER: It would be the easy answer to everything. One of the difficulties with young people is that it is really difficult getting those sorts of stats on a lot of things. I do not really know how you would do that one with the register. Because the register has been around so long, who would you be identifying as the other group that is not on the register?

Hon Dr STEVE THOMAS: You would not know that, but you would ostensibly find out. The simple thing would be the recidivism rate for those on the register and then an ideal bit of information for the committee would be those who would have been on the register, even if it was discretionary, compared to those who would, in a discretionary system, probably have been put into a different category. That would be the ideal and perfect proof from a scientific perspective, and as a scientist that is always the bit I am looking for.

Judge WAGER: It would, but we are not going to get it. Another reason is that, unlike adults, children might commit a sex offence and they might commit an arson offence and they might commit burglaries. There are so many different things going on in a child's life that they may be committing a lot of offences, and one of them might be a sex one, but it may not necessarily mean that they are going to be sex offender recidivists. Some might, and some might not. Often, with the young ones, it may be that they have been bullied, so they see that they can bully someone else. They may be a bully themselves. It might be their own experience of sexual abuse. They may simply not understand. Online porn has a lot to answer for these days. It is really hard to say, with a young person.

One of the issues I raised—and this, I am sure, is one of yours as well—was about risk assessment. I then thought: hang on, we get young people psychologically tested under the juvenile sex offender assessment protocol II, but when you actually look at what is tested, it is impulsive antisocial behaviour; it is interventions, what has happened and how they have responded to it. It is community stability: Do they have an intact family? Do they have a family that is at risk? Have they been a victim of sexual abuse themselves? They are all the same areas that are really covered by the other reports in any event.

Hon Dr STEVE THOMAS: Yes, which are never 100 per cent in themselves.

Judge WAGER: No. Exactly.

Hon COLIN HOLT: I was interested in your comment just a minute ago about distorted view, and working maybe with a psychologist to address that distorted view of a young offender. Of course, if you are 18 it may be normal sexual activity—it may not even be a distorted view; it would just be normal—but when you are 15, normal sexual activity with an 18-year-old becomes distorted. Would that be right?

Judge WAGER: Yes.

Hon COLIN HOLT: So you get caught up in the whole system, even though it seems quite normal to a 15-year-old.

Judge WAGER: What is abnormal to a child?—that is the thing. When you look at a lack of parental supervision for online porn, in the last year there has been a number of autistic kids who have very literally—they will hear about sex at school, and young boys no doubt with bravado and talk—they are shown some online porn, so they will not be able to engage in the sort of thought processes that would be appropriate and so try out something on your little sister or your cousin or something. They are the sort of distorted views —

Hon COLIN HOLT: Or your girlfriend.

Judge WAGER: Or your girlfriend—that need to be addressed, and can be.

The CHAIRMAN: It is an interesting phase for children that they go through, I think, as Hon Colin Holt points out, that we get to the point with adults where sexual behaviours are acceptable, but at that age when they start to become aware of their own sexuality—not so much sexuality, their sexual awareness—and about those appropriate behaviours. In other child development things, we guide them through these things. There seems to be a big gap as to what society and parents in the community generally can do to guide children through those appropriate behaviours, because when they do things in other areas that we do not approve of, we correct those behaviours and bring them back to where we are, but because it is of a sexual nature, it seems that we just criminalise it to a large degree, or if you get caught in the criminal system, your behaviours are criminalised and others are not. It is an exceptionally complex area from both a cultural and social point of view, and from a legal point of view as well. You are starting to deal with the certainties of that area. I think that was more of a statement on my part, but feel free to add your own comments to that.

Judge WAGER: Very much so, and the whole online offending, sexting and all of that sort of thing, sometimes it is quite difficult to even explain to a young person why it is an offence, because it is just the norm. There are so many things going on that, fortunately, were not going on when we were young people, that just make life more complex, definitely.

Mandatory reporting of sexual offending is a very important thing, but with young people it means that those who are in care—so those who have been placed under the care of the CEO of the Department of Communities—are more likely, in my view, to have matters brought to the attention of police. If you are living in a foster home and you are touching another kid inappropriately, then there is a requirement to have mandatory reporting, whereas if you were to see a young person touch another young person inappropriately in your home environment, you would take them to one side and have a talk, and explain about our personal boundaries and what is right and what is wrong. You end up with this sort of criminalisation of those who are already well behind the eight ball. In serious cases, obviously it is great when there is action, and some action has to be taken, but it is just another illustration of how complex the area is.

The CHAIRMAN: Do you think that, therefore, one group of children are being treated in one way for their behaviours and another group of children get treated in a completely different way, and then we are compounding the issues, because it seems that those kids who are in care or are already

subject to a whole range of disadvantage are then more likely to be—do you see that before the court?

Judge WAGER: Yes, I do. Because it is a question of degree, it is really hard to quantify. Who is to say what happens then in that family environment where you then explain what is right and wrong and maybe something happens again? In terms of the victim child, would it at that stage have been appropriate to take the matter to police? It is complicated, but my feeling—and, once again, I do not have statistics to support this—is that because of the requirement of mandatory reporting of child sexual abuse, or sexual offending, those in care who are already doing it hard are likely to be put in a difficult position.

Hon Dr STEVE THOMAS: Or could it be the case that, perhaps, behaviours learnt in the family are the direct cause of some of these behaviours, and perhaps some of those kids that come from a family thing should be in care, and there might be a catch-up point there?

[12 noon]

Judge WAGER: Definitely. There are all sorts of difficulties going on in families where the Department of Communities is not involved, and there are all sort of awful things that have happened, obviously, to young people where the department is involved. It is a question of degree. But in every case, I think, it really illustrates just how important it is for the young person to then have considered one-on-one discussions with somebody who they respect about what is appropriate and what is not.

The CHAIRMAN: In your supplementary submission, you outlined the difficulties in making a definitive risk assessment and you suggest that identifying factors is a more realistic goal. However, in practice and in the interests of community safety, does some kind of risk assessment need to be made?

Judge WAGER: I think in the really serious cases, and by that I mean, I think I have spoken about the sorts of cases that are really serious where people are targeted, where there has been violence involved, and the sort of situation of staking out a house and then sexually assaulting an older lady—those sorts of really serious matters are clearly in one category. On the other side then, it is really a matter of looking at what sort of background has this young person had? Have they been sexually abused themselves? Have they come from an environment of violence? Have they come from an environment of drug and alcohol abuse? Have they already been introduced to drug and alcohol abuse, violence and sexually inappropriate conduct within their family environment? So, I think all of those things that are covered in the reports end up going into the risk assessment, and that they are covered by that JSOAP—juvenile sex offender assessment protocol—as it is called, but they are also covered by the sorts of reports that I have spoken about.

And I did leave out that if the young person is under the care of the Department of Communities, or in some cases if the young person is an open case, so they are not actually under care, then the court will also get a report from the Department of Communities and that is helpful with all of that background information about the family.

The CHAIRMAN: Would it be fair to say that the sentencing process, with all it entails, is the most comprehensive and considered way to do all this at the time of sentencing?

Judge WAGER: In my view it is, yes.

The CHAIRMAN: Is the sentencing process likely to identify offenders, in your view, who may pose a high risk of offending, including young people displaying harmful sexual behaviours or paedophilia?

Judge WAGER: Yes, I think so.

The CHAIRMAN: Can you give us some examples of the therapeutic interventions that might be ordered by the court?

Judge WAGER: Because you are dealing with a young person, I think the one-on-one psychological counselling is a really important one. If the sex offender was an adult, then, of course, group counselling may be the way to go or there may be a combination of both. But, once again, you do not have to know that many children to know that if you put a naughty one together with other ones, then the naughty one is likely to win out, so group counselling is not necessarily the way to go. Also, young people are going to be functioning at different levels and their motivation for offending is going to be different, so it is very different from adults. So when it comes to what is actually going to work therapeutically, I think one-on-one psychological counselling and then simply what is going to give that young person the best opportunity to lead a productive and sociable life in the right direction, so learn through counselling that the reason why you do not touch other children in this way is because of X and what the repercussions are; understand some victim empathy, whether that is through some form of victim mediation; and then get on to doing good things in life so rather than hanging around in dark corners watching online porn, play sport, go to a social club, get a hobby and go to school. It all sounds very trite, but when you look at the number of young people who are truant who come before the Children's Court; when you look at the disengagement, sadly, from sport at really young ages; and when you look at the number of young people who are not feeling safe in their own homes, these things are really what is needed to get them thinking on the right track.

The CHAIRMAN: Would you say that mandatory registration undermines the therapeutic approach and the benefits of those therapeutic approaches in terms of getting young people back on track?

Judge WAGER: Look, it depends on the young person, but I think that there is a potential risk that it could for the reasons that I have already outlined. They may then identify and see themselves as being a sex offender; that they are a person known to the police and that that stays for seven and a half years; they are not allowed to do things because in their mind they are bad: "I can't be in that group. I can't go there. I'm bad." So I think that that labelling is counterproductive for a lot of young people. They are not in a position to have the responsibility necessarily to be able to comply with what is needed. "Where am I going to be living?" Well, if they are from an at-risk background, then whichever adult they are living with may not know where they are going to be living. There is the potential for things to go wrong and for the young person to be brought before the court not for further sexual offending, but for breaching the register that the young person would be better off without.

The CHAIRMAN: Can you give us a description of what the aggravating factors might be taken into consideration for registrable sexual offences?

Judge WAGER: I think in my first submission, I referred to what is presently in the act. There is not a requirement for mandatory reporting and I was referring to section 13, which allows an exercise of discretion. Those considerations, in my view, seem to be good ones, taking into account the evidence given during the proceedings. Of course, that may vary considerably. If there has been violence; if there has been the sort of threats that should not occur; if there has been an act where the intention of the young person is to physically harm while sexually abusing another young person, they are the sorts of things, I think, that should be taken into account.

We have then got the paperwork that is relevant—any document or record that is served on the offender by the prosecution and the statements that could be tendered, because on a plea of

“guilty” the evidence is not aired, so those things are simply accepted by the accused, but the court would have a copy of them.

Another consideration is —

any evidence given by a victim or the offender in relation to the making of the order;

Well, it could be that it is just any evidence given by the victim or the offender in the course of the proceedings. With young victims, these days, the evidence would usually be recorded in advance. They will go to see police early on. They will then have an interview that becomes their evidence-in-chief for the trial. So it is already recorded. You have already got that. So even if there is a plea of “guilty”, you can look at how old the victim was, how they were coming through, what their level of understanding was et cetera. We have got that even if the matter does not proceed to trial. We then get “any pre-sentence report given to the court”, which we have spoken of, and “any victim impact statement given to the court”. With young victims, that can be either the young person’s own statement or it might be that the parent or guardian has also made a statement, so that will come to the court. “Any mediation report will be given to the court” —same thing. “Any other matter that the court considers relevant” —which would be all of those circumstances. I would see the same information as being important. In terms of when I would put someone on the register in those circumstances, if there is a serious risk that the young person is going to reoffend, yes. If the young person’s conduct has been such that there has been targeting, there has been violence, there have been threats, there have been actions without consent—they are clearly the sort of factors that you would take into account.

[12.10 pm]

The CHAIRMAN: I am conscious of the time so I might just skip to some questions, and some of the questions I have skipped we may put back to you in writing.

Judge WAGER: Sure.

The CHAIRMAN: I am sure there is no issue there. One of the questions that was really important to us is in relation to mandatory registration. Your submission contends that mandatory registration conflicts with the objectives and principles of the Young Offenders Act.

Can you get into the specifics of why you say that?

Judge WAGER: It has the potential to conflict. Perhaps I should have used that word, “potential” to conflict. It has the potential to conflict because similar sorts of sanctions as would be there with a criminal record that will be expunged after two years for a young person will remain for seven and a half years so there is a degree of labelling there. Because when you look at what is required under the Young Offenders Act in terms of making sure that what is imposed is appropriate given the young person’s age and level of maturity, a mandatory term obviously does not address that. When you look at what some of the objectives and principles are in terms of making sure that they can stay with family; stay with community; the importance of education; and the importance of getting back on track, it may be that there are aspects of being on the register that get in the way of that. Let us insert the word “potential” there.

The CHAIRMAN: Yes. I am trying to get to what I think might be important.

Judge WAGER: Sure.

The CHAIRMAN: We have covered a lot of ground, which is great. I think we have had this question previously but I just put it to you again. Do you have an idea about what proportion of children who have committed a registrable offence actually reoffend with another registrable offence? Do you have any indication of those sorts of statistics? You might want to take that one on notice because

it is quite a technical question. Questionistically, do you have a sense of the level of reoffending of registrable offences? Is it higher or rare?

Judge WAGER: I would say it is rare but I would not be able to take that further.

The CHAIRMAN: Can we put that question to you on notice? You would have records obviously of the children you have dealt with and then if they come back before the court you would have some consistency with that. That will be question on notice 1.

Judge WAGER: Often children reoffend with a number of offences so it may be that they are already on the register and that they have reoffended. I cannot comment on that one.

The CHAIRMAN: We will put it to you in writing and it may be the case that your officers might be able to have a closer look at your records —

Judge WAGER: Very good idea.

The CHAIRMAN: — if that is a way of extracting that.

Judge WAGER: Sure.

The CHAIRMAN: Mandatory registration is often described as being administrative and not punitive in its approach. Do you have a view as to the, in effect, truthfulness of that statement? Is that, in fact, just an administrative thing or, in effect, is it punitive?

Judge WAGER: If I was sitting here as a District Court judge sentencing adults, I would have no difficulty at all in saying, “This is an administrative thing.” But because of the different factors that need to be taken into account with children, when sentencing, I cannot take it into account because it is still an administrative process. But the reality is that it may impact on some of the other factors that I need to take into account.

The CHAIRMAN: And would, effectively, be punitive—a punishment.

Judge WAGER: It could be. Once again, because every child is so different, it would depend on how the young person operates. There are some kids who may be fine being on the register and just think, “Oh, well, that’s something I have to do every year.” There may be some who would be just so embarrassed that kids at school would find out. If they are a young adult and they are restricted in what they can do career-wise, they may harbour a great grudge. There are some, quite frankly, who might wear it as a badge of honour—the young people.

The CHAIRMAN: During the Law Reform Commission’s inquiry regarding registration, there were submissions of evidence made that the possibility of registration as a sex offender may discourage offenders from entering a guilty plea. Your submission also indicates that offenders are likely to proceed to trial because they do not want to be on the sex offender register. Does the possibility of becoming a registered offender, in your view, discourage guilty pleas, particularly early guilty pleas?

Judge WAGER: I can only say this anecdotally. I am probably not in a position to comment. Probably defence counsel are in a better position to comment on that. I suppose the reality is that if you have particularly historical matters, I will often have it that the accused will give evidence, including what has happened since that time, basically, saying, “Hey; this is the person that I am now.” I cannot comment on that.

The CHAIRMAN: In regard to judicial discretion, do you have a view whether the onus should be on a prosecution to convince the court that registration should occur or on the defendant to convince the court that registration should not occur?

Judge WAGER: I think it should be on the prosecution because, as with everything in our system, the prosecution has the might, the prosecution has the resources and the prosecution is the one

who brings the charges. Our state is a very large one and in remote communities, who knows what quality of legal representation a young person may have. You also have young people who, because of their family situation, may not turn up to get legal advice before a court comes into a place or before they go to court. If the obligation is on the child—on the defence—in my view, it is just putting it in the wrong place.

The CHAIRMAN: This is a matter of speculation but if the onus was on the defendant, then in most every case, there would have to be an application and resources put into arguing against it unless it was just accepted that they would go on the register. But with the prosecution, if the onus is on them, it is more likely that the cases are completely inappropriate for registration are not even going to be put before the court at all.

Judge WAGER: Exactly.

The CHAIRMAN: Then you will only be dealing with the cases that are either very serious or contested.

Judge WAGER: That is right. I totally agree with that. There probably would not be that much argument. The ones that are very serious, are very serious and there would be some contested ones. They would come up when the child has reoffended and may have breached an order or where they have reoffended in a sexual way and then it would be appropriate to analyse it a bit closer to make sure that all factors are being considered.

The CHAIRMAN: I have a number of other questions that we would like to talk about but I note that our time has now come to an end. Would you like to make a closing statement regarding these matters?

Judge WAGER: No. Thank you.

The CHAIRMAN: Thank you, Your Honour, for attending today.

Judge WAGER: Thank you.

The CHAIRMAN: Please end the broadcast.

A transcript of this hearing will be forwarded to you for correction. If you believe that any correction should be made because of typographical or transcriptions 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 given you one question on notice but I am sure we have some additional questions to give you as well, so when you receive your transcript of evidence, the committee will advise you when to provide your answers to the questions taken on notice. If you want to provide 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 work you do. Obviously, it is not a very easy job being President of the Children's Court and you are obviously dealing with circumstances and people at very high stresses of their time but the goal you try to get when you are putting these young people back on track, I think, is so important. I think I speak for all committee members when we pass our respect and thanks for that. Thank you for coming today.

Judge WAGER: Thank you very much.

Hearing concluded at 12.19 pm
