



THIRTY-EIGHTH PARLIAMENT

REPORT 73

**STANDING COMMITTEE ON UNIFORM
LEGISLATION AND STATUTES REVIEW**

**COMMUNITY PROTECTION (OFFENDER
REPORTING) AMENDMENT BILL 2011**

Presented by Hon Donna Faragher MLC (Deputy Chairman)

August 2012

STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES REVIEW

Date first appointed:

17 August 2005

Terms of Reference:

The following is an extract from Schedule 1 of the Legislative Council Standing Orders:

“5. Uniform Legislation and Statutes Review Committee

- 5.1 A *Uniform Legislation and Statutes Review Committee* is established.
- 5.2 The Committee consists of 4 Members.
- 5.3 The functions of the Committee are –
- (a) to consider and report on Bills referred under Standing Order 126;
 - (b) on reference from the Council, to consider or review the development and formulation of any proposal or agreement whose implementation would require the enactment of legislation made subject to Standing Order 126;
 - (c) to examine the provisions of any treaty that the Commonwealth has entered into or presented to the Commonwealth Parliament, and determine whether the treaty may impact upon the sovereignty and law-making powers of the Parliament of Western Australia;
 - (d) to review the form and content of the statute book; and
 - (e) to consider and report on any matter referred by the Council.
- 5.4 In relation to function 5.3(a) and (b), the Committee is to confine any inquiry and report to an investigation as to whether a Bill, proposal or agreement may impact upon the sovereignty and law-making powers of the Parliament of Western Australia.”

Members for this inquiry:

Hon Adele Farina MLC (Chairman)	Hon Donna Faragher MLC (Deputy Chairman)
Hon Michael Mischin MLC	Hon Linda Savage MLC

Staff for this inquiry:

Denise Wong (Advisory Officer (Legal))	Cherelyn Brearley (Committee Clerk)
--	-------------------------------------

Address:

Parliament House, Perth WA 6000, Telephone (08) 9222 7222

unileg@parliament.wa.gov.au

Website: <http://www.parliament.wa.gov.au>

ISBN 978-1-922047-05-2

LIST OF ABBREVIATIONS AND DEFINED TERMS

Bill	Community Protection (Offender Reporting) Amendment Bill 2011
Commissioner	Commissioner of Police
Committee	Standing Committee on Uniform Legislation and Statutes Review
CPOR Act	<i>Community Protection (Offender Reporting) Act 2004</i>
FOI Act	<i>Freedom of Information Act 1992</i>
MCPEMP	Ministerial Council for Police and Emergency Management – Police
National Scheme	national approach to child protection offender registration

CONTENTS

LIST OF ABBREVIATIONS AND DEFINED TERMS	I
1 REFERRAL.....	1
2 BACKGROUND TO THE BILL.....	1
National Scheme	1
Purpose of the Bill.....	2
3 CLAUSES OF THE BILL WHICH MAY IMPACT ON THE PARLIAMENT’S SOVEREIGNTY AND LAW-MAKING POWERS	4
Clause 16 – Proposed Section 38(1)(a)(ii) of the CPOR Act.....	4
Delegation of Law-Making Power	4
Clause 33 – Proposed Sections 94A(5)(b) and (d) of the CPOR Act.....	9
Delegation of Law-Making Power	9
Clause 33 – Proposed Section 94B(8)(i) of the CPOR Act.....	14
Delegation of Law-Making Power	14
Clause 44 – Proposed Schedule 1, Clause 14(5)(f) of the <i>Freedom of Information Act</i> 1992	17
4 DISSENT	18
5 CONCLUSION	18
APPENDIX 1 NATIONAL SCHEME ACT IN EACH PARTICIPATING JURISDICTION.....	19
APPENDIX 2 REGULATION 15 OF THE <i>COMMUNITY PROTECTION (OFFENDER REPORTING) REGULATIONS 2004</i>	21
APPENDIX 3 REGULATION 53 OF THE <i>SECURITY AND RELATED ACTIVITIES (CONTROL) REGULATIONS 1997</i>	23

**REPORT OF THE STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES
REVIEW**

IN RELATION TO THE

COMMUNITY PROTECTION (OFFENDER REPORTING) AMENDMENT BILL 2011

1 REFERRAL

- 1.1 Pursuant to Standing Order 126(4), the Community Protection (Offender Reporting) Amendment Bill 2011 (**Bill**) was referred, on 17 May 2012, to the Standing Committee on Uniform Legislation and Statutes Review (**Committee**) for inquiry.

2 BACKGROUND TO THE BILL

National Scheme

- 2.1 The *Community Protection (Offender Reporting) Act 2004* (**CPOR Act**) requires convicted child sex offenders and certain other types of serious offenders to be registered under the Community Protection Offender Register and report routinely to the police on their whereabouts and other personal details. These offenders and their offences are referred to in the CPOR Act as ‘reportable offenders’ and ‘reportable offences’, respectively. This system of registration and monitoring has the aim of reducing the likelihood of reoffending and assisting the investigation and prosecution of future offences.¹
- 2.2 The CPOR Act received the Royal Assent on 8 December 2004 and the majority of its provisions had commenced operation by 1 February 2005. The CPOR Act resulted from an initiative of the Australian Police Ministers’ Council to establish a child offender register in each Australian State and Territory.² This initiative has, more recently, been referred to as the ‘national approach to child protection offender registration’³ (**National Scheme**). The scheme is, however, non-obligatory. The CPOR Act can be amended by the Western Australian Parliament without the need to

¹ Hon Peter Collier MLC, Minister for Energy representing the Minister for Police, Parliament of Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 17 May 2012, p2763.

² *Ibid.*

³ Ministerial Council on the Administration of Justice, 5th Ministerial Council for Police and Emergency Management – Police, 19 June 2009, Perth, *Agenda Item 3.2: National Approach to Child Protection Offender Registration – Report from National Working Party*, p1. This is available on the Committee’s webpage: www.parliament.wa.gov.au >> Legislative Council >> Committees >> Current Committees >> Uniform Legislation and Statutes Review Committee >> Reports >> Community Protection (Offender Reporting) Amendment Bill 2011.

obtain the approval of the other participating jurisdictions and Western Australia may opt out of the National Scheme by simply repealing the CPOR Act.⁴

- 2.3 By October 2007, the legislation in all Australian jurisdictions made pursuant to the National Scheme⁵ had commenced operation. In 2007, New South Wales, the ‘leading’ jurisdiction, reviewed its legislation under the National Scheme and, as a result, enacted the *Child Protection (Offenders Registration) Amendment Act 2007* (NSW), which commenced in October 2008.⁶
- 2.4 Through a National Working Party, the Ministerial Council for Police and Emergency Management – Police (MCPEMP) examined the New South Wales amending Act and produced a report⁷ which recommended that all participating jurisdictions amend their National Scheme legislation to reflect the approach adopted in New South Wales.⁸ At the 19 June 2009 MCPEMP meeting, all of the jurisdictions resolved to follow the recommendations made by the MCPEMP National Working Party.⁹

Purpose of the Bill

- 2.5 The Bill represents Western Australia’s implementation of the MCPEMP National Working Party recommendations. Some of the recommendations are already reflected

⁴ Letter from Mr Malcolm Penn, Assistant Director, Legal and Legislative Services, Western Australia Police, 23 May 2012, pp1-2.

⁵ The titles of the Acts are listed in **Appendix 1**.

⁶ Ministerial Council on the Administration of Justice, 5th Ministerial Council for Police and Emergency Management – Police, 19 June 2009, Perth, *Agenda Item 3.2: National Approach to Child Protection Offender Registration – Report from National Working Party*, p2. This is available on the Committee’s webpage: www.parliament.wa.gov.au >> Legislative Council >> Committees >> Current Committees >> Uniform Legislation and Statutes Review Committee >> Report >> Community Protection (Offender Reporting) Amendment Bill 2011.

⁷ This report is contained in Ministerial Council on the Administration of Justice, 5th Ministerial Council for Police and Emergency Management – Police, 19 June 2009, Perth, *Agenda Item 3.2: National Approach to Child Protection Offender Registration – Report from National Working Party*. This is available on the Committee’s webpage: www.parliament.wa.gov.au >> Legislative Council >> Committees >> Current Committees >> Uniform Legislation and Statutes Review Committee >> Reports >> Community Protection (Offender Reporting) Amendment Bill 2011.

⁸ Hon Peter Collier MLC, Minister for Energy representing the Minister for Police, Parliament of Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 17 May 2012, p2763.

⁹ Letter from Mr Malcolm Penn, Assistant Director, Legal and Legislative Services, Western Australia Police, 23 May 2012, p1. A list of the bills or Acts in each participating jurisdiction which implement the Ministerial Council for Police and Emergency Management – Police National Working Party recommendations, as provided by Western Australia Police on 6 June 2012, is available on the Committee’s webpage: www.parliament.wa.gov.au >> Legislative Council >> Committees >> Current Committees >> Uniform Legislation and Statutes Review Committee >> Reports >> Community Protection (Offender Reporting) Amendment Bill 2011. A table indicating each participating jurisdiction’s progress towards implementing these recommendations, as provided by Western Australia Police on 23 May 2012, is also available on the webpage.

in the CPOR Act and other State legislation so the Bill seeks to execute the remaining recommendations which are needed to ensure consistency with the National Scheme.¹⁰

2.6 The Bill also proposes to make amendments to the CPOR Act which are not based on MCPEMP National Working Party recommendations. Rather, these proposed amendments were agency-initiated¹¹ and many of them are aimed at enhancing the CPOR Act from an operational perspective. Some of the main proposals are summarised here:

- Proposed amendments to address the procedural and administrative issues associated with applying for an ‘offender reporting order’ or a ‘past offender reporting order’ in circumstances where an offender would not automatically be a reportable offender under the CPOR Act. These amendments were recommended by the State Solicitor’s Office and the Sex Offender Management Squad, the unit in Western Australia Police dedicated to managing all reportable offenders.¹²
- Proposed amendments to Part 5 of the CPOR Act, which deal with what are currently referred to as ‘prohibition orders’. The proposed amendments will, among other things, rename the orders to ‘protection orders’, empower the Courts to make more suitable, and a greater range of, orders and give the police the power to monitor a reportable offender’s compliance with an order.
- The Bill seeks to introduce the ability of the Commissioner of Police (**Commissioner**) to order that a reportable offender undergo assessment and/or treatment by certain health professionals.
- The proposed addition of showing offensive material to a child under 16 years old as a Class 2 reportable offence.
- A proposed new information sharing provision to enable public authorities to share information with the police regarding the assessment or management of

¹⁰ Hon Peter Collier MLC, Minister for Energy representing the Minister for Police, Parliament of Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 17 May 2012, p2763. A table summarising the Ministerial Council for Police and Emergency Management – Police National Working Party recommendations and an indication of how the Community Protection (Offender Reporting) Amendment Bill 2011 and existing State legislation meet these recommendations, as provided by Western Australia Police on 23 May 2012, is available on the Committee’s webpage: www.parliament.wa.gov.au >> Legislative Council >> Committees >> Current Committees >> Uniform Legislation and Statutes Review Committee >> Reports >> Community Protection (Offender Reporting) Amendment Bill 2011.

¹¹ Letter from Mr Malcolm Penn, Assistant Director, Legal and Legislative Services, Western Australia Police, 23 May 2012, p1.

¹² Hon Peter Collier MLC, Minister for Energy representing the Minister for Police, Parliament of Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 17 May 2012, p2764.

a reportable offender or for the purposes of making, or responding to, an application.

2.7 In this Report, a proposed amendment which results from a MCPEMP National Working Party recommendation is referred to as a ‘MCPEMP amendment’.

3 CLAUSES OF THE BILL WHICH MAY IMPACT ON THE PARLIAMENT’S SOVEREIGNTY AND LAW-MAKING POWERS

Clause 16 – Proposed Section 38(1)(a)(ii) of the CPOR Act

3.1 Clause 16 is a MCPEMP amendment. It proposes to amend section 38 of the CPOR Act, which prescribes additional forms of identification and documentation which are to be provided when a reportable offender reports in person,¹³ in order to verify or support details in the report.

3.2 Currently, section 38(1)(a), which will be replaced, requires a reportable offender to present any one of the prescribed forms of identification and any one of the prescribed documents relating to the identity of the reportable offender. These are prescribed by regulations.¹⁴ One of the forms of identification prescribed in the regulations is a current passport. A reportable offender, however, may choose to present another prescribed form of identification.

3.3 Under proposed section 38(1)(a)(i), a reportable offender, when reporting in person, must present any passports that the offender holds. Under proposed section 38(1)(a)(ii), if the reportable offender does not hold a passport, they will be required to present:

the form of identification or other document, relating to the identity of the reportable offender, specified by the regulations for the purposes of this paragraph;

Delegation of Law-Making Power

3.4 Proposed section 38(1)(a)(ii), which effectively replicates section 38(1)(a), continues the delegation, from the Parliament to the Executive, of the power to make a law prescribing what other forms of identification and documents may be presented by a reportable offender when reporting in person.

3.5 Parliaments regularly and legitimately delegate their law-making powers, for example, in cases:

¹³ Where the reportable offender is a child or is disabled, they may be accompanied by a parent, guardian, carer or other nominated person when reporting in person. The accompanying person may then make the report on the reportable offender’s behalf: section 38(4) of the *Community Protection (Offender Reporting) Act 2004*. Section 35(1) of the Act determines which reports must be made in person.

¹⁴ See regulations 15(1), (3) and (4) of the *Community Protection (Offender Reporting) Regulations 2004*.

*where there is agreement that a task must be performed and it cannot be effectively performed by the legislature without the assistance of a delegate or without an expenditure of time so great as to lead to the neglect of equally important business.*¹⁵

- 3.6 The Committee inquired as to why other forms of identification and documents should not be prescribed in the CPOR Act rather than in regulations. Western Australia Police explained that the proposed regulation-making power would be used to prescribe other documents which may be used by reportable offenders when travelling. Western Australia Police explained that they could not, at this stage, prescribe all of the possible documents that could be requested:

there may be other documentary evidence that the person may have in terms of countries that they may have visited outside Australia that may record details of their movement that might not be recorded in the actual passport that they are using.^[16] ... It may be that that documentary evidence is prescribed in different ways from different countries. We are not able to specifically specify in the bill what that form of documentary evidence we might be requiring the offender to produce when they return to Australia.

...

*... some offenders may have travelled outside Australia to some of the countries in South-East Asia and they may have other documentary evidence from the authorities in those other countries, as to which areas of those countries the reportable offenders have visited. The description of that documentary evidence will then be reflected in regulations. We have not gone into all that detail yet, because we do not necessarily know, say, the nature of the countries that people would necessarily be visiting, which we might require some further documentary evidence from.*¹⁷

- 3.7 As shown in **Appendix 2**, regulations 15(1), (3) and (4) of the *Community Protection (Offender Reporting) Regulations 2004* prescribe other forms of identification and documents which may be presented for the purposes of current section 38(1)(a). Regulations 15(2), (3) and (4) prescribe the forms of identification and documents

¹⁵ Jaffe, 'An Essay on Delegation of Legislative Power', (1947) 47 *Columbia LR* 359 at p361 as quoted in D Pearce and S Argument, *Delegated Legislation in Australia*, 3rd Edition, LexisNexis Butterworths, Australia, 2005, p5.

¹⁶ For example, a visa which may or may not be recorded in a person's passport: Mr Malcolm Penn, Assistant Director, Legal and Legislative Services, Western Australia Police, *Transcript of Evidence*, 13 June 2012, p5.

¹⁷ Mr Malcolm Penn, Assistant Director, Legal and Legislative Services, Western Australia Police, *Transcript of Evidence*, 13 June 2012, p2.

which may be presented for the purposes of section 38(1)(c).¹⁸ The forms of identification and documents are described there in sufficient detail to be certain, yet the descriptions would appear general enough to survive any likely changes in terminology.

- 3.8 Regulation 15 has been in operation since 1 February 2005 and has not yet been amended.¹⁹ Given that regulation 15 has operated for over seven years without the need for amendment, it could be argued that the prescribed forms of identification and documents could be prescribed in section 38 of the CPOR Act, albeit with the power to prescribe any additional forms of identification and documents in regulations.²⁰
- 3.9 On the other hand, it could be argued that the subject matter of the proposed amendments is more suitable to be maintained in the regulations given the amount of detail involved, some of which may be subject to change over time and could be more conveniently and expeditiously changed as necessary.

¹⁸ Section 38(1)(c) of the *Community Protection (Offender Reporting) Act 2004* relates to a person making a report who is not the reportable offender. Refer to footnote 13 for an indication of who this person might be.

¹⁹ This was confirmed by the Western Australia Police: Mr Malcolm Penn, Assistant Director, Legal and Legislative Services, Western Australia Police, *Transcript of Evidence*, 13 June 2012, p5.

²⁰ Refer to Hon Adele Farina MLC, Chairman, Standing Committee on Uniform Legislation and Statutes Review, Hon Peter Collier MLC, Minister for Energy representing the Minister for Police, and Mr Malcolm Penn, Assistant Director, Legal and Legislative Services, Western Australia Police, *Transcript of Evidence*, 13 June 2012, pp4-5.

Recommendation 1: The Committee recommends that the Legislative Council consider whether clause 16 of the Community Protection (Offender Reporting) Amendment Bill 2011 (namely, proposed section 38(1)(a)(ii) of the *Community Protection (Offender Reporting) Act 2004*) appropriately delegates Parliament’s law-making power.

If the Legislative Council takes the view expressed in paragraph 3.8 above, the Committee proposes the following form of words for the consideration of the Legislative Council. This includes a consequential amendment to section 38(1)(c) of the *Community Protection (Offender Reporting) Act 2004*:

Page 12, lines 27 and 28 — To delete “form of identification or other document,” and insert:

identification documents,

Page 12, lines 30 and 31 — To delete the lines and insert:

required by subsection (2A);

Page 13, after line 2 — To insert:

(2) Delete section 38(1)(c) and insert:

- (c) if not the reportable offender — present for inspection —
 - (i) any passport that the person holds; or
 - (ii) if the person does not hold a passport — the identification documents, relating to the identity of the person making the report, required by subsection (2A).

(3) After section 38(1) insert:

(2A) For the purposes of subsection (1)(a)(ii) and (c)(ii), the identification documents required are —

- (a) any one of the following —
 - (i) a current driver’s licence that displays a photograph or digital image of the licence holder;
 - (ii) an Australian naturalisation or citizenship document;
 - (iii) an original birth certificate or a certified copy, or certified extract, of a birth certificate;

(iv) a form of identification or document prescribed for the purposes of this paragraph;

and

(b) any one of the following —

(i) a current signed credit or debit card, a passbook or a statement of account issued by a bank, building society or credit union;

(ii) a current Medicare card;

(iii) a gas, water, electricity or telephone account issued within 12 months before the report is made;

(iv) a notice of rates from a local government (however described) or a notice of water service charges or land valuation;

(v) a pensioner concession card, a Commonwealth seniors health card, an entitlement card issued under the *Veterans' Entitlements Act 1986* (Commonwealth) or another entitlement card issued by the Commonwealth government or a State or Territory government;

(vi) a lease or rental agreement;

(vii) a motor vehicle registration notice or certificate;

(viii) a renewal notice for a home building or contents, or a motor vehicle, policy of insurance;

(ix) a student identity card or a certificate or statement of enrolment from an educational institution;

(x) an electoral enrolment card or other evidence of electoral enrolment;

(xi) a form of identification or document prescribed for the purposes of this paragraph.

(2B) A form of identification or other document is not valid for the purposes of subsection (2A)(b)(iv) to (xi) unless it was issued or entered into, as the case requires, within 2 years before the report is made.

(2C) Except as stated in subsection (2A)(a)(iii), a form of identification or other document is not valid for the purposes of subsection (2A) unless it is an original.

Clause 33 – Proposed Sections 94A(5)(b) and (d) of the CPOR Act

- 3.10 Clause 33 is not a MCPEMP amendment. Under the CPOR Act, reportable offenders may also be the subject of protection orders²¹ made by a Court pursuant to sections 90, 92 or 95. A protection order may prohibit a reportable offender from engaging in any conduct specified in the order. Some examples of conduct which may be prohibited are prescribed in section 93(1) of the CPOR Act.
- 3.11 Among other things, clause 33 of the Bill proposes to insert section 94A into the CPOR Act. The proposed section authorises Court-made protection orders to require a reportable offender to comply with orders, made by the Commissioner, to undergo assessment and, if necessary, treatment by one or more of the following health professionals: a medical practitioner, psychiatrist, psychologist or social worker. The Committee noted that a failure to comply with a Commissioner's order for assessment and/or treatment will not result in the commission of an offence but may result in the Commissioner seeking a variation of the protection order.²²

Delegation of Law-Making Power

- 3.12 Proposed section 94A(5) authorises the making of regulations for a range of matters associated with the Commissioner's orders for assessment and/or treatment. The Committee particularly notes proposed sections 94A(5)(b) and (d), which are reproduced here:

(5) *The regulations may —*

...

(b) *regulate the consequences of injury or sickness^[23] with respect to complying with the orders of the Commissioner under subsection (1);*

...

²¹ 'Protection order' is the phrase used in the Community Protection (Offender Reporting) Amendment Bill 2011. Currently, the *Community Protection (Offender Reporting) Act 2004* uses the phrase 'prohibition order'. All references to prohibition orders in that Act will be consequentially amended to prohibition orders if the bill is passed.

²² See clause 34(3) of the Community Protection (Offender Reporting) Amendment Bill 2011; proposed section 101(2A) of the *Community Protection (Offender Reporting) Act 2004*; and the Explanatory Memorandum for the Community Protection (Offender Reporting) Amendment Bill 2011, p17. See also, Mr Malcolm Penn, Assistant Director, Legal and Legislative Services, and Mr Martyn Clancy-Lowe, State Coordinator, Sex Offender Management Squad, Western Australia Police, *Transcript of Evidence*, 13 June 2012, pp9, 11 and 12 and p12, respectively.

²³ The reference to 'injury or sickness' is not confined to the reportable offender's injury or sickness. For example, it may encompass the injury or sickness of a family member of the reportable offender: Mr Malcolm Penn, Assistant Director, Legal and Legislative Services, Western Australia Police, *Transcript of Evidence*, 13 June 2012, pp10 and 11.

- (d) *without limiting section 96,^[24] provide for the variation of protection orders under this section in relation to reportable offenders —*
 - (i) *who fail to comply with the orders of the Commissioner under subsection (1); or*
 - (ii) *whose compliance with those orders is affected by an authorised absence, injury or sickness,*

including the variation of protection orders by the imposition of additional requirements on those offenders;

...

- 3.13 Western Australia Police submitted that the matters for which proposed section 94A authorises regulations to be made:

are administrative and process based, [and] the decision making ability appropriately rests with the Executive. Any regulations which are approved by the Minister for Police and Executive Council will, in any event, be forwarded to Parliament for consideration by the Delegated Legislation Committee.²⁵

- 3.14 The Committee noted that the Joint Standing Committee on Delegated Legislation’s Terms of Reference require it to consider an ‘instrument’²⁶, which includes regulations, to inquire whether the instrument:

- (a) *is authorized or contemplated by the empowering enactment;*
- (b) *has an adverse effect on existing rights, interests, or legitimate expectations beyond giving effect to a purpose authorized or contemplated by the empowering enactment;*

²⁴ Sections 96 to 98 (Part 5, Division 3) of the *Community Protection (Offender Reporting) Act 2004* already provide for a Court to vary or revoke a child protection prohibition order (known as a ‘child protection order’ under the *Community Protection (Offender Reporting) Amendment Bill 2011*).

²⁵ Letter from Mr Malcolm Penn, Assistant Director, Legal and Legislative Services, Western Australia Police, 7 June 2012, p1.

²⁶ ‘Instrument’ is defined as “(a) *subsidiary legislation in the form in which, and with the content it has, when it is published; (b) an instrument, not being subsidiary legislation, that is made subject to disallowance by either House under a written law.*” ‘Subsidiary legislation’ is defined as having “*the meaning given to it by section 5 of the Interpretation Act 1984*”: Term of Reference 3.7, Schedule 1 of the Legislative Council Standing Orders.

-
- (c) *ousts or modifies the rules of fairness;*
 - (d) *deprives a person aggrieved by a decision of the ability to obtain review of the merits of that decision or seek judicial review;*
 - (e) *imposes terms and conditions regulating any review that would be likely to cause the review to be illusory or impracticable; or*
 - (f) *contains provisions that, for any reason, would be more appropriately contained in an Act.*²⁷ (bolding added)

3.15 The Committee was of the view, however, that it is best practice, if possible, to determine the appropriateness of a regulation-making power at the stage when a bill is debated by the Parliament.

Proposed Section 94A(5)(b) of the CPOR Act

3.16 Western Australia Police advised the Committee that proposed section 94A(5)(b) was modelled on section 82(b) of the *Sentence Administration Act 2003*, which provides that regulations may, for the purposes of the provisions which apply to offenders complying with community corrections orders:²⁸

regulate the consequences of injury and sickness with respect to community corrections orders

3.17 To date, the *Sentence Administration Regulations 2003* have not prescribed any consequences of injury and sickness, pursuant to section 82(b) of the *Sentence Administration Act 2003*.²⁹

3.18 Western Australia Police suggested that regulations made under proposed section 94A(5)(b) could, for example, provide that a consequence of injury or sickness would be that:

the Commissioner of Police might say to the reportable offender, "I want you to report to the sex offender management squad, and I would like you to provide some type of evidence or give me some

²⁷ Term of Reference 3.6, extracted from Schedule 1 of the Legislative Council Standing Orders.

²⁸ Letter from Mr Malcolm Penn, Assistant Director, Legal and Legislative Services, Western Australia Police, 18 June 2012, p1 and Enclosure 1.

²⁹ *Ibid*, p1.

information to prove to me that your family member was sick, so that you are not deliberately trying to avoid the treatment."³⁰

- 3.19 Given the advice provided by Western Australia Police, the Committee was of the view that this delegation appears to be appropriate. The Committee, however, recommends that the responsible Minister provide the House with examples of what “consequences of injury or sickness with respect to complying with the [assessment and/or treatment] orders of the Commissioner” may be the subject of regulations.

Recommendation 2: The Committee recommends that the responsible Minister provide the Legislative Council with examples of what consequences of injury or sickness are contemplated to be the subject of regulations made under proposed section 94A(5)(b) of the *Community Protection (Offender Reporting) Act 2004* (clause 33 of the *Community Protection (Offender Reporting) Amendment Bill 2011*).

Proposed Section 94A(5)(d) of the CPOR Act

- 3.20 With respect to proposed section 94A(5)(d), Western Australia Police offered the following scenario as an example in support of the regulation-making power:

*It may be that the nature of the treatment conditions that have been imposed by the court are very specific, so it might not be necessary that you need to go back and seek a formal variation of the order itself, but there might be some subtle variations that the Commissioner of Police will be able to authorise in terms of days of attendance et cetera that would amount to not a formal variation of the order, but a variation of some of the specific attendance requirements. That is why there is some ability in there to cater for that.*³¹

- 3.21 This appears to have confused the Commissioner’s orders for assessment and/or treatment and Court-made protection orders with respect to assessment and/or treatment. Contrary to the scenario posed by Western Australia Police, proposed section 94A(5)(d) grants a regulation-making power to provide for the variation of Court-made protection orders, not the Commissioner’s orders for assessment and/or treatment.
- 3.22 When the Committee sought clarification of the purpose for proposed section 94A(5)(d), Western Australia Police explained that it would:

³⁰ Mr Malcolm Penn, Assistant Director, Legal and Legislative Services, Western Australia Police, *Transcript of Evidence*, 13 June 2012, p11.

³¹ *Ibid*, p13.

*allow for the prescription of specific ways in which protection orders could be **varied by the Court** to deal with offenders who fail to comply, or are unable to comply, with assessment and treatment requirements.*³² (bolding added)

- 3.23 Western Australia Police envisage that, in such circumstances, the Commissioner would be the applicant for the Court variation of the protection order.³³
- 3.24 Western Australia Police could not identify any similar provision in existing legislation which allowed regulations to vary court orders.³⁴ Western Australia Police did, however, identify some Western Australian statutes, which set out in the Act, rather than in regulations, provisions relating to offenders who have not complied with a court order. Furthermore, these Acts also prescribe the manner in which a court should consider dealing with the offenders when a variation of an existing order is sought due to non-compliance.³⁵
- 3.25 Given the advice provided by Western Australia Police that such matters have been dealt with in the text of other Acts, the Committee was of the view that further explanation is required as to why this approach has not been proposed in this Bill.

Recommendation 3: The Committee recommends that the responsible Minister explain to the Legislative Council why clause 33 of the Community Protection (Offender Reporting) Amendment Bill 2011 (namely, proposed section 94A(5)(d) of the *Community Protection (Offender Reporting) Act 2004*) does not, itself, provide for:

- **the variation of protection orders when a reportable offender is unwilling or unable to comply with an assessment and/or treatment order made by the Commissioner of Police; and**
- **the manner in which a court should consider dealing with the offender when a variation of an existing order is sought due to non-compliance.**

- 3.26 If the House decides that such matters should be dealt with in the text of the CPOR Act, the Committee recommends that the Minister further explain what matters are currently intended to be prescribed in the regulations. This would allow consideration

³² Letter from Mr Malcolm Penn, Assistant Director, Legal and Legislative Services, Western Australia Police, 21 June 2012, p2.

³³ *Ibid*, p1.

³⁴ *Ibid*, p2.

³⁵ Section 33P of the *Sentencing Act 1995*, read with section 33N(2)(a) of that Act, is an example of this: Letter from Mr Malcolm Penn, Assistant Director, Legal and Legislative Services, Western Australia Police, 21 June 2012, p1.

to be given as to whether these matters can be inserted by way of a statutory amendment into the text of the Bill.

Recommendation 4: The Committee recommends that, if the Legislative Council is of the view that proposed section 94A(5)(d) of the *Community Protection (Offender Reporting) Act 2004* (clause 33 of the *Community Protection (Offender Reporting) Amendment Bill 2011*) should, itself, provide for the variation of protection orders, the responsible Minister advise what matters are intended to be prescribed by regulations made under the proposed section.

Clause 33 – Proposed Section 94B(8)(i) of the CPOR Act

3.27 Proposed section 94B is not a MCPEMP amendment. It empowers authorised police officers to test reportable offenders for their compliance with:

- protection orders, where the orders prohibit the consumption or use of alcohol, drugs or other specified substances; and
- if applicable, treatment orders made by the Commissioner, where the treatment involves the taking of specified medication.

3.28 An authorised police officer may require the reportable offender to submit to a breath test or an oral fluid test, or provide a sample of their blood, hair, urine or oral fluid for analysis.

Delegation of Law-Making Power

3.29 Proposed section 94B(8) authorises the making of regulations to provide for various matters relating to the manner in which the tests are to be conducted. The Committee particularly notes proposed section 94B(8)(i), which is reproduced here:

(8) *The regulations may provide for the following matters —*

...

(i) *the admissibility in any proceedings of certificate evidence, including certificate evidence of —*

(i) *the authorisation referred to in paragraph (c);³⁶ and*

³⁶ “the authorisation of persons as analysts for the purposes of this section”: proposed section 94B(8)(c) of the *Community Protection (Offender Reporting) Act 2004*; clause 33 of the *Community Protection (Offender Reporting) Amendment Bill 2011*.

(ii) *the results referred to in paragraph (d);*^[37]
and

(iii) *the approval referred to in paragraph (f).*^[38]

3.30 Given the view expressed by the Committee in paragraphs 3.14 and 3.15, the Committee inquired as to why it was proposed that such matters be dealt with by regulation rather than being prescribed in the CPOR Act. Western Australia Police (as per proposed section 94A) submitted that the matters for which proposed section 94B authorises regulations to be made:

*are administrative and process based, [and] the decision making ability appropriately rests with the Executive. Any regulations which are approved by the Minister for Police and Executive Council will, in any event, be forwarded to Parliament for consideration by the Delegated Legislation Committee.*³⁹

3.31 Western Australia Police further explained that the regulation-making power:

*obviates the need for the analyst to go along and justify their qualifications, justify who they are working for or justify the process they go through. It is not a unique provision in terms of facilitating that.*⁴⁰

3.32 For example, Western Australia Police directed the Committee to a similar provision in the *Security and Related Activities (Control) Act 1996*. Section 83 of that Act provides for the making of regulations relating to random drug testing of certain licensees.⁴¹ Section 83(g) provides that regulations may be made:

providing for certificate evidence in any proceedings as to the taking and analysis of any sample and the authority of any analyst to carry out an analysis.

³⁷ “the reporting of the results of breath or oral fluid tests or blood, hair, urine or oral fluid analysis”: proposed section 94B(8)(d) of the *Community Protection (Offender Reporting) Act 2004*; clause 33 of the *Community Protection (Offender Reporting) Amendment Bill 2011*.

³⁸ “the approval of equipment or apparatus for the purposes of testing or analysis”: proposed section 94B(8)(f) of the *Community Protection (Offender Reporting) Act 2004*; clause 33 of the *Community Protection (Offender Reporting) Amendment Bill 2011*.

³⁹ Letter from Mr Malcolm Penn, Assistant Director, Legal and Legislative Services, Western Australia Police, 7 June 2012, p1.

⁴⁰ Mr Malcolm Penn, Assistant Director, Legal and Legislative Services, Western Australia Police, *Transcript of Evidence*, 13 June 2012, p13.

⁴¹ Letter from Mr Malcolm Penn, Assistant Director, Legal and Legislative Services, Western Australia Police, 18 June 2012, p2 and Enclosure 2.

- 3.33 Regulation 53 of the *Security and Related Activities (Control) Regulations 1997* provides for certificates of various descriptions to be evidence of the matters certified in it, in the absence of proof to the contrary. Regulation 53 is reproduced in **Appendix 3**. Western Australia Police advised that it is likely that regulations made under proposed section 94B(8)(i) will be in a similar form to regulation 53 of the *Security and Related Activities (Control) Regulations 1997*.⁴²
- 3.34 In addition to the above example, Western Australia Police advised that there are a number of other regulations relating to the management of offenders which prescribe the admissibility of certificate evidence relating to alcohol and drug testing.⁴³
- 3.35 Western Australia Police also provided one example of an Act which prescribes the admissibility of such certificate evidence: the *Road Traffic Act 1974*. Section 70 of that Act details what is to be taken as *prima facie* evidence in proceedings relating to various alcohol and drug driving offences.⁴⁴
- 3.36 The Committee's research also identified other Western Australian Acts that prescribe the admissibility of certificate evidence about a range of matters,⁴⁵ rather than leaving this detail to regulations. The Committee identified another three Acts which prescribe that certificate evidence about drug, other chemical and medical analyses is *prima facie* evidence of the matters stated in the certificates. These Acts are:
- the *Cross-border Justice Act 2008*. Section 43(3)(b) provides that, in certain circumstances, a certificate relating to the testing procedures issued under another participating jurisdiction's drink or drug driving laws is *prima facie* evidence of the matter stated in the certificate for the purposes of section 70(1) or (3a) of the *Road Traffic Act 1974*;
 - the *Health Act 1911*. Section 227(9) provides that a certificate purporting to be signed by an analyst analysing a drug for the purposes of the section is "*sufficient evidence*" of the identity of the drug analysed and of the result of that analysis. Section 377(3) provides that a certificate purporting to be signed by a Government bacteriologist, an analyst, or other person authorised to grant the certificate, is "*sufficient prima facie evidence*" of the facts stated in the certificate: and

⁴² *Ibid*, p2.

⁴³ See regulations 27 and 28 of the *Prisons Regulations 1982*, regulations 103 and 104 of the *Young Offenders Regulations 1995* and regulations 11(7) and (8) of the *Sentence Administration Regulations 2003*.

⁴⁴ Letter from Mr Malcolm Penn, Assistant Director, Legal and Legislative Services, Western Australia Police, 21 June 2012, p2.

⁴⁵ Such as a person's qualifications or approval to perform certain tasks and the status of things at a certain point in time, for example, whether a person or premises is licensed and whether a person is suffering a communicable form of tuberculosis.

- the *Pollution of Waters by Oil and Noxious Substances Act 1987*. Section 33(2) provides that a certificate of an analyst appointed under the section stating that they have analysed or examined a substance and stating the result of their analysis or examination is admissible as “*prima facie evidence*” of those stated facts and of the correctness of the result of the analysis or examination. This certificate would be admissible in evidence in any proceedings for an offence against a provision of the Act.

3.37 It could be argued that it is appropriate to prescribe such matters in regulations. Equally, as a number of other Acts have been identified as prescribing these matters (as identified in paragraphs 3.35 and 3.36 above), it could be argued that the same approach should be taken in this Bill.

3.38 The Committee, therefore, recommends that the responsible Minister provide an explanation to the House as to why these matters ought not be prescribed in the CPOR Act.

Recommendation 5: The Committee recommends that the responsible Minister explain to the Legislative Council why clause 33 of the Community Protection (Offender Reporting) Amendment Bill 2011 (namely, proposed section 94B(8)(i) of the *Community Protection (Offender Reporting) Act 2004*) does not, itself, prescribe the admissibility of certificate evidence.

Clause 44 – Proposed Schedule 1, Clause 14(5)(f) of the *Freedom of Information Act 1992*

3.39 This clause proposes to amend the *Freedom of Information Act 1992* (FOI Act) by inserting a new class of information which is exempt from freedom of information disclosure. The new exemption will appear in Schedule 1 of the FOI Act as follows:

14. Information protected by certain statutory provisions

(5) *Matter is exempt matter if its disclosure would reveal or tend to reveal the identity of anyone as —*

...

(f) *a person in respect of whom information is contained in the Community Protection Offender Register established under the Community Protection (Offender Reporting) Act 2004 section 80.*

3.40 The Committee noted that the Information Commissioner does not object to clause 44:

In general, and in keeping with the objects and intent of the FOI Act, I do not support additional exemptions from access to information under the FOI Act except in very limited circumstances. However, in this case, I accept that the kind of information contained in the [Community Protection Offender] Register is of a highly sensitive nature that requires protection from disclosure and that the present exemptions in the FOI Act may not adequately protect that information from disclosure. I accept that there is an overriding public interest against disclosure of information contained in the Register and, consequently, I do not object to this proposed new exemption in the FOI Act.⁴⁶

3.41 The Committee was of the view that clause 44 is appropriate in the circumstances.

4 DISSENT

4.1 Hon Adele Farina MLC dissents from the report.

5 CONCLUSION

5.1 The Committee commends its report and recommendations to the Legislative Council.



Hon Donna Faragher MLC
Deputy Chairman
16 August 2012

⁴⁶ Submission No 2 from Mr Sven Bluemmel, Information Commissioner, Office of the Information Commissioner, 1 June 2012, p1.

APPENDIX 1
NATIONAL SCHEME ACT IN EACH PARTICIPATING
JURISDICTION

NSW – *Child Protection (Offenders Registration) Act 2000*

VIC – *Sex Offenders Registration Act 2004*

SA – *Child Sex Offenders Registration Act 2006*

TAS – *Community Protection (Offender Reporting) Act 2005*

QLD – *Child Protection (Offender Reporting) Act 2004*

ACT – *Crimes (Child Sex Offenders) Act 2005*

NT – *Child Protection (Offender Reporting and Registration) Act*

WA – *Community Protection (Offender Reporting) Act 2004*

APPENDIX 2
REGULATION 15 OF THE *COMMUNITY PROTECTION*
(OFFENDER REPORTING) REGULATIONS 2004

15. Form of identification for reporting in person (s. 38)

- (1) For the purposes of section 38(1)(a) of the Act, the following forms of identification of, or other documents relating to, a reportable offender that are to be presented for inspection when the reportable offender or another person makes a report in person are specified —
 - (a) any one of the forms of identification to which subregulation (3) applies;
and
 - (b) any one of the forms of identification or other documents to which subregulation (4) applies.
- (2) For the purposes of section 38(1)(c) of the Act, the following forms of identification of, or documents relating to, a person (other than the reportable offender) that are to be presented when the person makes a report (in this regulation called the *relevant report*) in person are specified —
 - (a) any one of the forms of identification to which subregulation (3) applies;
and
 - (b) any one of the forms of identification or other documents to which subregulation (4) applies.
- (3) This subregulation applies to —
 - (a) a current motor driver's licence that displays a photograph of the licence holder;
 - (b) a current Australian or overseas passport;
 - (c) an Australian naturalisation or citizenship document; and
 - (d) an original birth certificate or a certified copy, or certified extract, of a birth certificate.
- (4) This subregulation applies to —
 - (a) a current signed credit or debit card, a passbook or a statement of account issued by a bank, building society or credit union;
 - (b) a current Medicare card;
 - (c) a gas, water, electricity or telephone account issued within 12 months before the relevant report is made;
 - (d) a notice of rates from a local government (however described) or a notice of water service charges or land valuation;
 - (e) a pensioner concession card, a Commonwealth seniors health card, an entitlement card issued under the *Veterans' Entitlements Act 1986* of the

- Commonwealth, or another entitlement card issued by the Commonwealth government or a State or Territory government;
- (f) a lease or rental agreement;
 - (g) a motor vehicle registration notice or certificate;
 - (h) a renewal notice for a home building or contents, or a motor vehicle, policy of insurance;
 - (i) a student identity card or a certificate or statement of enrolment from an educational institution; and
 - (j) an electoral enrolment card or other evidence of electoral enrolment.
- (5) A form of identification or other document is not valid for the purposes of subregulation (4)(d) to (j) unless it was issued or entered into, as the case requires, within 2 years before the relevant report is made.
- (6) Except as stated in subregulation (3)(d), a form of identification or other document is not valid for the purposes of this regulation unless it is an original.

APPENDIX 3
REGULATION 53 OF THE *SECURITY AND RELATED ACTIVITIES*
(CONTROL) REGULATIONS 1997

53. Certificates which are evidence

In any proceeding under the Act and in the absence of proof to the contrary, any of the following certificates is evidence of the matters certified in it —

- (a) a certificate purporting to be signed by the chief executive officer of the Chemistry Centre (WA), certifying that a named person is, or was at a particular time, approved as an analyst under regulation 46(2); and
- (aa) a certificate purporting to be signed by the chief executive officer of the Chemistry Centre (WA), certifying that identified equipment is, or was at a particular time, approved testing equipment; and
- (b) a certificate purporting to be signed by a technologist, certifying that —
 - (i) identified sampling equipment comprises the items required by regulation 47; and
 - (ii) he or she prepared that sampling equipment in accordance with regulation 48; and
 - (iii) at the time it was prepared the sampling equipment was sterile and fit for use in taking blood or urine samples (as the case requires) if used on or before the stated expiry date;and
- (c) a certificate purporting to be signed by a sample collector certifying that an identified blood or urine sample was taken or collected —
 - (i) from a named person; and
 - (ii) at a specified date and time; and
 - (iii) in accordance with these regulations; and
 - (iv) using sampling equipment that was sealed in a package with a specified serial number;and
- (d) a certificate purporting to be signed by an analyst, certifying —
 - (i) that an identified blood or urine sample taken or collected from a named person was analysed for drugs in accordance with these regulations; and
 - (ii) the results obtained from that analysis.

[Regulation 53 amended in Gazette 28 Apr 2006 p. 1658; 4 Dec 2009 p. 4908.]