PARLIAMENTARY COMMISSIONER AMENDMENT (REPORTABLE CONDUCT) BILL 2021

Committee

Resumed from an earlier stage of the sitting. The Deputy Chair of Committees (Hon Jackie Jarvis) in the chair; Hon Sue Ellery (Leader of the House) in charge of the bill.

Clause 2: Commencement —

Committee was interrupted after the clause had been partly considered.

Hon NICK GOIRAN: When we were considering the bill prior to the interruption for the taking of questions without notice, the Leader of the House kindly indicated that part of the bill—that being the portion that can be described as part 2, division 2—will come into effect precisely 12 months after what is described as the rest of the act. The trigger point is clause 7 of the bill. When is it intended that clause 7 of the bill will come into operation?

Hon SUE ELLERY: On the date to be proclaimed.

Hon NICK GOIRAN: When does the government intend to proclaim clause 7?

Hon SUE ELLERY: I cannot give the honourable member a precise date. The best advice I am given is that some work needs to be done around the educative materials and the like that are to be provided, but I am not able to give the member anything more specific than that.

Hon NICK GOIRAN: The educative materials will be prepared by the Ombudsman's office. It is an important piece of work to be done because once the primary provisions are proclaimed, people will have an obligation under law to report, and it would be good for them to understand precisely what the thresholds are and the circumstances under which it might be appropriate for them to seek an exemption. We will get to the exemptions a little later. Is that piece of work that can be described as the preliminary educative work in an advanced stage?

Hon SUE ELLERY: I am not sure how advanced I would describe it, but it is certainly advanced. They have checked the relevant copies of the material that has been used in the other jurisdictions and undertaken broad consultation, but they also intend to consult, if you like, industry group by industry group to make sure that the material makes sense to those in different areas of the economy.

Hon NICK GOIRAN: That piece of work, minister, has been undertaken by the Ombudsman's office. The minister indicated in her second reading reply that at a cost of $1.4 million, there are nine full-time equivalents. Are they already with the Ombudsman's office undertaking this work or is that pending the bill passing?

Hon SUE ELLERY: That is pending the bill passing.

Hon NICK GOIRAN: The work that is being done—it is not yet at an advanced stage but it has advanced because some work has been done—is being done with the existing resources of the Ombudsman's office, and I commend the Ombudsman and his office for doing so. That said, one would think that the Ombudsman must have some idea about how long he is prepared to allow this preliminary work to go on before he is ready to say to government, "Please proclaim this bill." Has there been an indication from the Ombudsman about that?

Hon SUE ELLERY: No; that is what I tried to tease out in answer to the member's question earlier. I am sorry; I do not have that information here.

Hon NICK GOIRAN: Given that we will need to spend some time considering clause 7 in particular at length—I think it is highly ambitious that that will happen in the next 47 minutes—I wonder whether the minister or those assisting her could specifically ask about this. Ordinarily, when governments choose to leave the commencement of bills for proclamation, it is typically because they need to wait for regulations to be drafted and those things are left with the Parliamentary Counsel's Office. We are often given an indication from government that it expects that to take three months, six months or some period of time. It is somewhat unusual that there has been no indication, but I suspect that if asked, the Ombudsman might be able to provide an indication. I wonder whether the minister can do that.

Hon SUE ELLERY: I am happy to take the question and see whether we can get an answer, but I am not going to hold up the committee's consideration of clause 2 or any other provisions of the bill waiting for it. I am happy to see whether we can get something during the dinner break, but I want to proceed.

Hon NICK GOIRAN: I agree, minister; there is no need to postpone debate on clause 2 and wait for that information. But if it can be sourced, it would be of assistance.

Clause 26 is one of the provisions that is being left to the later period. Whenever section 7 of this soon-to-be act comes into operation, some 12 months later, all of division 2 of part 2 will come into operation. Part of that second division is clause 26 of the bill. Why has that been pushed out to the secondary phase?

Hon SUE ELLERY: Those in the first phase, if you like, are those entities that already operate under complex and extensive regulatory regimes and are used to doing so. The ones that are being pushed out are those that are

not used to operating in that kind of environment. The judgement is that they will need a longer time to understand what they will need to do to meet the requirements.

Hon NICK GOIRAN: That would be an excellent explanation if my question pertained to clause 27 but it relates to clause 26. Clause 27 lists all those organisations that will be addressed in the second phase. Clause 26 deals with a different issue.

Hon SUE ELLERY: I am sorry that I gave the member a fantastic answer to the wrong question. The first tranche, if you like, of conduct that will be reportable will go to sexual conduct and the like. The two that are referred to in clause 26 will perhaps be harder and less obvious for organisations to understand exactly what kind of behaviour or conduct they will need to report. The view is that more time is needed to make sure that is done properly.

Hon NICK GOIRAN: I agree with that. The curious element, though, is that the bill—we are still on clause 2—states that this provision, clause 26, will automatically come into effect 12 months after the first phase comes into effect. I understand the 12-month delay for clause 27, which comprises those organisations that, as the minister said, might not routinely be used to operating under this type of reportable conduct scheme and the like, unlike the organisations and entities set out in clause 25. For the purpose of giving an extra 12 months for the Ombudsman to consult with and educate those organisations, the Parliament is saying, "Let's give them an extra 12 months." But clause 26 is a particularly complex component because it will include behaviour that is described as "significant neglect of a child"—the use of the word "significant" is significant—and that will require clarity from the Ombudsman's office and the Western Australia Police Force and for all that to be communicated to both sets of entities; that is, the clause 25 entities and the clause 27 entities. In addition to that, it will capture conduct that is described as "any behaviour that causes significant emotional or psychological harm to a child". That notion will also not be without its complexities and difficulties. It seems perhaps ambitious on the part of government to say that rain, hail or shine, 12 months after clause 7 comes into effect, all these entities will have to report under these two new categories. Was any consideration given to leaving clause 26 to be proclaimed on a different date?

Hon SUE ELLERY: I am advised no. I think the honourable member has to read two things together. There is a 12-month period within which the work will be done to make sure that material and guidance is provided on what those things mean. But the second bit that he needs to take into account is what we discussed before—that is, the approach that the commissioner will take, which will not be with a sledgehammer: "You did not do this. Out you go—jail or an $8 000 fine." He has made it clear that his intention is to take an educative approach rather than a sledgehammer-type approach.

Hon NICK GOIRAN: I acknowledge that, minister. Nevertheless, I express my concern. The situation at the moment, on 16 August 2022, is that the Ombudsman of Western Australia, who is going to be taking on these significant roles, including being resourced by the taxpayer to the tune of some $2.4 million in due course, is not presently able to inform the Parliament, through the executive, of what the time line will be for these things because work is presently underway. That work is on materials to educate not only the two different sets of entities, but also decision-makers, so that they can get their heads around what exactly is intended by the terms "significant neglect of a child" and "any behaviour that causes significant emotional or psychological harm to a child" in clause 26. It is perhaps somewhat dangerous to be including an automatic provision that the clause will take effect 12 months' after the rest of the act. This is one of the perhaps rare instances in which it might have been desirable to have left this particular matter for proclamation. Keep in mind that I am on the record as repeatedly asking governments of both persuasions to minimise the circumstances in which they leave things to proclamation, but this one almost seems to have been in reverse, where the primary provisions could have been given a specific date and these ancillary ones that require further work could have been left to a date to be proclaimed in the future. Nevertheless, the Ombudsman has absolutely got his work cut out for him on this matter. That said, I have no further questions on clause 2.

Clause put and passed.

Clauses 3 and 4 put and passed.

Clause 5: Section 4 amended —

Hon NICK GOIRAN: Clause 5 deals with the insertion of some terms that will be used, and I want to take the attention of the Leader of the House specifically to two of those terms—that is, the term "investigator" and the term "religious body". The term "investigator" is set out on page 3, from lines 21 through to 25. The Leader of the House touched on this in her reply, courtesy of the remarks that I made in the second reading debate. One of the concerns is that despite the best efforts of the Ombudsman to educate entities, organisations might feel out of their depth with regard to this matter, and might choose to utilise the services of an external investigator. Equally, even if organisations might feel out of their depth, they might not feel that they have the financial resources to contract an external investigator. Consequently, the responsibility will fall upon an employee within the relevant entity. Is there

an expectation that the Ombudsman will be providing any sort of, shall I say, short courses or something of that nature to assist entities to train up individuals within organisations on how to be an investigator?

Hon SUE ELLERY: Yes. As I said in my reply to the second reading debate, the sort of work that the office is going to do is to help build capacity to meet and comply with the scheme. That will include, in respect to these provisions in particular; developing tailored guidance and support materials, developing education programs for each sector in collaboration with the relevant peak bodies, and providing advice as requested. The Ombudsman will actually be proactive in providing the tailored guidance and education programs.

Hon NICK GOIRAN: One would presume that the materials that will be prepared by the Ombudsman's office and, indeed, the advice that could be taken over the telephone would be provided by the Ombudsman at no cost to entities. What will be the situation with the programs that the Ombudsman develops?

Hon SUE ELLERY: It will be free.

Hon NICK GOIRAN: I am not too concerned about whether the other jurisdictions charge for that; the fact that ours will be free in Western Australia is welcomed. However, is this consistent with the other jurisdictions—that their like bodies, whether that is a commissioner for children and young people, a guardian or otherwise, will provide those three forms of information, being the materials, the program and the advice?

Hon SUE ELLERY: Yes.

Hon NICK GOIRAN: Is there any intention, or scope, I should say, in the bill—it is already clear it is not the intention of the government to go down this path—for the qualifications for an investigator to be set out by way of regulation?

Hon SUE ELLERY: No, there is no head of power in the bill to provide for that.

Hon NICK GOIRAN: Is that something that the other jurisdictions do?

Hon SUE ELLERY: No.

Hon NICK GOIRAN: I now turn to the other term, "religious body", which is found at page 3, lines 28 to 30. As I understand it, the term "religious body" currently appears in four Western Australian acts and two regulations, yet none of them have the term defined. Why was it deemed necessary and desirable to do so in this bill?

Hon SUE ELLERY: I am advised that the other jurisdictions had it defined in those terms. I cannot tell the member whether there was any variation in language, but each of the jurisdictions had a definition of "religious body".

Hon NICK GOIRAN: Is the Leader of the House in a position to indicate whether there are what I would describe as significant differences in our definition compared with those in the other jurisdictions?

Hon SUE ELLERY: The best recollection of the people at the table is that this was picked up out of existing legislation from one or all of those jurisdictions. If it gives the honourable member comfort, I will ask them to check during the dinner break whether there was a significant difference, but the advice that I am given is that there is not.

Hon NICK GOIRAN: Yes, please do that. Can the Leader of the House indicate who was consulted about this definition?

Hon SUE ELLERY: I do not have the list here. Again, I can probably get it over the dinner break. I am advised that 10 religious bodies were consulted on that definition.

Hon NICK GOIRAN: I am curious to see whether there are any differences in the definitions in other jurisdictions. I note in particular the reference at lines 20 and 30 to an operation under the auspices of one or more religious denominations or faiths, which appears, at first glance, to be a curious notion. Nevertheless, 10 organisations have been consulted, we are informed. I think the minister previously indicated that the Ombudsman consulted with some 120 or 126 stakeholders—a large number—and that any concerns that were raised with the Ombudsman have been not only taken into account, but also reflected in the bill. If we take that for what it is, it is reasonable for us to conclude that it is an indication that the 10 stakeholders who were expressly consulted about this definition, if we were to reveal who they were and ask them—I am not asking the government to do that—are satisfied with this definition of "religious body".

Hon SUE ELLERY: That is the advice I have been provided. I think it is worth noting that the advice provided to me is that the Ombudsman's office physically went back to meet with people to talk through their concerns and how they might be accommodated.

Hon NICK GOIRAN: The minister will have heard me indicate earlier that there are four acts in Western Australia at the moment that use the term "religious body", and two regulations, none of which include a definition. This will be the first time we will insert a definition, according to my research. What impact will us inserting this definition have on the interpretation of the term in the other acts?

Hon SUE ELLERY: I guess I have to start by taking at face value that what the honourable member says is true because I have not had the opportunity to check that. Let us assume that what the member said is true, for the purpose of this discussion. I will see whether there is any advice. I am not sure I can take this one much further because I am being advised that the people prepping this piece of legislation did not look at the other pieces of legislation in which that term appears.

Hon NICK GOIRAN: I will just make the observation that that is regrettable, because if we are going to be doing something new and different in this particular bill, it is important to be clear about whether it will have an impact on the way in which the term has always been understood and interpreted in those other four pieces of legislation. That said, the minister indicated that hopefully over the upcoming adjournment we might be able to at least get to the bottom of whether there are any significant differences in the other jurisdictions, and I am grateful for that.

Clause put and passed.

Clause 6 put and passed.

Clause 7: Part III Division 3B inserted —

Hon NICK GOIRAN: It is probably fair to describe clause 7 as the most significant and substantial provision in the bill. It starts at page 4 of the bill and goes all the way to page 40. The minister will see that at the start of page 4 the very first term that is used is the very simple definition of "child". Given that the age that is being applied to the definition is the same as is available under the common law—18 years of age—why was it deemed desirable to expressly define the word "child", given that it is unnecessary to do so?

Hon SUE ELLERY: I am advised that the reason is twofold: first, to be clear; and, second, it is in the other jurisdictions' legislation. We were aiming for consistency, and that is what we did.

Hon NICK GOIRAN: I understand the desire to be consistent with the other jurisdictions. Indeed, we noted both in the minister's second reading speech and in my contribution to the second reading debate that the final report of the Royal Commission into Institutional Responses to Child Sexual Abuse specifically called upon state and territory governments to establish nationally consistent legislative schemes, and this does fit with that. That said, the problem I have with that is we have already identified a number of instances when there is inconsistency, and the government has taken an approach for the reasons that have already been outlined. In something like this, when it really does not matter—it is not necessary to include it—it seems curious that that would be the approach taken when it could have implications for how other statutes are read in the event that they do not have these express definitions. Nevertheless, I do not think too much turns on that.

I move to the second term, which is "commencement day". There is a reference to a 2021 act. I take it that the government accepts that that will read 2022.

Hon SUE ELLERY: Yes.

Hon NICK GOIRAN: We will give that job to the clerks or parliamentary counsel to deal with it by way of a clerical amendment.

On page 5 is the term "physical assault". What was the rationale for not using the criminal definition of "assault"?

Hon SUE ELLERY: The criminal definition of "assault" is narrower than the definition the government has chosen for the scheme. The definition used is appropriate for a civil jurisdiction aimed at protecting children from abuse. The royal commission's findings support this approach. At volume 7, page 268 of the royal commission's report, the royal commission noted —

> … reportable conduct schemes should require the reporting of conduct by employees that is broader than conduct that would constitute a criminal offence.

A broader definition is consistent with the other jurisdictions and is the same as that used in New South Wales. If it is of assistance to the honourable member, New South Wales defines "assault" to mean —

(a) the intentional or reckless application of physical force without lawful justification or excuse, or

(b) any act which intentionally or recklessly causes another to apprehend immediate and unlawful violence.

Victoria uses the term "physical violence", which is not further defined, and the ACT includes the ill-treatment of a child, which also is not further defined, in the definition of reportable conduct. It also includes offences against the person under part 2 of the Crimes Act 1900. The view was that the New South Wales definition best suited our purposes.

Hon NICK GOIRAN: We can see here that the term "physical assault" that is proposed to be used is based on the New South Wales model. The minister indicated that it is a wider definition than the criminal definition of "assault". How much wider are we talking? We can see that the proposed definition, refers to the intentional application of physical force without lawful justification or excuse. If a person or an entity comes across that type of conduct—

an intentional application of physical force without lawful justification or excuse—would it not be reported to police in any event? To what extent is it really broader than the criminal definition of "assault"?

Hon SUE ELLERY: I do not have any advice available to me at the table that could compare and contrast with the Criminal Code. Obviously, though, the view taken was that the New South Wales approach had the most definitions within it, if you like, as opposed to the other two jurisdictions that left certain elements undefined, and so that was deemed not to be necessary. But I do not have that kind of compare and contrast here.

Hon NICK GOIRAN: The words that appear at page 5, lines 28 to 34, are nearly identical to the New South Wales definition that was read out, which I do not quibble with. In this instance, it is helpful, given that Victoria and the ACT have appeared to take an undefined approach to this issue. This will assist persons in these entities to understand when they meet the threshold of needing to report to the Ombudsman.

On the notion of intentional application of physical force without lawful justification or excuse, would the intentional use of physical force by an employee in one of these relevant entities for self-defence be captured by this definition?

Hon SUE ELLERY: It will depend a little on the circumstances. There are questions around the management of a child—for example, physical contact that forms part of normal professional duties such as restraining a child. Physical contact that forms part of normal professional duties is not included in reportable conduct. The definition of "reportable conduct" under proposed section 19G sets out conduct that is not included in reportable conduct, which includes, under proposed subsection (2)(a), conduct that is —

> reasonable for the discipline, management or care of a child or of another person in the presence of a child, having regard to —
>
> (i) the characteristics of the child, including the age, health and developmental stage of the child; and
>
> (ii) any relevant code of conduct or professional standard that at the time applied …

It will depend, honourable member, on the circumstances each time a report of that nature is made.

Hon NICK GOIRAN: On the self-defence scenario, if an employee is intentionally applying physical force for self-defence, that is not conduct that is reasonable for the discipline, management or care of a child. It is what I would describe as conduct that is reasonable for self-defence. That particular proposed section 19G(2) will not necessarily help the entity to understand —

Hon Sue Ellery: That did not go to self-defence.

Hon NICK GOIRAN: No.

Hon SUE ELLERY: The intention is not that someone who is acting in self-defence will have a report made against them, but someone will have to make a judgement about whether it was self-defence or not self-defence.

Hon NICK GOIRAN: I agree. I think it is important to get that on the record, and no doubt that will form part of the instructive materials that the Ombudsman will provide to entities. I can absolutely see that as part of, say, a frequently asked questions file.

I just want to touch on one further scenario before moving on to a different term. We dealt with the self-defence scenario. The minister has already helpfully taken us to proposed section 19G(2), which in my view adequately deals with the scenario whereby the application of the force is used not necessarily for self-defence, but to protect another person. That is captured in that particular provision.

Hon Sue Ellery: Even to protect the child from themselves.

Hon NICK GOIRAN: Indeed, to protect the child from self-harm is another good scenario.

The final scenario I want to touch on is about damage to property. We can foresee a scenario in which a child perhaps is, for whatever reason, about to embark on the destruction of property, so it is not a person here. Might a physical restraint in that situation be intentional application of force and fall into the category of reportable conduct?

Hon SUE ELLERY: In the first instance, it is about making sure the child is safe. If in the course of damaging property it is viewed at the time that in the heat of the moment if that kid keeps doing that he or she is going to hurt themselves, we can see how applying that physical force is a reasonable excuse to have. Equally, if there was any relevant code of conduct or professional standard that applied to the discipline, management or care of the child or other person—if, for example, a school or some other entity had a code of conduct around children damaging particular pieces of equipment because it could be detrimental to the child—that would be taken into account.

Hon NICK GOIRAN: I will move on to the next point after I make this comment. I think it is an area that would warrant further consideration by the Ombudsman and perhaps would warrant consultation with the Commissioner of Police to make sure that we put that beyond doubt rather than necessarily relying on an organisation or industry having a code of conduct. I suspect they will be able to address this point, but I want to make sure that they definitely turn their minds to it.

I want to touch on an issue under proposed section 19C—sexual misconduct. That term, which is found on page 6 starting at line 1, appears in only one other Western Australian act and one other regulation, but, similar to the earlier issue I raised, it is not defined in that particular act or regulation. Why is it being defined here? Perhaps the answer is that this is what is done in the other jurisdictions.

Hon SUE ELLERY: Yes, I am advised that is what the other jurisdictions do. I have asked whether there is a significant difference and I am advised that they all use very similar wording.

Hon NICK GOIRAN: With the earlier term, which is "physical assault", we ascertained that we are very much following the New South Wales model; the other two jurisdictions really leave it undefined. In this particular instance, "sexual misconduct" is defined in each of the other three jurisdictions, albeit perhaps with slight variations, but, consistent with those other three jurisdictions, will we also include a defined term?

Hon SUE ELLERY: Yes; there is no substantive difference. The closest form of words is in the New South Wales legislation, but they are all, I have to say, much of a muchness, honourable member.

Hon NICK GOIRAN: I now move to proposed section 19D, "Employees of relevant entities". Why does this provision, as we see at lines 6 and 7, only capture adult employees, contractors and volunteers?

Hon SUE ELLERY: I am advised that the intention is to avoid capturing those situations involving—the expression used is "Romeo and Juliet"—15 or 16-year-olds. That is the intention of that provision.

Hon NICK GOIRAN: It is a curious threshold, is it not? Even if that is the rationale, we might think that the threshold might have been 16 rather than 18 years of age. I can understand if the government wants to ensure that any sexual act involving somebody under the age of 16 years is relevantly dealt with, but it still seems peculiar that the choice is 18 years. Potentially, a 17-year-old employee could allegedly commit sexual misconduct or a sexual offence, but because they are 17 and not 18 years old, the entity would be under no obligation under this scheme to report the matter to the Ombudsman.

Hon SUE ELLERY: That is correct; the entity will not be under an obligation to report under this legislation. However, there may well an obligation to report under other pieces of legislation. It might be that a crime has been committed or is alleged to have been committed, and that might have to be reported to the police.

Hon NICK GOIRAN: Is the same threshold of 18 years of age used in other jurisdictions?

Hon SUE ELLERY: The advice is that we think it is the same. Again, we will use the opportunity of the dinner break to confirm that, but the best advice I have is that the answer is yes.

Hon NICK GOIRAN: Was consideration given at any stage to making the threshold 16 years of age?

Hon SUE ELLERY: No; I am advised that none of the other jurisdictions have that threshold.

Hon NICK GOIRAN: Was the Commissioner for Victims of Crime consulted about the bill generally, and specifically on this issue?

Hon SUE ELLERY: Yes, she was consulted on the bill; this issue was not raised.

Hon NICK GOIRAN: Was this issue not raised by any of the 126 stakeholders?

Hon SUE ELLERY: No, I was answering the question that the member asked me.

Hon NICK GOIRAN: I am not suggesting that the minister has not responded adequately; this is a follow-up question.

Hon SUE ELLERY: In fact, the opposite happened. Originally, that definition was not in the legislation. It was raised during consultation that the definition should be 18 years of age.

Hon NICK GOIRAN: This gets curiouser and curiouser. At least one stakeholder has expressly raised this with government and suggested that the threshold level should be 18 years. Was it just one stakeholder or were a number of stakeholders of that view?

Hon SUE ELLERY: I am advised that it was originally raised by one stakeholder, but the consultations were done in groups of multiple stakeholders, so others were party to the conversation and supported that.

Hon NICK GOIRAN: All right, we will move on from that point and see what information might arise during the break on exactly what the other jurisdictions have done on this threshold point. I remain concerned about scenarios of sexual misconduct and sexual offences by, particularly, volunteers who might be under the age of 18 years who, if they were 18 years old, would be captured and considered to be an employee. I am finding it difficult to understand the rationale from that one stakeholder, whoever it was, or others that might have agreed on what would be the distinction between a 17-year-old driving their vehicle to an entity's place, committing sexual misconduct at the age of 17 and not being required to be reported; whereas, had they had their eighteenth birthday, the entity would be mandatorily required to report them to the Ombudsman. But, as I say, I do not think we can take it any further today; we will see what the other jurisdictions have done.

I move to the next proposed section, 19E, which deals with the head of a relevant entity. Proposed subsection (4) states —

> The regulations may prescribe a person or class of persons to be the head of a relevant entity.

What are the person or classes of persons that are intended to be prescribed?

Hon SUE ELLERY: There is no list of proposed persons or classes of persons to be prescribed. It is there as one of those—I know the member loves these—catch-all provisions in the event that it is needed in the future.

Hon NICK GOIRAN: So that no-one is confused by the record, it is certainly not one of the provisions I love, but I think that the current government does love this type of provision. Is this regulation-making power something that is seen in other legislation in other jurisdictions?

Hon SUE ELLERY: I do not have information available to me at the table on whether other jurisdictions have a precise head of power in respect to the head of a relevant entity. We will check, and if we are able to advise the member, we will. They certainly have regulation-making powers within their acts.

Hon NICK GOIRAN: Other jurisdictions certainly have general regulation-making powers; whether they have this specific one remains to be seen.

Hon Sue Ellery: Yes.

Hon NICK GOIRAN: Proposed section 19E(5) refers to subsection (4); that is the subsection we have just been dealing with, which there is no intention to use at the present time. It then states that those regulations have effect despite proposed subsections (1), (2) and (3). Can the minister help me understand what we are trying to achieve here?

Hon SUE ELLERY: It is to give effect in the event that it were deemed necessary that a particular class of person or persons ought properly to be deemed to be the head of a relevant entity; but, for whatever reason, that conflicted with proposed sections 19E(1), (2) and (3) that are already set out. It is as the member reads it; but, I have to say, we are not going into this with a list of whom we think it might apply to.

Hon NICK GOIRAN: Is the minister saying, then, that in the event the power for regulations set out in proposed subsection (4) is used, the regulation will possibly be inconsistent with proposed subsections (1), (2) and (3), and by virtue of proposed subsection (5) we are saying that notwithstanding the fact that it is inconsistent, the subsidiary legislation—that is, the regulation—will have primacy over proposed subsections (1), (2) and (3)?

Hon SUE ELLERY: That is correct.

Sitting suspended from 6.00 to 7.00 pm

Hon NICK GOIRAN: Prior to the interruption for the dinner break, there were a number of matters that the Ombudsman's office was potentially going to look into. Might this be a convenient time to provide an update to the chamber?

Hon SUE ELLERY: The first bit was about the definition of "physical assault" in this bill. In the Criminal Code, the term used is "assault". That definition is —

> A person who strikes, touches, or moves, or otherwise applies force of any kind to the person of another, either directly or indirectly, without his consent, or with his consent if the consent is obtained by fraud, or who by any bodily act or gesture attempts or threatens to apply force of any kind to the person of another without his consent, under such circumstances that the person making the attempt or threat has actually or apparently a present ability to effect his purpose, is said to assault that other person, and the act is called an assault.

It also includes a definition of the term "force". There is a bit more detail in the words used to describe what constitutes an assault. I probably have other information but I am going to sit down first.

I am also advised that the anticipated time until proclamation is about three months. There was a question about whether the provisions in the other jurisdictions included a regulation-making power for the heads of the entity. The answer to that is yes, for each of the jurisdictions. I am just checking that the words are the same.

I have an answer to the question about an employee being someone over 18 years of age. It is the same in Victoria but not in New South Wales or the Australian Capital Territory. The member will recall from our conversation that it was raised in stakeholder consultation here.

Hon NICK GOIRAN: I thank the minister and the Ombudsman's team for the provision of that information.

Hon SUE ELLERY: Sorry, honourable member. There is a bit of COVID happening behind us.

There is one more, which relates to the definition of "religious body". The definition in our bill is based on that in the ACT legislation. New South Wales also includes a definition in its act, which reads —

(a) a body established for a religious purpose, and

(b) an entity that establishes, or directs, controls or administers, an educational or other charitable entity that is intended to be, and is, conducted in accordance with religious doctrines, beliefs or principles.

Victoria uses the definition used by New South Wales. I do not know whether that helps the member. I will do it again, honourable member, and provide a proper comparison. In the bill before us now, "religious body" means —

> a body established or operated for a religious purpose that operates under the auspices of 1 or more religious denominations or faiths …

The same definition is used in the ACT bill. New South Wales and Victoria, which have identical definitions, have similar definitions. The definitions used by New South Wales and Victoria are the same, and the definitions used by the ACT and WA will be the same.

Hon NICK GOIRAN: I thank the Leader of the House and the Ombudsman's office for the provision of that supplementary information. Two of the three jurisdictions use the same definition for "religious body", that being New South Wales and Victoria, yet the choice has been to move away from that and implement the ACT model. On the face of it, the ACT definition appears to be the more peculiar of the definitions. As I said earlier, it is not clear to me why the ACT has included "operates under the auspices of 1 or more religious denominations or faiths" and why we would then do the same when, on a plain reading of it, it seems peculiar and the other two jurisdictions have chosen not to go down that path. Obviously, an intentional decision has been made, subject to, as the Leader of the House indicated, consultation with 10 stakeholders. I describe it as a peculiar choice. We cannot do anything further about it. If the matter had gone before the Standing Committee on Legislation, it might have been able to inquire into it, but that did not happen.

With regard to the other matter of the threshold age for an employee to be captured by the legislation—I refer to proposed section 19D on page 7, starting at line 6—the Leader of the House indicated that the New South Wales legislation does not limit it to the age of 18 years and mentioned that, nevertheless, the matter was expressly raised by a stakeholder and was subject to further considerations. Again, I note that that means it was a matter actively considered by government and the choice was made to go down this path. I generally commend the approach that has been taken. It is obvious that there has been wideranging consultation with some 126, I think, stakeholders.

I commend the breadth of that consultation. I also commend the fact that there appears to have been a great desire by the Ombudsman's office in preparing the brief to parliamentary counsel to make sure that all the stakeholder feedback has been not only considered, but also accommodated. As a general principle, I commend that approach, but it troubles me if the approach is simply to accept or facilitate the stakeholder feedback, absent deeper analysis. It seems to me, particularly in respect of the threshold age for an employee, that it would have been desirable for the Ombudsman or government to push back on the stakeholders and really get them to articulate in the clearest possible way why it is so important for the threshold level to be 18 years and not, for example, 16 years. That might have happened, but it is not at this point obvious that it did. If it did, no further explanation has been provided. That is a shame, but it is something that will hopefully be captured when, in the fullness of time, this legislation is reviewed. All of that said, I thank the minister, the advisers and the Ombudsman's office for the provision of the supplementary information.

I return to the matter we were considering prior to the adjournment—proposed section 19E(5), on page 9 of the bill. If regulations are to be made under proposed subsection (4), then in light of proposed subsection (5), will they have the effect of modifying the application of proposed subsections (1), (2) and (3) in a particular instance?

Hon SUE ELLERY: Yes, that is possible; but, again, I make the point that I made earlier. I know the honourable member has made it clear in other pieces of legislation and in this one that he does not like these kinds of catch-alls, but the best advice I have is that that is the intention. But no-one is going into this with the view that it is these types of people that we are trying to catch.

Hon NICK GOIRAN: Although I would describe it as undesirable, from time to time we see the sort of catch-all regulation-making power that is found at proposed section 19E(4). There have been many debates and discussions about that over the years, and there is no purpose in taking that any further this evening, but proposed subsection (5) is particularly relevant at this time. It could have derived from a famous king who came along and decided that, from time to time, he would like to have the power at the stroke of a pen to be able to change or modify the law by way of regulation. I suppose it is at the very least a yellow alert, if not a red alert, when the government includes on page 9, line 23, a regulation-making power about which the government says, "Well, we don't really intend to use it anyway, and we can't actually provide the house with a description of any persons or class of persons that we intend to prescribe", but it is then compounded by lines 25 and 26, under which the infamous king could come along and say, "Well, irrespective of everything else that Parliament's just passed from page 8, line 19 through to page 9, line 22, it means nothing in this instance because I say so by virtue of this special regulation that I've passed." That is something that would ordinarily exercise the mind of the Legislative Council, certainly in previous Parliaments,

and certainly it would exercise the mind of the Standing Committee on Legislation irrespective of the composition of that committee and the chairing of it. It has been routinely drawn to members' attention and it seems inappropriate to be included in the bill. The point that I make is that if lines 23 to 26 were to be deleted, I guess, by the government's own admission, that would not be fatal to the bill because at the present point in time the government does not intend to prescribe any regulations under proposed section 19E(4).

To conclude this particular theme, is it the government's view that it considers both proposed subsections (4) and (5) to be necessary, as distinguished from desirable; and, if it is to be considered necessary, why is it necessary?

Hon SUE ELLERY: I have nothing further to add than what I have already said, honourable member. I note the member's views. They have been expressed before, not just by him, but by others in this chamber. I note the member's views, but the government is not of a mood to delete either proposed subsection (4) or (5). The best advice I have been given is that proposed subsection (5) is a safety net for proposed subsection (4). I note the point the member is making. I have been in this place for a long time, so I understand the arguments, but the government is not of a mood to delete them.

Hon NICK GOIRAN: As I speedily move to the next item for consideration in clause 7, I must make a little note to myself on the next occasion to undertake some research on the occasions when Hon Sue Ellery was in opposition and might have railed against Henry VIII clauses.

Hon Sue Ellery: You'll find them.

Hon NICK GOIRAN: I want to do it, Leader of the House, so that next time I can actually quote the remarks made by the honourable member once upon a time.

Hon Sue Ellery: It will not change my opinion.

Hon NICK GOIRAN: No, I understand that and I appreciate that in this instance the Leader of the House is operating under the instructions of the minister whom she is representing.

That said, I take the minister to proposed section 19F, which deals with a reportable allegation, and, in particular, the definition of "reportable allegation". In the New South Wales Children's Guardian Act 2019, division 6, sections 40(1) and (2), reference is made to the standard that is to apply when assessing whether conduct is in fact reportable conduct. The New South Wales legislation says that when assessing conduct, the head of the relevant entity must make a finding of reportable conduct if it is satisfied, on the balance of probabilities, that the case against the employee has been proved. Subsection (1) says —

> The head of the relevant entity or the Children's Guardian must make a finding of reportable conduct if it is satisfied that the case against the employee the subject of the reportable allegation has been proved against the employee on the balance of probabilities.

Subsection (2) states —

> Without limiting the matters the head of the relevant entity or the Children's Guardian may take into account in deciding whether it is satisfied the case has been proved on the balance of probabilities, the head of the relevant entity or the Children's Guardian may take into account —
>
> (a) the nature of the reportable allegation and any defence, and
>
> (b) the gravity of the matters alleged.

Compare and contrast that with what we have here in proposed section 19F, which commences at page 9 of the bill. Members will see that the threshold that is to be applied is "belief on reasonable grounds". Keeping in mind that the genesis of this matter was the New South Wales legislation and the findings of the royal commission with a view to having a nationally consistent approach, why is a different threshold being applied in this legislation?

Hon SUE ELLERY: There are a couple of things here. The honourable member has me at a disadvantage as I do not have in front of me the New South Wales act that he just referred to. I am advised that the member was referring to the provisions in that act that relate to an investigation once it has been conducted and an outcome determined. The bit we are dealing with in proposed section 19F is the grounds on which a report of an allegation is made, and the language is the same as that in Victoria and the ACT—that is, with reference to reasonable grounds or reasonable belief. In New South Wales, the relevant comparison—apples with apples—is an allegation that an employee has engaged in conduct that may be reportable conduct. I do not know that we were necessarily comparing apples with apples.

The other bit of information I have been provided with is that the definition of "reportable allegation" in the bill before us now is, in addition to being consistent with Victoria and the ACT, also consistent with our Western Australian legislation for children and community services, specifically in relation to mandatory reporting, working with children criminal record checks, and assessment and reassessment for child-related employment.

Hon NICK GOIRAN: If it is the case that a reportable allegation is merely the beginning of the matter and not a finding, what is the standard that will be applied by the Ombudsman and relevant entities when making such a finding?

Hon SUE ELLERY: I am advised that it is not set out in the legislation before us, and that, because it is deemed a civil matter, the WA regime will apply on the basis of the balance of probabilities.

Hon NICK GOIRAN: But that is not found in the bill before us.

Hon Sue Ellery: Correct.

Hon NICK GOIRAN: Why was the decision made to exclude it from the bill before us when it is expressly in the New South Wales legislation?

Hon SUE ELLERY: It was considered not necessary on the basis that the Ombudsman's own act, for example, operates on the balance of probabilities. It was deemed not necessary to spell it out in these provisions as that is how the Ombudsman conducts their obligations under their other legislative regime.

Hon NICK GOIRAN: Does the Parliamentary Commissioner Act 1971 contain a provision that sets out that the standard is on the balance of probabilities?

Hon SUE ELLERY: I am not sure we can take it much further because I am advised that no, it is not contained in the provisions of that act, but that is the way that the Ombudsman, whoever has held the position, has conducted their obligations in respect of the functions they have had to carry out.

Hon NICK GOIRAN: In other words, the Ombudsman, whoever holds that role, has always known without it needing to be specified by Parliament that the standard that is to be applied is the balance of probabilities. Despite the fact that New South Wales expressly put that in there, the decision was made to say it was unnecessary to do so here. I compare and contrast that with the information provided earlier on the definition of a child, which in the bill before us, at proposed section 19C, means a person who is under 18 years of age. Again, the Ombudsman, whoever that person is at any time, does not need the benefit of Parliament to tell them that a child is somebody under the age of 18, yet in this instance the government has expressly decided to include it. When I asked earlier why that was included, the explanation that was given was that is what was done in the other legislation. I simply point out that that approach was taken with regard to the definition of a child, yet it is not provided with regard to the standard of proof necessary to make a finding. Of the two, I would have thought that the standard of proof required for the finding would be the more important of the two, because it is the one that might be the subject of more detailed debate or consideration. Nevertheless, that is what the record currently reflects.

I turn to proposed section 19G, which deals with the concept of reportable conduct as distinct from a reportable allegation. This proposed section will be subsequently amended. Despite the fact that proposed section 19G begins on page 10 at line 5 and continues on to page 11 at line 4, it will change in about 15 months' time, particularly with regard to subsection (1). At the moment, reportable conduct will include conduct of —

(a) a sexual offence;

(b) sexual misconduct;

(c) a physical assault committed against, with or in the presence of, a child;

(d) an offence prescribed by the regulations for the purposes of this paragraph.

But in 15 months' time, it will also include —

(ca) significant neglect of a child;

(cb) any behaviour that causes significant emotional or psychological harm to a child;

That is by virtue of clause 26 of the bill. The minister will see at proposed section 19G that the conduct includes conduct irrespective of whether it has been commenced or concluded and whether the conduct occurred before, on or after commencement day. I am not concerned about conduct that has occurred on or after the commencement date, but I am interested in conduct that has occurred before the commencement date. When will time begin to run on the obligation of an entity to notify with regard to conduct that has occurred before?

Hon SUE ELLERY: Notification is required from the day that the proclamation is made. To use the member's description, the clock starts ticking on the obligation to report from that time.

Hon NICK GOIRAN: Does that mean that on the day of clause 7 being proclaimed as operative, a large backlog of notifications will be required to be sent to the Ombudsman?

Hon SUE ELLERY: They are obligated to meet those provisions only once they become aware. If they have been aware before, which I think is the member's question —

Hon Nick Goiran: Yes, they might be aware now, for example.

Hon SUE ELLERY: Yes, then presumably they have also advised police or whomever else, depending on the particular circumstances. That might already be known. The answer to the member's question is yes, there may well be historical matters that they will need to report from that time on. I need to clarify that. If they become

aware after that date, the obligation is then; the clock starts ticking once this clause is proclaimed and they become aware of an event. It is not that the clock starts ticking on proclamation day. If they have known something for the last 10 years, 20 years, six months or six days, they will now have an obligation. The obligation to report is when they become aware of something new after the date of proclamation.

Hon NICK GOIRAN: Is it the case that the conduct that is being notified of must pertain to a person who is a child at the time the notification is given?

Hon SUE ELLERY: It is when the person was a child. This clause will be proclaimed. If the head of the entity becomes aware of conduct that occurred to someone who is now 21 years old, but was a child at the time, that is reportable. The question that needs to be answered is whether the person was a child when it happened. That is despite the fact that they may be an adult when they are reporting it to the entity.

Hon NICK GOIRAN: If that is true, that means that all matters forever with respect to an entity would need to be reported to the Ombudsman because there is one of two scenarios. The head of an entity, as at today, 16 August 2022, will already be aware of a certain number of matters but does not currently have an obligation to report them to the Ombudsman. Some of those matters will pertain to persons who are now adults. Once the operative provisions of the bill come into effect in approximately three months, the head of that entity might then become aware, for the first time, about what I would describe as historical matters, including those for persons who are now adults, and including matters that the head of the entity knows have already been reported to the police. It might have even been through the redress scheme and so forth. Is it really the intention of government that, in those instances, we still expect them to go to the Ombudsman and give them a notice?

Hon SUE ELLERY: The answer to the member's question is yes, also assuming that the person is an employee at the time that they bring it to the attention of the entity. But I think the point needs to be made that in that first report, the entity is saying, "This is what I have become aware of. This is what I have done. This is what I intend to do." The office of the commissioner will need to consider whether it is historical and whether it has been reported to the police and has been through the redress scheme et cetera and make a judgement about what, if any, further action needs to be taken. The prime purpose here is protecting a child.

Hon NICK GOIRAN: If the entity were aware of information of instances of a former employee, would there be no obligation on the part of the entity to report back to the Ombudsman?

Hon SUE ELLERY: That is correct.

Hon NICK GOIRAN: The minister will recall that I mentioned with respect to proposed section 19G that what is currently before us on pages 10 and 11 of the bill will not be the content of the act in approximately 15 months' time, because proposed subsection (1) will be expanded to include the provisions in clause 26. Is it then the case, just going further with these entities and their somewhat complicated obligations, that in approximately three months' time, we will say to them, "You need to inform the Ombudsman about any reportable conduct—sexual offences, sexual misconduct or physical assault—of your current employees. Be aware, entities, that in 12 months' time, we are going to retrospectively impose upon you a requirement to upgrade your notice." The notice that an entity may give at the three-month mark—that is from today—will suffice for 12 months, but in 15 months' time, will we expect them to send in a revised version in the event that their employee is otherwise captured by what is described as "significant neglect of a child" or "any behaviour that causes significant emotional or psychological harm to a child"?

Hon SUE ELLERY: While the officers are considering further advice for me, the member will recall—I also made the point in answer to earlier questions—that there will be a whole series of educational materials and programs prepared. I cannot imagine that the Ombudsman's office is going to be silent on that part that is coming into effect at a later period. But I will check with the officers whether there are any other points I need to make.

The advisers have confirmed that when the Ombudsman's office does that initial round of educational programs et cetera, it will make reference to the fact that there will be two additional criteria added. The extra time will give it the opportunity to prepare the material that will provide guidance to entities on what sorts of things constitute the elements that are set out in those two provisions in clause 26. We talked about this before. The member knows that those elements are a bit harder to identify and understand with some precision.

Hon NICK GOIRAN: The minister would be particularly mindful of this because one of the classes of entities is providers of education services.

Hon SUE ELLERY: With due respect, they are already used to looking at things like neglect and emotional and psychological abuse.

Hon NICK GOIRAN: Sure, but the principals of these schools do not have an obligation to report to the Ombudsman.

Hon SUE ELLERY: That is correct. All I am saying is that that category of people is most likely to understand what they are looking for.

Hon NICK GOIRAN: Yes, they are already on alert for these types of things in the ordinary course of their employment. They will need to return to the historical records on each of the employees in their school and ascertain whether there has ever been an allegation of any behaviour that causes significant emotional or psychological harm to a child.

Hon SUE ELLERY: That will be the case if someone comes to them, so remember the bit that we discussed earlier. It is not about them trawling back through their records. Once this legislation comes into effect and someone brings something to their attention, they will need to ascertain to what extent that is a reportable matter. They will go back and look at the provisions. They may need to do that piece of work when the provisions in clause 26 come into effect. If someone has come to them in the intervening period, they may need to do that, but it is not a case of a principal sitting there and being obligated to go back and look through all their files even if nobody has come to them or said anything. The obligation to provide a report to the commissioner kicks in if someone comes to them after these provisions have been proclaimed.

Hon NICK GOIRAN: Even though the principal of the school has a file, which they know exists, I appreciate that there is a distinction between people and what they might choose to do, in any event, out of a sense of moral obligation and what they are required to do under the law, with the pain of the penalty for failing to do so. To be clear: we are saying that the principal of the school, even though he or she knows that they have a file on a complaint about behaviour that causes significant emotional or psychological harm to a child and the complaint relates to a current employee, unless somebody actively brings it to their attention after commencement day, for the sake of the exercise that we are going through right now, by knocking on their door, metaphorically speaking, and saying, "I just remind you of that matter that you have in that file", they are not obliged to contact the Ombudsman.

Hon SUE ELLERY: That is correct. Let us go back to the first principle. It is about keeping children safe. If someone had reason to believe, irrespective of their obligation, that an allegation had been made against a teacher, a gardener, whoever, at a school, and they did not believe it had been properly dealt with at the time, they might feel inclined to lodge a report in any event. Having said that, these things are treated very seriously when those sorts of allegations are made, irrespective of this regime coming into effect. At the stroke of a pen, the director general has, can and does when required—far too frequently for my liking—say, "You are banned from school because X, Y, Z allegation has been made." There are strong mechanisms in place now.

I am not saying that that principal will be turned away by the Ombudsman; I am saying that the legal obligation to report kicks in if someone comes to them after this legislation has been proclaimed. If they have reason to believe that someone is still teaching kids and children are at risk, as opposed to saying that the police dealt with it 15 years ago and that person is no longer working in the schools, and they know that to be a fact, they might not do anything about that. They are certainly not obliged to and they might feel no moral obligation to because it was dealt with appropriately at the time. We should go back to the first principle. Are children at risk? Once this legislation becomes law, I think any principal worth their salt who believes that children are at risk will make a report anyway.

Hon NICK GOIRAN: Indeed. We would think that in that situation they would already have taken some industrial action with respect to the employee whom they are concerned about. I refer to a scenario in which a historical matter has been investigated and not substantiated, and somebody then comes forward and reminds the principal of the historical matter, but the principal feels no need to report that to the Ombudsman because it has already been looked into and it has been found that it has no substance. Would the fact that it has been raised on a fresh occasion trigger an obligation to go to the Ombudsman?

Hon SUE ELLERY: Yes, it would.

Hon NICK GOIRAN: The particular category of matters that is described as reportable conduct in proposed subsection (1) at present includes the following three things —

(a) a sexual offence;

(b) sexual misconduct;

(c) a physical assault committed against, with or in the presence of, a child;

There is also a fourth category, which is —

(d) an offence prescribed by the regulations for the purposes of this paragraph.

I assume that is another one of those famous McGowan Labor government safety valves.

Hon SUE ELLERY: I think it is fair to say it is one of parliamentary counsel's safety valves.

Hon NICK GOIRAN: Is it not the intention to have any offences listed?

Hon SUE ELLERY: We do not have a list.

Hon NICK GOIRAN: Not only will there not be a list, but also it is not presently the intention to include any offences by the use of that subsection?

Hon SUE ELLERY: No.

Hon NICK GOIRAN: At the moment, we can reasonably take it that in approximately three months' time, we will have these three categories. Are each of those three categories of sexual offence, sexual misconduct and physical assault included in the legislation in New South Wales, Victoria and the Australian Capital Territory?

Hon SUE ELLERY: Yes, they are.

Hon NICK GOIRAN: Further to that, do those other jurisdictions also include significant neglect of a child, and behaviour that causes significant emotional or psychological harm to a child?

Hon SUE ELLERY: Yes, they do.

Hon NICK GOIRAN: I refer to proposed section 19H, "Reportable conviction". Will overseas convictions be captured under this proposed section?

Hon SUE ELLERY: Convictions under the jurisdiction of other states will be, yes. Convictions under commonwealth legislation will be, yes, even if that offence is committed under Australian commonwealth legislation but in another country.

Hon NICK GOIRAN: I am not talking about those types of offences. If a person was convicted of an offence overseas, would that be captured here?

Hon SUE ELLERY: I am advised that it will not be captured by being an offence, but it will be a reportable allegation. If someone says, "I know that person X committed this crime in"—insert country of your choice—that will be a reportable allegation, and steps will need to be taken to report it. Decisions will be then made about how best to investigate it et cetera.

Hon NICK GOIRAN: I ask the Leader of the House to turn to proposed section 19I, "Entities to which reportable conduct scheme applies". It states —

> The reportable conduct scheme applies to an entity set out in column 2 of Schedule 2 that —
>
> (a) exercises care, supervision or authority over children as part of its primary functions or otherwise; and
>
> (b) is not exempt under section 19O(1).

We have discussed previously that the bill captures government departments and agencies, but does the bill include commercial services for children, including entertainment or party services, gym or play facilities, photography services and the like?

Hon SUE ELLERY: I am advised that they are not included. The royal commission, in its final report, provided a rationale for certain institutions not being covered by reportable conduct schemes. It states —

> The recommended scope of reportable conduct schemes is narrower than the types of institutions required to comply with the Child Safe Standards.
>
> We do not recommend that institutions providing the following services come within the scope of reportable conduct schemes:
>
> - activities and services provided by clubs and associations with a significant membership of, or involvement by, children
> - coaching or tuition services for children
> - commercial services for children
> - transport services for children.
>
> Some of these services may nevertheless be covered if they are ancillary to other services that are covered—for example, transport services that are ancillary to a disability service.
>
> Given the limited evidence before us relating to these types of institutions, we believe that it would be a disproportionate regulatory burden to require that they be subject to additional oversight through reportable conduct schemes. In reaching this conclusion we also considered:
>
> - the relatively lower responsibility that these institutions have for the care, protection and supervision of children

If the honourable member think's about a children's birthday party organisation, a child might come into contact with that service once a year for a number of hours, as opposed to living in residential care in the care of the state. The report continues —

- the significant regulatory burden that reportable conduct schemes place on institutions that have a high membership base and low resources, or that operate as sole traders or small businesses
- the large number and diverse nature of institutions in this group, which could make regulation by government impractical
- the potentially limited capacity of an oversight body to engage with and support these institutions in addition to the types of institutions that we recommend be covered
- the fact that most of these institutions are not covered by the existing New South Wales, Victorian and Australian Capital Territory schemes.

…

Other existing and recommended regulatory mechanisms will ensure that institutions whose employees engage in child-related work, but are not covered by reportable conduct schemes, are nevertheless encouraged to improve their responses to, and reporting of, child sexual abuse.

The commission flagged that it might be considered something to do in the future and that state and territory governments should periodically review the operation of reportable conduct schemes to determine whether the schemes should cover additional institutions. I am also advised that that is specifically covered in the review provisions in the bill before us.

Hon NICK GOIRAN: I understand the point that the minister makes about those organisations that have what might be described as one-off contact with children. One of the categories that the minister mentioned is coaching or tuition services for children, and by the very nature of those activities, it would be more often than not the type of activity that is done on an ongoing basis, rather than a one-off basis, yet it will not be captured by the reportable conduct scheme. If I compare and contrast that, we see that page 58 of the bill has "Examples of activities, facilities, programs or services" that are intended to be captured by religious bodies, such as art groups, choir and music groups, dance groups, sports teams, tutoring services—to name just a few examples listed there. It is not obvious to me why those activities would be seen as more dangerous with regard to child-safe standards just because the organisation that runs it happens to be a religious body.

Hon SUE ELLERY: I will get some advice, but it is also the case that we could expect that if a child is interacting with one of those services, that is not the only contact they would have with that religious organisation. It is likely that they will attend more than just a youth group, for example, but I will see whether there is further advice I can give the member.

I am advised that it was trying to identify where ministers of a religious organisation, who would be considered employees, might engage with children, and that is why a list was provided of the scope of things which a religious organisation does but which, if they happened with a birthday party provider or a tutorial service, are not included. It is about recognising that ministers in a faith-based organisation will be captured as employees and to set out, as I understand it, the kinds of activities that they may be doing.

Hon NICK GOIRAN: It includes employees of that religious body, contractors and volunteers. Let us take, for example, a netball team that is run by a religious body compared with a netball team that is run by a secular organisation. Two different standards will apply, yet the risk to children participating in that activity, I argue, would be the same. It is not apparent why one group would not be captured, keeping in mind that someone who might be the coach of that particular netball team almost certainly in that context will be a volunteer. The person might even volunteer to be the coach in two different organisations. If there is reportable conduct in one, the Ombudsman will be notified as a matter of law; if it happens in the other organisation, not necessarily. In fact, in that situation, can the Ombudsman still receive a complaint if the scope of the conduct falls outside of the scheme?

Hon SUE ELLERY: The advice I have been provided is that religious institutions were deemed to be generally larger institutions than, say, an organisation that is running local netball teams. That may or may not be the case, and the member could probably come up with examples of when that is not the case. The prospect was that the royal commission said this is where to start, because of the evidence put before it about where the perpetrators of abuse against children have been and are. The member will note from the bit I read out earlier that the royal commission made the point that it was going to start with this. It was not going to include those other organisations because the burden of the regulatory regime would be too great on them, but it will not walk away from that forever and we need to take account of that in the review provisions, which is what we have done. The member is right if his line of thinking is that it is not perfect and it is not logically consistent. I understand the point the member is making, but the royal commission said, on balance, that the evidence before it is those institutions that have been the perpetrators of abuse.

Hon NICK GOIRAN: I thank the minister for that explanation. At least it helps to explain what I think we would describe as the start of this rather than necessarily being the finish line. That is helpful when we consider that the legislation currently before us talks about dealing with this in two phases. I guess the minister is encouraging us

and those observers who are interested in the passage of this bill to not see it as a two-phase reform but just the first two phases of reform. I think the minister has foreshadowed a future clause dealing with the issue of review.

Thinking about sports teams, it would be troubling. I go back to the fact that in the early group we will have providers of education services. It is routinely the case that providers of education services will have sports teams, just as it is with religious bodies, and these sports teams will be captured by that. But if a sports team falls outside those types of providers, at least for the foreseeable future, it will not be captured. That means that those who are particularly concerned about child safety will need to give special regard to those organisations, because the last thing we want is the perpetrators shifting their activities from schools and religious organisations, and seeing opportunities in other organisations that they might see as vulnerable. Such is the challenge for all of us.

Minister, speaking of schools and proposed section 19I, if a school was to use a subcontractor, let us say a plumber, to fix its bathrooms and an employee of that subcontractor is accused of reportable conduct, who is the head of the entity? Is it the school principal or the owner of the plumbing business?

Hon SUE ELLERY: The bill captures those contractors in schools who are engaged in a contract in activities related to children, say, a childcare service on a school site. In that case, the head of the entity is the director general for the Department of Education. A plumbing service, such as the example the member gave, is not captured by this.

Hon NICK GOIRAN: Is that because the service that the business is providing to the school is not a service related to children, even though a person might be working on bathrooms that the children are using?

Hon SUE ELLERY: That is correct, but that is a bad example because the kids would not go into the bathrooms while the plumber is working on them. The plumber would not want that. The kids would probably love it, but the plumber would not want that. Theoretically, that is correct. It is about the services they are engaged to provide. If they provide services to children, they are captured; and, if not, they are not.

Hon NICK GOIRAN: To use, perhaps, a better example, what about a contractor who is brought in by the school to look after the gardens? They will be all over the campus. Their job is to deal with the plants and so forth —

Hon Sue Ellery: Reticulation.

Hon NICK GOIRAN: Yes—the weeds, the height of the lawns and the like. They do not necessarily interact with children. That said, I cannot be the only student—back in the day—who had some interactions with the gardener. I think that would be routine; in fact, it would be a rather rude gardener who cannot even say hello to a child who walks by. In fact, I think the school and the principal would encourage that for the culture of the organisation. The point is that the subcontractor, who is providing a gardening service, is not captured by the scheme.

Hon SUE ELLERY: I am advised that a contracted gardener is not covered, but if the gardener is employed directly by the school, they are.

Hon NICK GOIRAN: I ask the minister to turn to the provision about employees of relevant entities, which is found at page 7. Proposed section 19D defines an employee of a relevant entity. We already know from the previous discussion that the starting threshold requires the person to be over the age of 18. Paragraph (a) defines an employee as —

> an officer or employee of the relevant entity …

That is exactly the scenario that the minister just outlined: the gardener is an employee of the relevant entity. Paragraph (b) states the employee must be —

> engaged by the entity to provide services to children, including as a volunteer or contractor …

The minister has indicated that so long as the volunteer or contractor is engaged to do something on the premises other than provide services to the children, they are not captured by the scheme. Is that the case in the other jurisdictions?

Hon SUE ELLERY: I am advised that it is.

Hon NICK GOIRAN: Proposed section 19J, which deals with the objects and principles of this division, refers to three objects —

> (a) preventing reportable conduct; and
>
> (b) reporting, notifying and investigating reportable allegations and reportable convictions; and
>
> (c) taking appropriate action in response to findings of reportable conduct.

Proposed paragraphs (b) and (c) seem to be obviously addressed by the bill. How is it that this division will help to prevent reportable conduct?

Hon SUE ELLERY: We have already talked about the extent of the work that will be done on education and the level of consultation that will happen with industry and peak bodies of industry to provide assistance to those who will be obligated to report. That of itself will mean there will be significant public awareness of the issues around

reportable conduct and abuse of children. If we use the netball example again, a person may well find themselves in that position during the course of their work, because they run a school or whatever it is that will be covered by this legislation, and they will carry that information with them for the rest of their life, whether it is attending their kids' netball games on the weekend or whatever. In the first instance, there will be an enormous number of people in the workforce and in the organisations captured by this legislation who will be made aware of the obligations. In a sense it is like achieving cultural change. Once people start to talk about family and domestic violence, for example, a lot of things flow from that. I am going to see whether there is further information I need to give the member. But in a very general sense, at the very least there will be public awareness of the issues.

I am also advised, and the honourable member might intend to take us there anyway, that proposed section 19R sets out the provisions the head of the relevant entity has to put in place to prevent reportable conduct as well.

Hon NICK GOIRAN: I thank the minister for that explanation. Proposed section 19L starts to carve out scenarios in which the scheme will no longer apply to an agent of the Crown. Why is that so?

Hon SUE ELLERY: I think this is another—let us hope he is not listening—standard Parliamentary Counsel special. I am advised that this is a standard clause in many pieces of Western Australian legislation.

Hon NICK GOIRAN: Can we look at the first one, minister?

Hon Sue Ellery: These are around penalties.

Hon NICK GOIRAN: Yes. Proposed section 19L states that proposed section 19U(6) will not apply if the relevant entity is an agent of the Crown. Proposed section 19U(6) says —

> It is an offence for the head of a relevant entity to fail, without reasonable excuse, to comply with subsection (2).
>
> Penalty for this subsection: a fine of $5 000.

I think the minister gave the example of a director general earlier; I cannot recall whether it was Education or Communities.

Hon Sue Ellery: Yes, it was Education.

Hon NICK GOIRAN: Let us use that as an example. Hypothetically, the director general for Education fails without reasonable excuse to comply with proposed subsection (2)—that is, to give written notice to the Ombudsman within seven working days—and is then immune. I do not think that that can be said to be a Parliamentary Counsel special and something that is routinely found in legislation.

Hon SUE ELLERY: I am advised that is correct, honourable member.

Hon NICK GOIRAN: It is correct in the sense that that is what would occur: the director general would be immune from prosecution, and the government considers that to be satisfactory. This will apply only to agents of the Crown; it will not apply to anybody else. Therefore, if anyone else in Western Australia under these headings—forget about the public bodies, because they are the immune ones; they are the special class of Western Australian citizens—a provider of private education services, private health services, out-of-home care services, childcare services or youth justice services, or the religious bodies that we discussed earlier, or providers of disability services or accommodation and respite services for children, fails to notify the Ombudsman within seven working days, under this new scheme that we are about to pass, they will be subject to a fine of $5 000. But if they happen to be in the luxurious position of being within a public authority, they do not need to be worried about that.

Hon SUE ELLERY: I would not describe it as a luxurious position. The member is right, though; they will not be subject to the fines and penalties. But it is the case, for example, that relevant heads of entities in the public sector have agreements in place with the Public Sector Commissioner and are required to comply with legislation, and the Public Sector Commissioner can take action against them on the basis of their failure to comply with relevant legislation.

Hon NICK GOIRAN: Minister, that is with respect to proposed section 19U(6), which is the notification to the commissioner. But as we consider what else these individuals are immune from, we turn to proposed section 19W, "Head of relevant entity must respond to reportable allegation or report conviction". Proposed subsection (7) states —

> It is an offence for the head of a relevant entity to fail, without reasonable excuse, to comply with subsection (1) or (6).
>
> Penalty for this subsection: a fine of $5 000.

The type of element that the head of a relevant entity will have failed to have done, without reasonable excuse, is set out at proposed section 19W(1), which states —

> As soon as practicable after the head of a relevant entity becomes aware of a reportable allegation or reportable conviction involving an employee of the relevant entity, the head of the relevant entity —

(a) must —

(i) investigate the reportable allegation or reportable conviction …

And so on and so forth. Again, if you are the director general of Education, the director general of Communities or, indeed, the Commissioner of Police, you need not be concerned because you can fail to respond to such an allegation or reportable conviction and there will be no penalty for you. Is there some other way in which these individuals will be captured so that they are not treated—I say it somewhat tongue-in-cheek, but for the lack of a better description—as a first-class citizen who is immune from these things while everybody else has to comply with the state of the law?

Hon SUE ELLERY: As was just set out in the example the member gave at proposed section 19U(6)—it can be provided for the other two that are listed in the same proposed section—as public servants, as heads of their respective agencies, they are held to account by the agreements that are put in place between them and the Public Sector Commissioner, which will include provisions that they need to comply with legislation. In fact, the outcome for them may be considerably worse than a $5 000 fine. Although they are excluded from these provisions, they will not fail to be held to account. The Public Sector Commissioner holds them to account, and they are expected to comply with all relevant legislation.

Hon NICK GOIRAN: Will there be a protocol in place for the Ombudsman to report these matters to the Public Sector Commissioner?

Hon SUE ELLERY: There does not need to be a protocol in place. The Ombudsman can report matters to the Public Sector Commissioner at any point. I will check and see whether it is planned to have one, but the Ombudsman has regular catch-ups with all sorts of senior people in government, including the Public Sector Commissioner. The Ombudsman has a role to monitor the rollout and implementation of the scheme, so he can make a report at any time to anyone about that. Of course, the Ombudsman has powers equivalent to those of a royal commission. For example, if he wanted to hold an inquiry off his own motion, he has the power to do so.

Hon NICK GOIRAN: If we consider proposed section 19W(7), we see that it states —

> It is an offence for the head of a relevant entity to fail, without reasonable excuse, to comply with subsection (1) or (6).

That deals with them becoming aware of a reportable allegation involving an employee, and they are required to investigate, but they have not done so. For reasons I will explain in a moment, the Ombudsman might be completely unaware that that situation has occurred. In contrast, the earlier provision provides that information must be disclosed to the commissioner within seven working days. It will, of course, be the Ombudsman who decides whether to instigate a prosecution under that provision. It may be a situation in which the Ombudsman has a case before him and one of his hardworking officers says, "I need to let you know, Mr Ombudsman, that person X has failed to provide this information within seven working days and is therefore in breach of section 19U. I recommend that you take some action." He then says, "Thank you for drawing that to my attention. Unfortunately, what you have failed to highlight is that this person cannot be captured because they are an agent of the Crown." Surely the Ombudsman must have a protocol at that time to say, "Look, instead of referring this matter to police for a prosecution, my standard operating procedure is that I now launch some kind of complaint or send some material to the Public Sector Commissioner."

Hon SUE ELLERY: It is not that they are not captured; it is that the penalties set out therein do not apply to them. When that comes to the attention of the commissioner, the commissioner's response would be the same as it would be if the person were the head of a private sector organisation—that is, "Provide due cause. Do you need assistance? Is there some way I can help you meet your obligations?" The difference is, ultimately: what power does the commissioner have to implement the penalty? That is where the difference is; it is not that they do not have the obligation. In the same way that the Public Sector Commissioner provides training for directors general and others around all manner of governance obligations, including which matters must be reported to the Corruption and Crime Commission et cetera, I am absolutely sure the Public Sector Commissioner would do the same kind of exercise in this situation. As I said, although the powers of the Public Sector Commissioner to deal with a director general who has failed to comply with a piece of legislation that they are required to comply with do not run to imprisonment, they certainly have the capacity to go beyond a $5 000 fine.

Hon NICK GOIRAN: The point is conceded that the penalties, or the sanctions, for an agent of the Crown almost certainly would be more severe than the penalty that is set out in this proposed section, so I do not quibble with that. What I am trying to seek confirmation of is that there will actually be a sanction and a defined process, because here in the legislation there certainly is in regard to any other Western Australian captured by the scheme. I would describe these particular individuals as being silent.

Hon Sue Ellery: I understand the point you are making.

Hon NICK GOIRAN: That could be satisfied by there being an already existing protocol in the Ombudsman's office to say that any instance when an agent of the Crown is seen to be in breach of the Ombudsman's legislation, the Ombudsman has a protocol that automatically refers the matter to either the Public Sector Commission or the Corruption and Crime Commission. That may already exist. I do not know. I guess that is what I am trying to get to the bottom of.

Hon SUE ELLERY: I understand the point the honourable member is trying to make. I am not sure whether a formal document or memorandum of understanding like that exists and I do not think I have that information at the table, but I can tell the member that the Public Sector Commissioner makes it her business to make sure that her officers are complying with the legislation they are required to comply with. I am sure that she will have conversations with the Ombudsman and I am sure that he will probably initiate the same thing in reverse, but the penalty rests in the functions that she carries out and the policies and procedures she has in place. They go to the performance agreements that she has with the public sector directors general that have set out within them a whole range of standard provisions, which include compliance with the legislation pursuant to their particular responsibilities. The member will not find it in this bill. That is where that set of provisions exist.

Hon NICK GOIRAN: I will conclude with an observation, hopefully for the benefit of Parliamentary Counsel if they are listening to this debate. I understand what is trying to be achieved here. I think that a nice solution when we find this scenario before us in future legislation would be to simply mandate that a report has to be made to the Public Sector Commission or the CCC. All that would be required is an extra clause to say that the commissioner—that is, the Ombudsman—must, in the event that he or she finds these scenarios to have unfolded, report the matter to one of those organisations. I think that would neatly capture everything, but we can move on.

The minister has helpfully, during her second reading reply, set out the supplementary resources that will be provided to the Ombudsman to fulfil this new expanded role, which is set out at proposed section 19M, "Functions of the commissioner in relation to scheme". That sets out proposed subsections (1)(a) through to (k). The minister will see that it includes at proposed subsection (1)(j) on page 15 that a report will be provided to Parliament on the reportable conduct scheme. What will be the frequency of that reporting?

Hon SUE ELLERY: The commissioner will report annually to the Parliament but may also make a report about any matter at any time, and is not precluded from doing that.

Hon NICK GOIRAN: Will there be a specific annual report?

Hon SUE ELLERY: Yes.

Hon NICK GOIRAN: Is that distinct from the annual report that the Ombudsman provides?

Hon SUE ELLERY: I am advised that it will be within the report that the Ombudsman provides.

Hon NICK GOIRAN: Proposed sections 19M(1)(e) and (f), on page 14, refer to the commissioner considering whether or not something is in the public interest. Does the Ombudsman currently have to apply a public interest test from time to time?

Hon SUE ELLERY: There is a public interest provision in the secrecy provisions of the Parliamentary Commissioners Act.

Hon NICK GOIRAN: At proposed section 19N, what class or type of conduct is likely to be exempted by the commissioner?

Hon SUE ELLERY: Examples of conduct that may be exempted include: conduct that has been identified as not creating a heightened risk for children, which therefore does not need to be captured by the scheme; specified conduct for entities that have established effective investigation processes and demonstrated an ability to respond to investigations to an appropriate standard; conduct that has been inadvertently included; and conduct that it is no longer appropriate or necessary for the scheme to capture. As the member will note in proposed subsection (2), the commissioner must publish the details of that. I am also advised, if it is helpful to the honourable member, that recommendation 7.10 in the royal commission's report was that reportable conduct schemes should provide for power to exempt any class or kind of conduct from being reportable conduct.

Hon NICK GOIRAN: That takes us to proposed section 19O and the exempt entities, or the possibility of entities being exempt. Is it the intention to exempt any entities?

Hon SUE ELLERY: No, not at this point, but as the scheme matures, that might come to be considered prudent.

Hon NICK GOIRAN: Do New South Wales, Victoria and the ACT all include these types of exemption provisions?

Hon SUE ELLERY: Yes.

Hon NICK GOIRAN: At proposed section 19P, we move from the notion of exempting conduct and entities and we turn to exempting investigations. Will the commissioner be required to report on the exemptions that he gives?

Hon SUE ELLERY: I am advised that, no, there is not a specific provision requiring him to do that, but, by way of good practice, it may well be that he does that in a de-identified way in the annual report.

Hon NICK GOIRAN: Yes, I think so, and I would encourage the Ombudsman to give consideration to that for obvious reasons—identifying an investigation would seem to defeat the purpose of exempting an investigation.

If there were to be some form of a table in the annual report, which is not uncommon, that would indicate the frequency of the use of these exemption provisions. I think that would be appropriate, particularly when we consider that at proposed section 19M there is an obligation on the part of the Ombudsman to publish details of any exempt class or kind of conduct, and that that publication will take place on the commissioner's website. It does seem to me that although there is strong transparency with regard to that exemption provision, the silence with regard to proposed sections 19O and 19P, although understandable, might be remediated in the form of a de-identified table or report. I encourage the commissioner to look at that.

Moving to proposed section 19Q, "Commissioner may approve head of relevant entity in certain circumstances", how will the Ombudsman communicate to the heads of each relevant entity their new responsibilities under the scheme?

Hon SUE ELLERY: I am advised that there will be direct contact with the head of the entity. That will also be considered as part of the guidelines and educative material that is being prepared. I am advised that some initial discussions have already commenced with, for example, some of the corporate executives of respective government agencies that will be captured by the regime.

Hon NICK GOIRAN: It seems to me that under proposed section 19Q the relevant entity must take the first step and nominate a person or a holder of a position in the entity to be the head of the entity, and that will subsequently come before the Ombudsman and he will then give that person approval or otherwise. What will happen if no person comes forward?

Hon SUE ELLERY: I am advised that because the commissioner's office will be aware of the entities to be captured, if they do not receive notification from the entity identifying who the head is, they will reach out; that is, the commissioner will reach out to the entity to make sure that they meet its obligations.

Hon NICK GOIRAN: Is that an indication that the government or the Ombudsman knows how many entities will be captured by the scheme?

Hon SUE ELLERY: I am advised that work has begun on identifying the entities to be captured. The work done so far indicates probably about 4 000 entities. That is not a precise figure. Once the legislation is passed, that work will be expedited and the figure will become more precise.

Hon NICK GOIRAN: There is work to be done and the work is underway. At this point it is fair to say that because the work is underway, we do not have a complete list of the entities. As the Leader of the House foreshadowed in an earlier clause, possibly clause 1, what we expect would occur after the commencement of this matter is that new entities will emerge and the Ombudsman cannot necessarily be expected, I do not think, to be in this constant state of scanning and monitoring for the emergence of new entities that may be captured by this scheme. Again, I go to my question: What will happen if an entity exists and does not provide the name and there is no volunteer? Is there any penalty on the organisation for failing to have nominated a head? What kind of power exists for the Ombudsman to pursue this?

Hon SUE ELLERY: While the advisers are finding that bit of information, the member may remember what I said way back at the beginning when we started questioning. The intention is not to take a sledgehammer approach; it is to be educative. As a minister in the government, I imagine that, over time, public sector guidelines, Premier's circulars or whatever would be developed for the public sector so that every time a new entity is created, part of the notification process goes to the obligations under this bill and the commissioner is notified. I imagine that sort of thing would happen over time. As I described for the public sector, for other sectors, I am advised that many of the organisations are already captured in other regulatory frameworks, so lists already exist, for example, for some of the other regulatory frameworks that the Ombudsman's office is familiar with and used to dealing with. If the point the member is making is that this is a big task, there is no question about that. It will be an evolving task as well. It is never going to be static. That is a point well made and understood.

Hon NICK GOIRAN: That is helpful, minister, but when push comes to shove, if a new entity exists, the entity is such that it is intended to be captured by this scheme. As set out in proposed section 19Q(1)(b), if the entity has no chief executive officer or principal officer and it refuses to provide a person, the patient and tolerant Ombudsman will continue to knock on that entity's door and encourage it, because he does not want to take the sledgehammer approach, and educate it on the importance of complying with this scheme. When push comes to shove, what power will the Ombudsman have in this scenario?

Hon SUE ELLERY: There is not a penalty. There is not a fine. There is not an imprisonment. Ultimately, the Ombudsman will have the power to name and shame. As we discussed a few clauses ago, the commissioner will have the power to make a report to Parliament at any time about any matter.

Hon NICK GOIRAN: That is good. I will move on to proposed section 19R. It includes a large range of duties and responsibilities that are being imposed upon heads of relevant entities. Some of these things might be said to already be occurring with—I think this was the phrase used in an earlier part of the debate—a "modern" organisation. We might expect that it would be doing this; nevertheless, it is a fairly robust set of requirements. What is the nature of the support that is going to be provided, particularly for volunteer organisations?

Hon SUE ELLERY: It is recognised that some of the organisations that are going to be captured may not have put some of these things, such as complaints mechanisms, in place already. It is proposed that the Ombudsman's office will work with, and have resources available relevant to, each industry so that organisations can access guidance notes and some common resources through, for example, their peak body organisations. The honourable member would be well aware that organisations such as the Chamber of Commerce and Industry of Western Australia provide a whole range of regulatory, particularly industrial, employment advice to its members, which range from some very small organisations to some very large organisations. Organisations can access guidance notes and some common resources. The provision of education advice and assistance is set out in the functions of the Ombudsman, which we have already canvassed, around education and providing advice.

Hon NICK GOIRAN: I move to proposed section 19S. What is the penalty for noncompliance with proposed section 19S(2)?

Hon SUE ELLERY: Similar to that which I described before, there is no fine, penalty or imprisonment, but, as I have said, the Ombudsman has the power to name and shame—for example, to make a report to the Parliament about any particular matter.

Hon NICK GOIRAN: I take the minister to proposed section 19U, "Head of relevant entity must notify Commissioner". This is where we invoke the seven working day time frame, which I expressed some concern about in the second reading debate. In response to that, the minister explained in part to the chamber that the seven working day period is longer than the Victorian legislation, which I understand has a three-day period, and shorter than the Australian Capital Territory legislation, which has a 30-day period. What is the period of time for the New South Wales legislation?

Hon SUE ELLERY: It is seven days.

Hon NICK GOIRAN: Is that seven working days as well?

Hon SUE ELLERY: Yes, I am advised that it is.

Hon NICK GOIRAN: There has been some interaction with those other jurisdictions, and I think the minister indicated that the Ombudsman visited each of those jurisdictions. Did any of those jurisdictions—Victoria with its three-day period, New South Wales with its seven-day period or the ACT with its 30-day period—indicate whether any problems arose as a result of the time frame that they were using?

Hon SUE ELLERY: No, but if the member recalls, I think I made this point; I cannot remember whether it was in the second reading reply or in reply to a subsequent question. The royal commission made the point that it thought that 30 days was too long. If the prime focus is the safety of children, then waiting 30 days is too long.

Hon NICK GOIRAN: That being so, there was still a decision to not invoke the Victorian model of three days. Why was that?

Hon SUE ELLERY: I thought I said this in my second reading reply speech, but maybe I did not. Originally, the draft had three days. In the process of consultation, stakeholders raised that that was too short, so the seven-day figure was the response.

Hon NICK GOIRAN: I agree. If the head of a relevant entity becomes aware of a reportable allegation or conviction involving a person who is an employee of their relevant entity, they need to be satisfied about a number of things. We have teased out a range of examples over the course of today. These are things that would be in the mind of the head of the relevant entity. It could then be the case that the head of the relevant entity might want to take advice on their obligations. Keep in mind we have already accepted that organisations might choose to use an external investigator because they do not feel equipped to do this themselves, albeit that might come at a cost. In the same spirit, they may want to go to an external source of advice, particularly a lawyer, to make sure they are complying correctly with the scheme. Seven working days will require them to expedite not only seeking the advice, but also receiving the advice. In her reply, the minister helpfully mentioned the possibility of an extension being granted, and referred us to proposed section 19U(4). Is that provision for an extension also available in other jurisdictions?

Hon SUE ELLERY: We do not have that information at the table. I am advised that it is in at least one but I cannot tell the member which one that is.

As I said during my response to the second reading debate, I think it is worth noting that in discussions with the other jurisdictions, from my recollection, nobody reported an issue that they had that amount of time, whether it was three days or seven days. That was not proving to be a barrier.

I also made the point that certainly in the first part of the life of this scheme, the Ombudsman is not looking to use a sledgehammer. It may well be that the head of the entity says that they will do it but they need further advice. Certainly, the approach that the Ombudsman will take in the first instance will be to either guide them in the formal provisions that relate to exemptions or assist them. If we look at this situation in five or 10 years, a different approach may be taken, but the system has to grow and it has to start somewhere. A very deliberate decision has been made. We will not whack people over the head in the first instance.

Hon NICK GOIRAN: Did the minister say that the request for the extension, with respect to this extension provision that is found at proposed section 19U(4), ought to be submitted within seven working days?

Hon SUE ELLERY: I am advised that that would be the expectation.

Hon NICK GOIRAN: The minister mentioned that at least one of the other jurisdictions has an extension provision. Has that extension provision needed to be invoked or used?

Hon SUE ELLERY: I do not have that information at the table.

Hon NICK GOIRAN: I must say that the advisers have been doing an outstanding job recollecting information relating to this matter. It is forgivable, once in a blue moon, for something to not be immediately top of mind. I say that in all seriousness. The advice has been excellent during consideration of this legislation.

I take the minister to proposed section 19U(2)(j). We have one of these infamous clauses. What is the information that is intended to be prescribed by the regulations?

Hon SUE ELLERY: There is nothing specifically planned.

Hon NICK GOIRAN: This is one of those occasions when the government will blame parliamentary counsel and I will blame the government for allowing it to be there, and we will move forward.

Proposed section 19U(6) provides that if the head of an entity fails to comply with proposed subsection (2), the penalty will be $5 000. This penalty level is found frequently throughout the bill. If I remember correctly, when we were discussing this matter under clause 1, the minister was potentially going to go away and see whether there were any significant deviations in the penalties of the other jurisdictions.

Hon SUE ELLERY: I did ask the advisers at the table and was told that there were not.

Hon NICK GOIRAN: So the $5 000 penalty is consistent with New South Wales, Victoria and the ACT, but I think the minister also drew to our attention the Children and Community Services Act.

Hon SUE ELLERY: Yes, four elements in the Children and Community Services Act have similar penalties.

Hon NICK GOIRAN: Very good. I refer to proposed section 19V, "Information may be disclosed to Commissioner or head of entity". What security measures will be in place to ensure that the highly sensitive information that is provided to the commissioner will remain confidential?

Hon SUE ELLERY: I am advised that the Ombudsman is well versed in maintaining confidentiality provisions. Secrecy provisions exist within the legislation that covers his work. I do not have a list of the specific things in place, but the member would obviously be aware that that office carries out a range of other functions and has provisions in place to ensure confidentiality.

Hon NICK GOIRAN: Some of the matters that the Ombudsman deals with are important to the person who is putting the complaint before the commissioner but would not necessarily be at the level of sensitivity as an unproven allegation of sexual misconduct. What types of matters is the office of the Ombudsman dealing with in its functions and role that equates to that level of sensitivity?

Hon SUE ELLERY: The child death review function is one of them. Family and domestic violence is another. Those are serious matters; if the wrong information got out or if incorrect information got out, that could destroy people's lives and could lead to prosecution. Very serious information is held within that office.

Hon NICK GOIRAN: In this instance, unlike perhaps some of those other scenarios, the Ombudsman will have what I think I previously described as a hands-on role working with these entities because the Ombudsman gets to choose whether he wants to monitor them undertaking the investigation or, potentially, sit back and monitor the police undertaking the investigation or, indeed, undertake the investigation himself. When the Ombudsman undertakes his own investigation, there will already be the existing provisions with respect to security of information. Dealing with the police, it follows that the police are routinely dealing with these sensitive matters. A different situation will arise depending on the entity that is involved. Some may be very large and have almost specialists in the field. Others will be quite amateur with respect to these matters, mere novices, yet they will be dealing with the most

highly sensitive information. Will there be special protocols as between the Ombudsman and the entities to maximise the prospect of that sensitive information being kept confidential?

Hon SUE ELLERY: I am advised that will be covered in the guidance and education material that will be prepared. There will be standing operating procedures set out within those.

Hon NICK GOIRAN: Proposed section 19W is another area that we touched on not only in the second reading debate, but also briefly during debate on clause 1. This is the issue of entities having the capacity to engage an independent investigator, but it also enables an employee to investigate the reportable allegation. I previously asked the minister with respect to the protection for reporters and entities, and the minister helpfully drew our attention to proposed section 30AA. Are there any protections in place for the employee undertaking the investigation?

Hon SUE ELLERY: I provided the provisions in my second reading reply. A person cannot do anything to the detriment of another person because they have made a will or may in the future exercise a power or perform a duty imposed by the act. The penalty for that is $8 000 and imprisonment for two years. It is section 30B.

Hon NICK GOIRAN: The minister referred me to the amendment to section 30B found at clause 22, but the $8 000 penalty is in the primary act.

Hon Sue Ellery: Yes.

Hon NICK GOIRAN: I ask the minister to turn to proposed section 19W(4), which states —

> As soon as practicable after making a finding of reportable conduct in relation to an employee under this Act, the head of the relevant entity must ensure that —
>
> (a) appropriate action is taken in relation to the employee in response to the finding; …

What is intended by "appropriate action"?

Hon SUE ELLERY: It will be entirely dependent on the nature of what is found. It could be training, dismissal or referral to the police. It could be all manner of things and will depend entirely on the circumstances. The member may recall from our conversation about measures, for example, that an entity will be required to put measures in place to prevent reportable conduct occurring. We talked about policies and procedures that the commissioner might recommend and provide some assistance on. I anticipate that if policies and procedures are put in place setting out an organisation's expectations and what will happen if they do not comply or are found in breach of them, then the commissioner would expect those provisions, those policies, to be applied. What that will be made up of will depend entirely on the circumstances of the conduct that is found, the policies and procedures of the organisation and whether, in fact, it needs to be referred for criminal investigation.

Hon NICK GOIRAN: What will be the sanction for the head of an entity who fails to take appropriate action?

Hon SUE ELLERY: I am advised that there will not be a penalty. The honourable member will have seen that proposed subsection (7) sets out the penalties for proposed subsection (1) or (6); we are talking about proposed subsection (4). I am advised that it would be much harder for the Parliamentary Commissioner for Administrative Investigations to apply a penalty, given that what is required is appropriate action and that is a matter for judgement. It is possible that the Ombudsman may make further recommendations to the entity, saying, "I suggest you consider X, Y or Z action, given this is what you found." The name and shame, the report to Parliament, remains in place, but it was deemed that it will be too difficult to impose a fine on something that is a matter of judgement and entirely dependent on the particulars at hand.

Hon NICK GOIRAN: We do not want the commissioner to be some kind of industrial inspector providing an ancillary role to the important role that we are already giving him.

I would describe proposed section 19X as the natural justice provision. What will be the required time frame for the head of the relevant entity to inform the employee they are subject to an investigation?

Hon SUE ELLERY: I am advised that the decision not to include a time frame was because we do not want to be prescriptive; for example, the matter might have to be referred to the Western Australia Police Force or the Corruption and Crime Commission and we do not necessarily want to compel the entity to let the subject of the investigation know if it would perhaps compromise what those two bodies were doing. The view was taken not to specify a period of time. That is the advice I have been given.

Hon NICK GOIRAN: Is that the case in the other jurisdictions?

Hon SUE ELLERY: I am advised, yes.

Hon NICK GOIRAN: I turn to proposed section 19ZH(1).

Hon Sue Ellery: Zooming!

Hon NICK GOIRAN: I do not want the minister to get too carried away, but we are making substantial progress.

Within what time frame will the head of the relevant entity be required to notify the parties, including an employee, a child and the child's parent or guardian, that a reportable allegation or conviction has been reported to the commission?

Hon SUE ELLERY: I am advised there is no specified time frame for similar reasons to those I outlined previously, honourable member. It might compromise action that has to be taken under other legislation.

Hon NICK GOIRAN: Further to this proposed section, the minister will recall that in my speech in the second reading debate, I expressed a concern about proposed sections 19ZH(3)(b) and (c), for different reasons. I will not spend too much time on proposed subsection (3)(c), which is the perennial issue about circumstances prescribed by the regulations. In the absence of any information to the contrary, I assume that that is just there in the now-traditional way of the forty-first Parliament. I remain modestly concerned about proposed paragraph (b), which is found on page 38, starting at line 14, and the mandatory nature of it. By way of further explanation, although I did touch on it in the second reading debate, to be clear, there is no question that it is appropriate that the Ombudsman and the head of the relevant entity have regard to the view of the child concerned. As a matter of principle, that is entirely appropriate.

Things become grey when we leave it to the commissioner or the head of the relevant entity to, in their mind, be satisfied that the child in question, first of all, has sufficient maturity; secondly, understands the nature of the matter that is before them; and, thirdly, expresses a view about whether it should or should not be disclosed to, for example, a parent. Again, keep in mind that there is already an appropriate catch-all provision in proposed subsection (3)(a), which says that the commissioner—that is, the Ombudsman—or the head of the relevant entity must not disclose information if the disclosure would put the wellbeing of the child or the safety of another person at risk. That is an important and appropriate provision that will be put in place, and it will be mandatory for both the Ombudsman and the head of the relevant entity.

But that seems to be sufficient; that seems to be enough. But then we introduce this new element in the bill at proposed subsection (3)(b), wherein we ask those people to then weigh up another consideration to do with the child and whether they have sufficient maturity and understanding and consent; in that instance, we then mandate that the commissioner or the head of the relevant entity must not provide the information. It concerns me because I can foresee a scenario wherein those two things would be in conflict. To disclose the information to the parent—obviously, we are talking about a parent who is not the alleged perpetrator—who the Ombudsman or the head of the relevant entity might know or believe is the best person to journey alongside that victim of child sexual abuse and to help that child in those circumstances but to be prohibited from disclosing it because of proposed subsection (3)(b) does trouble me slightly.

We have touched on this, particularly in the second reading debate. What I am interested to know is: Firstly, what is the extent to which the other jurisdictions have the same provision in place? Secondly, what is the extent to which there was express consultation on this point?

Hon SUE ELLERY: I am advised, firstly, no, it does not exist in other jurisdictions. Secondly, it was raised in consultation. The member will recall that I said earlier that those consultations were held in groups of people and groups of agencies, so it was raised there. I am not advised that there were any objections to it; no objections were made. To the extent that there was an express discussion—there was an express discussion, because someone suggested it—no-one objected to it.

Hon NICK GOIRAN: The other jurisdictions do not include it.

Hon Sue Ellery: Correct.

Hon NICK GOIRAN: At whose suggestion will we introduce the provision? Someone thought it was appropriate to include this. I understand the point the minister is making that there was consultation and no-one objected, but what is the —

Hon Sue Ellery: It was made in the consultation, so what we put in was not drafted by the original drafters. That issue was raised in consultation.

Hon NICK GOIRAN: Is the minister in a position to indicate whether it was raised by one stakeholder or multiple stakeholders?

Hon Sue Ellery: I don't think I can.

Hon NICK GOIRAN: Is that because the information is not present and available to the minister?

Hon Sue Ellery: Correct.

Hon NICK GOIRAN: It really is a point of concern that none of the other jurisdictions has this provision. We have inserted it, potentially on the basis of one stakeholder's request. I accept that no-one else has objected, but it does not seem as though it is the preferred course of action. Nevertheless, that is where we are. Can the minister assist the chamber by indicating how the provision is intended to work in the event that the commissioner and the

head of a relevant entity have a different level of satisfaction as to whether the child has sufficient maturity to consent to the disclosure?

Hon SUE ELLERY: That is a good question. As with all aspects of the scheme, the Ombudsman will provide oversight of these decisions. Ultimately, I think the Ombudsman would keep a very close eye on these provisions, and if he thought he had to intervene, he would do so. I am advised that if a parent becomes aware, they can make a complaint to the commissioner, and I am just finding out where those provisions are in the bill.

We might, if we can, move on with the honourable member's questions while we look that up; it is taking a moment.

Hon NICK GOIRAN: The information we are currently looking for is a provision under which, as I understand it, if a parent finds out that there has been a reportable conduct matter, they can put in a complaint. Would they put the complaint in to the Ombudsman?

Hon SUE ELLERY: That is as I understand it, but I do not know whether it is set out as specifically as a complaint about that particular provision. My advisers are trying to find it. They tell me it is in there, but they are trying to find it.

Hon NICK GOIRAN: We are still on clause 7, so if the minister is happy, we can return to that when the information is available.

I turn to the head of the relevant entity making a determination on the level of satisfaction they have with the child and whether the child has sufficient maturity. I take the minister's point that the Ombudsman will have this oversight role. We could have a scenario in which the entity is implicated very heavily in the matters that are being complained of and therefore we would have the Ombudsman providing oversight to ensure that the child was not being placed under duress over the consent they might provide on their disclosure. However, another scenario could be that the Ombudsman, who almost certainly will be entirely a stranger to that set of circumstances, might not be the person who is best placed to determine what is in the best interests of the child. The Ombudsman might not know the family. Indeed, the head of the relevant entity might well know better than the Ombudsman in a particular circumstance. That scenario could exist. It is that conflict that troubles me. If the head of the relevant entity said, "I've decided that the child does not have sufficient maturity, and so I am going to disclose this information to the parent", notwithstanding that the Ombudsman holds a different view, would a penalty apply to the head of the relevant entity?

Hon SUE ELLERY: No penalty is set out in the provisions of the bill.

If the honourable member is happy to go to the matter that we were looking at before, it is found at proposed section 19ZB on page 30. Under proposed section 19ZB(3) —

> The Commissioner may decide to conduct an investigation under this section —
>
> …
>
> (d) in response to a complaint made to the Commissioner by any other person —

The provisions beforehand refer to a complaint by an employee, for example —

> in relation to any of the following that affects the person in the person's personal capacity —
>
> (i) the handling or investigation …
>
> (ii) a finding of reportable conduct …
>
> (iii) any action taken or not taken by the head of a relevant entity in response to a finding of reportable conduct in relation to an employee of the relevant entity.

I am advised that is the provision that the commissioner could use to deal with a complaint.

Hon NICK GOIRAN: I accept that that provision exists and is appropriate and that there is a complaints handling mechanism under this scheme by which the commissioner may decide the course of conduct and the like and investigate, but the parents cannot complain if they do not know about it. It troubles me that we are talking about an allegation of sexual abuse of a child. The allegation does not involve the parent and yet the head of an entity and the Ombudsman, who could largely be strangers, will get to decide ahead of the parent, who could be completely unaware of what is occurring with their child. As a matter of principle, I am concerned about that. I cannot take it any further this evening, but I hope that the Ombudsman, as he prepares his educative materials and the like over the next three months, gives strong consideration to this issue, particularly in light of what we have identified tonight, which is that none of the other jurisdictions have gone this way. I respect the fact that consultation occurred and that there were no objections, but I would just ask for extra caution to be applied when considering how we are going to use this particular provision.

I move now to proposed section 19ZH(3)(c). The minister has indicated previously in our discussions that there is no intention for the government at this stage to prescribe any regulations. The minister will be pleased to know that, at this point, I have no further questions on clause 7.

Clause put and passed.

Clause 8 put and passed.

Clause 9: Section 20 amended —

Hon NICK GOIRAN: Clause 9 will amend section 20 of the Parliamentary Commissioner Act 1971. I ask the minister to specifically consider proposed section 20(2AA), which is at the start of page 42. The intention is to insert —

> No obligation to maintain secrecy or other restriction upon the disclosure of information obtained by or furnished to the head of a relevant entity or an investigator conducting an investigation under Division 3B, whether imposed by any enactment or by any rule of law, applies to the disclosure of information for the purposes of an investigation by the Commissioner under this Act.

My question is: why is this clause necessary?

Hon SUE ELLERY: I am advised it is necessary in respect of the other bits of legislation that govern the functions of the Ombudsman. Essentially, this means that even if another piece of legislation exists that says to someone, "You must not disclose", the Ombudsman's power is greater than that. It takes priority over that. That person is released from their obligation not to disclose under another piece of legislation, given the primacy of the Ombudsman's role in investigations.

Hon NICK GOIRAN: Is this, again, something that was found in the models in the other three jurisdictions?

Hon SUE ELLERY: No, and I think that is a function of the other functions not sitting within the Ombudsman in those jurisdictions. This is consistent with the powers the Ombudsman has in the other areas that he has responsibility for.

Hon NICK GOIRAN: Is there a like provision to proposed subsection 2AA already in the Parliamentary Commissioner Act 1971, in other parts and divisions?

Hon SUE ELLERY: Yes, with respect to the 1971 act, and I will see whether there are others. In the Parliamentary Commissioner Act 1971, section 20(2A) says —

> No obligation to maintain secrecy or other restriction upon the disclosure of information obtained by or furnished to persons in the service of the Crown or any authority to which this Act applies, whether imposed by any enactment or by any rule of law, applies to the disclosure of information for the purposes of an investigation under this Act.

This provision extends that to all entities to be covered by the scheme, not just government entities. Of course, the parliamentary commissioner's responsibility is to handle complaints about how government has made decisions et cetera, so the way that this is written in the bill before us now extends that power beyond a complaint about government agencies.

Clause put and passed.

Clause 10: Section 21 amended —

Hon NICK GOIRAN: Just for the sake of facilitating the passage of the bill this evening, I indicate that after some questions on clause 10, my next question is at clause 25. My questions at clause 25, which would capture clauses 25, 26 and 27, could probably be dealt with in one group.

With regard to clause 10, there is discussion about the commissioner having the power to enter a premises. Will any notice be given?

Hon SUE ELLERY: I am advised that we do not think so, but we will triple-check. It is the same argument that we used for the previous line of questioning. There is an existing provision that the Ombudsman has the power to enter any government agency for the purpose of carrying out their function dealing with complaints about government agencies. This will extend it beyond those government agencies.

Hon NICK GOIRAN: Section 21 of the act as it is at the moment already contains a power to enter premises, but as the Leader of the House indicated, that is limited to premises used or occupied by any department authority to which the act applies, whereas this bill will expand that, only in circumstances in which there is an investigation under division 3B. Nevertheless, what will be the extent of any oversight mechanism for this power of entry?

Hon SUE ELLERY: There is nothing specific. There is no parliamentary inspector; there is no parliamentary committee.

Hon NICK GOIRAN: If there is a misuse by the Ombudsman's office of this power to enter premises under amended section 21 of the act, where will the complaint lie?

Hon SUE ELLERY: I am advised that as he is an officer of the Parliament, ultimately, Parliament could take action, but there is nothing set out in the Parliamentary Commissioner Act 1971 that provides any oversight and there is not intended to be in this bill either.

Hon NICK GOIRAN: With regard to the power of entry into premises, is there any power for the commissioner to also, having entered the premises, seize any documents or materials?

Hon SUE ELLERY: No.

Clause put and passed.

Clauses 11 to 24 put and passed.

Clause 25: Schedule 2 inserted —

Hon NICK GOIRAN: Clause 25 inserts schedule 2, found at page 56 of the bill. We briefly touched on this earlier and the minister will note that the schedule presently before us, which will be inserted for the first time immediately after schedule 1, will be in place for 12 months and thereafter it will be amended to the extent that we see in the information provided at clause 27. How does the combined schedule—what it will look like in approximately 15 months—compare with what is in place in the other jurisdictions?

Hon SUE ELLERY: I am advised that it is the same.

Clause put and passed.

Clauses 26 and 27 put and passed.

Title put and passed.

Report

Bill reported, without amendment, and the report adopted.

Third Reading

Bill read a third time, on motion by **Hon Sue Ellery (Leader of the House)**, and passed.