REPORT OF THE

STANDING COMMITTEE ON LEGISLATION

IN RELATION TO

CHILD WELFARE AMENDMENT BILL 1998

Presented by Hon Bruce Donaldson MLC

Report 54

STANDING COMMITTEE ON LEGISLATION

Date first appointed:

December 21 1989

Terms of reference:

1 There is hereby appointed a standing committee to be known as the *Legislation Committee*.

2 The Committee consists of 5 members.

3 A Bill originating in either House, other than a Bill which the Council may not amend, may be referred to the Committee after its second reading or during any subsequent stage by motion without notice.

4 A referral under clause 3 includes a recommittal.

5 The functions of the Committee are to consider and report on

(a) Bills referred under this order;

(b) what written laws of the State and spent or obsolete Acts of Parliament might be repealed from time to time;

(c) what amendments of a technical or drafting nature might be made to the statute book;

(d) the form and availability of written laws and their publication.

Members as at the time of this inquiry:

Hon Bruce Donaldson MLC, Chairman

Hon Bill Stretch MLC, Deputy Chairman

Hon John Cowdell MLC

Hon Derrick Tomlinson MLC

Hon Giz Watson MLC

Staff as at the time of this inquiry:

Ms Mia Betjeman, Principal Advisory Officer

Ms Kate Fitzgerald, Committee Clerk

Ms Yeshika Naidoo, Articled Clerk

Address:

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

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

ISBN 0 7307 6434 6

GLOSSARY AND LIST OF ABBREVIATIONS

Bill	Child Welfare Amendment Bill 1998.
CCR	child concern report.
CMA	child maltreatment allegation.
Clause Notes	Clause notes which accompanied the Bill when it was tabled in the Legislative Council on May 11 1999.
Convention	The United Nations Convention on the Rights of the Child agreed by the United Nations in 1989 and ratified by Australia in 1990.
CPUPMH	Child Protection Unit, Princess Margaret Hospital, Western Australia.
EDWA	Education Department of Western Australia.
FCS	Department of Family and Children's Services, Western Australia.
FOI Act	*Freedom of Information Act 1992*.
HALO	Helping All Little Ones.
JCPCAC	Joint Community Parent and Children's Advocacy Committee.
LASECA	Lobby Against Sexual Exploitation of Children in Australia.
manager	The manager of the register.
Principal Act	*Child Welfare Act 1947*.
Protocols	Reciprocal Child Protection Procedures including Protocols for the Child Protection Services Register, March 1997, developed by FCS.

register	The child protection services register proposed to be regulated pursuant to the provisions of the Bill.
Regulations	*Child Welfare Regulations 1977*.
Second Reading Speech	The second reading of the Bill by Hon Murray Criddle MLC in the Legislative Council of Western Australia on May 11 1999.
SNP	Supplementary Notice Paper No. 32 dated May 23 2000 which contains amendments to the Bill proposed by Hon Norm Kelly MLC.
WAGRO	Western Australian Grandparents Reform Organisation Inc.
##	A symbol used in this report to signify a new section which, if the Bill becomes law, will be added to an existing Act. This should not be confused with a clause of the Bill.

CONTENTS

CHAPTER 1
EXECUTIVE SUMMARY

1.1 The Child Welfare Amendment Bill 1998 ("Bill") amends the *Child Welfare Act 1947* and consequentially amends the *Freedom of Information Act 1992, Spent Convictions Act 1988* and *Young Offenders Act 1994*.

1.2 On May 23 2000, the Legislative Council referred the Bill to the Committee for consideration and report by August 31 2000. Following prorogation of Parliament, whereupon the Bill and consequently the referral to this Committee lapsed, the Bill was referred again on September 5 2000.

1.3 The purpose of the Bill is to regulate the operation of the Child Protection Services Register. The register is the formal mechanism to improve co-ordination and co-operation across Government agencies in the area of child welfare.

1.4 The Committee resolved to concentrate on relevant areas of interest raised in the second reading debate in the Legislative Council, the debate on the motion to refer the Bill to the Committee, and as raised by witnesses to the Committee. These were:

- the definition of "approved person" in proposed section 120A of the Bill;[1]
- the definition of "reporting agency" in ## 120A of the Bill;
- the appointment, powers and accountability of the manager of the register;
- the security of information on the register;
- rights of removal of information contained on the register;
- notifications;
- any deterrence to children in reporting maltreatment due to the reporting requirements;
- the impact of the United Nations Convention on the Rights of the Child;
- proposed amendments to the *Freedom of Information Act 1992*;
- natural justice considerations;
- appeals; and
- evaluation of the register.

[1] In this briefing note ## is used to signify a section proposed to be inserted into the Act by the Bill.

1.5 In summary the Bill allows for interagency co-operation in dealing with child protection matters. Generally the Committee believes that interagency co-operation should be encouraged so long as appropriate safeguards are in place for the secure passage of confidential information between agencies and individuals within those agencies.

1.6 The Committee has recommended a number of amendments to the Bill and these are summarised in Chapter 2.

CHAPTER 2
RECOMMENDATIONS

2.1 Recommendations are grouped as they appear in the text at the page number indicated:

Page 26

Recommendation 1

The Committee recommends that the definition of 'reporting agency' in proposed section 120A of clause 4 of the Bill be amended in the following manner –

Page 3, after line 23 - To insert the following new subclause –

" (ba) the department of the Public Service principally assisting with the administration of the *Police Act 1892*; "

Page 26

Recommendation 2

The Committee recommends that the definition of 'reporting agency' in proposed section 120A of clause 4 of the Bill be amended in the following manner –

Page 3, lines 26 to 28 - To delete "*Education Act 1928*" and substitute the following–

" *School Education Act 1999* "

Page 44

Recommendation 3

The Committee recommends that proposed section 120D(3), clause 4 of the Bill be amended in the following manner –

Page 6, line 14 – to delete "subsection (4)(b)" and insert instead –

" subsections (4) and (4a) "

Page 44

Recommendation 4

The Committee recommends that proposed section 120D, clause 4 of the Bill be amended in the following manner –

Page 6, after line 30 - To insert the following new subclause –

"(4a) Where a person referred to in subsection (1)(a)(ii) or (c)(i) was convicted of an offence in relation to which a spent conviction order has been made under section 39 of the *Sentencing Act 1995* or where the conviction has not been recorded under section 55 of the *Young Offenders Act 1994,* a Judge may –

(a) on the application of that person; and

(b) having regard to –

(i) the nature and seriousness of the offence; and

(ii) whether the person who committed the offence was under the age of 18 years at the time it was committed, and in such case the age of the person at that time,

order the removal of the information relating to the offence from the register; and the manager shall comply with any such order. "

Page 47

Recommendation 5

The Committee recommends that proposed section 120E in clause 4 of the Bill be amended in the following manner –

Page 7, line 12 - To delete "Information" and insert instead –

" Subject to any order made by a court under sections 120D(4) or 120D(4a), information "

Page 60

Recommendation 6

The Committee recommends that proposed section 120G, clause 4 of the Bill be amended in the following manner –

Page 9, after line 20 - To insert the following new sub-clause -

“

(5) If the manager decides to exercise a power given by subsection (3), the manager shall record the decision and the reasons for it in the prescribed manner. ”

Page 61

Recommendation 7

The Committee recommends that proposed section 120H(1), clause 4 of the Bill be amended in the following manner -

Page 9, after line 25 - to insert before “120D(1)(c)” the following –

“ 120D(1)(a)(ii) or ….”

Page 62

Recommendation 8

The Committee recommends that proposed section 120H, clause 4 of the Bill be amended in the following manner -

Page 10, after line 5 - To insert the following new sub-clause -

“(4) If, at the time of notification, a spent conviction order has been made under section 39 of the *Sentencing Act 1995* or the conviction has not been recorded under section 55 of the *Young Offenders Act 1994* in relation to the offence, then notification under subsection (1) is to include a statement of the person’s right to apply for the removal of the information under section 120D(4a). ”

Page 65

Recommendation 9

The Committee recommends that proposed section 120J(2), clause 4 of the Bill be amended in the following manner -

Page 11, lines 7 to 8 – after the words "manager shall" to delete the remaining lines and substitute the following–

" , if the manager is satisfied that it is in the best interests of the child concerned to do so - ".

Page 65

Recommendation 10

The Committee recommends that proposed section 120J, clause 4 of the Bill be amended in the following manner -

Page 11, after line 13 - To insert the following new sub-clause -

" (3) If the manager permits an approved person to have access to information under subsection (1) or (2), the manager shall record the decision and the reasons for it in the prescribed manner. "

Page 68

Recommendation 11

The Committee recommends that proposed section 120K, clause 4 of the Bill be amended in the following manner –

Page 12, lines 3 to 6 – delete subsection (5) and insert instead –

" If the manager decides to refuse access, the manager shall -

(a) record the decision and the reasons for it in the prescribed manner; and

(b) give written notice of the decision to the person who requested access within 14 days after the decision is made. "

Page 69

Recommendation 12

The Committee recommends that proposed section 120K, clause 4 of the Bill be amended in the following manner –

Page 12, line 7 – to delete "subsection (5)" and insert instead –

" subsection (5)(b) "

Page 77

Recommendation 13

The Committee recommends that proposed section 120P, clause 4 of the Bill be amended in the following manner -

Page 14, after line 3 - To insert the following new sub-clause –

" (2) The Minister is to cause the report to be laid before each House of Parliament within 7 sitting days of being received. "

Page 81

Recommendation 14

The Committee recommends that proposed section 120R, clause 4 of the Bill be amended in the following manner –

Page 15, line 2 - To delete the word "may"

and

line 3 - after "agencies," insert the following words -

" is to ".

Page 85

Recommendation 15

The Committee recommends that Clause 6 of the Bill be amended in the following manner –

Page 16, line 5 - To delete "section 120P(1)" and substitute the following–

" section 120Q(1) "

Page 85

Recommendation 16

The Committee recommends that the Bill be amended in the following manner –

Page 15, after line 19 - To insert the following new sub-clause -

" 120S. Review of Part

(1) The Minister is to carry out and complete a review of the operation and effectiveness of this Part within 6 months after the expiration of 5 years from the commencement of this Part.

(2) Without limiting the scope of the review provided for in subsection (1), the Minister is to have regard to -

(a) the need for the continuation of the register; and

(b) the functions of the manager.

(3) The Minister is to prepare and present to each House of Parliament a report based on the review as soon as practicable after it is completed, and in any event not later than 6 years of the date on which this Part commenced."

CHAPTER 3
REFERENCE AND PROCEDURE

REFERRAL TO THE COMMITTEE

3.1 The Bill's long title is:

> "*An Act to amend the Child Welfare Act 1947 and to consequentially amend the -*
>
> *Freedom of Information Act 1992;*
>
> *Spent Convictions Act 1988*; *and*
>
> *Young Offenders Act 1994.* "

3.2 On May 11 1999 the Bill was introduced and read a first time in the Legislative Council on a motion of Hon Murray Criddle MLC.[2] The second reading commenced on May 11 2000 and was agreed to on May 23 2000 when the House resolved to refer the Bill to the Committee for consideration and report by 31 August 2000.[3]

3.3 Parliament was prorogued on August 4 2000 whereupon the Bill (and consequently the referral to this Committee) lapsed. Following opening of Parliament on August 17 2000 the Bill was referred again to the Committee on September 5 2000.[4] The Legislative Council set no reporting date.

THE COMMITTEE'S APPROACH TO THE INQUIRY

Role of the Committee

3.4 As the Bill was referred after the second reading had been agreed, the role adopted by the Committee in the scrutiny of the Bill was to consider matters of detail in particular clauses and provide recommendations and proposals for amendment.

3.5 As part of this process the Committee has made comment on whether the Bill is consistent with the claims made in the second reading debate, particularly by the Minister promoting the Bill. In this report, the "Second Reading Speech" refers to that of Hon Murray Criddle MLC in the Legislative Council.

---

2 Western Australia, *Parliamentary Debates (Hansard)*, Legislative Council, May 11 1999, 8066.

3 Western Australia, *Parliamentary Debates (Hansard)*, Legislative Council, May 23 2000, 6966.

4 Western Australia, *Parliamentary Debates (Hansard)*, Legislative Council, September 5 2000, 564.

3.6 At the outset the Committee notes that many submissions raised concerns as to the current exercise of discretion and decision making processes of the Department of Family and Children's Services ("FCS"). The Committee has not inquired into these concerns as they seek to raise matters outside the specific provisions of the Bill. The Bill provides for a register and it is the provisions relating to the register on which the Committee has focused its inquiry.

Consultation Process

Scope of Inquiry

3.7 The Committee resolved to concentrate on relevant areas of interest raised in the second reading debate in the Legislative Council, the debate on the motion to refer the Bill to the Committee, and as raised by witnesses to the Committee.[5] These were:

- the definition of "approved person" in ##120A of the Bill;[6]
- the definition of "reporting agency" in ##120A of the Bill;
- the appointment, powers and accountability of the manager of the register ("manager");
- the security of information on the register;
- rights of removal of information contained on the register;
- notifications;
- any deterrence to children in reporting maltreatment due to the reporting requirements;
- the impact of the United Nations Convention on the Rights of the Child ("Convention");
- proposed amendments to the *Freedom of Information Act 1992* ("FOI Act");
- natural justice considerations;
- appeals; and
- evaluation of the register.

3.8 The Committee also considered amendments related to the above areas that have been raised in Supplementary Notice Paper No. 32 ("SNP").[7]

---

5 Western Australia, *Parliamentary Debates (Hansard)*, Legislative Council, May 23 2000, 6954 – 6966.

6 ##120A Bill. In this briefing note ## is used to signify a section proposed to be inserted into the Act by the Bill.

7 Legislative Council of Western Australia, *Supplementary Notice Paper No. 32*, May 23 2000.

Briefings from the Department of Family and Children's Services

3.9 On June 21 2000 the following FCS officers attended a Committee hearing:

- Ms Anne McMullan, Relieving Manager, Child Protection Services Register;
- Mr Bill Budiselik, Executive Director, Industry Development and Service Specification;
- Ms Rae Markham, Senior Policy/Project Officer;
- Mr James Laffer, Regional Manager, Procurement Social Services Unit; and
- Ms Tara Gupta, Director Legal Services.

3.10 These officers gave briefings on all of the areas of specific interest to the Committee and explained the general framework of the reforms contained in the Bill. The Committee expresses its appreciation to FCS for its assistance throughout the inquiry.

Written Submissions

3.11 The Committee resolved to invite submissions on the Bill from the general public. On June 10 2000, the Committee advertised, in *The West Australian* newspaper, for written submissions pertaining to the specific provisions of the Bill. The Committee also specifically invited submissions from government agencies and interest groups involved or interested in child welfare.

3.12 A list of submissions received by the Committee is set out in Appendix 1. The Committee thanks the individuals and organisations that provided evidence and information to the Committee.

Hansard and Legislative Council Committee Office Staff

3.13 The Committee takes this opportunity to acknowledge the services of Hansard in the transcription of evidence gathered by the Committee. The Committee also expresses its appreciation to staff of the Committee: Ms Mia Betjeman, Principal Advisory Officer; Ms Kate Fitzgerald, Committee Clerk and Ms Yeshika Naidoo, Articled Clerk, for their assistance during the Committee's inquiry and the preparation of this report.

CHAPTER 4
OVERVIEW OF THE BILL

OVERVIEW

4.1 Clause 4 of the Bill, inserts Part VIIIA into the Principal Act. That Part provides for the regulation of a child protection services register ("register") which is part of a package of initiatives developed and progressed by the Government in response to the Wood Royal Commission into the New South Wales Police Service. [8]

4.2 The purpose of the Bill is to regulate the operation of the register. The register is the formal mechanism to improve co-ordination and co-operation across Government agencies. As stated by the Hon Murray Criddle MLC during the Second Reading Speech:

> *"The register is designed to meet government reporting requirements on child maltreatment; inform the minister responsible for administering the Child Welfare Act on government agency responses to child maltreatment; coordinate the involvement of multiple government agencies; inform contributing agencies of previous child maltreatment incidents and confirm the names of individuals who have been convicted of criminal offences against children; require reporting agencies to adhere to the reciprocal child protection procedures; and ensure, where a lead or coordinating agency is not apparent, that one agency assumes this responsibility.*
>
> *The child protection services register pre-empts and satisfies a number of recommendations from the Wood royal commission's paedophile inquiry. It will also provide accurate and reliable information regarding the incidence of child maltreatment in Western Australia. The provision of services and supports to children who experience child maltreatment and their families is the responsibility of all relevant government departments. This requires collaboration between agencies if the most effective outcome for a child is to be achieved. Unfortunately, this coordination has not always been*

[8] Second Reading Speech, Western Australia, *Parliamentary Debates (Hansard)*, Legislative Council, May 11 1999, 8067. In August 1998 the Wood Royal Commission published recommendations with regard to the detection and prevention of paedophilia.

> *evident. A child or family may receive similar services from more than one agency or, regrettably receive no services at all."*[9]

4.3 The register has been in operation on a pilot basis since July 1996. As at May 1999 more than 1,900 children had been recorded. Of these children, 80 percent were aged 12 years and under; one-third had suffered physical maltreatment; one-third had been sexually abused; and the remainder had experienced either neglect or emotional abuse. FCS provided over 90 percent of the notifications. Police and hospitals provided the remainder.[10]

4.4 In summary, the Second Reading Speech stated that the Bill will:

- provide regulation for the services reporting to the register which will increase the number of registrations of children by other government departments;
- provide departments which have legal restrictions on the release of information with the ability to provide the register with information; and
- assure departments that their records will be treated confidentially.[11]

GENERAL ISSUES

Convention of the Rights of a Child, Article 16

Overview

4.5 The position of the Convention has been brought to the attention of the Committee by both verbal and written submission.

4.6 The Convention was agreed to by the United Nations in 1989 and ratified by Australia in 1990. It emphasises that the primary responsibility for the care and protection of children lies with the family. If, however, the State is required to intervene in some way, Article 3 of the Convention requires that the 'best interests of the child' must be the primary consideration.

4.7 The basic principle of the Convention is that all children, regardless of individual differences, have equal rights which should be respected. In addition it recognises

---

9 Second Reading Speech, Western Australia, *Parliamentary Debates (Hansard),* Legislative Council, May 11 1999, 8067.

10 Ibid, 8068.

11 Ibid.

that as children are especially vulnerable to mistreatment and abuse, they are in need of special care and protection.[12]

Submissions

4.8 Some submissions received by the Committee evidenced a belief that the Bill impinges upon a child's right to privacy under the Convention.[13] Reference was made to Article 16 which states:

> *"1. No child shall be subject to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.*
>
> *2. The child has the right to the protection of the law against such interference and attacks."*

4.9 FCS submitted to the Committee that:

- The Bill does not contravene Article 16 as it seeks to protect the right of the child not to be maltreated whilst preserving confidential information. Such information is only disclosed where the child is the subject of further inquiry or where there has been an inadequate provision of services.
- The Bill also aims to conform with Article 19 which requires signatories to take all legislative, administrative, social and educational measures to protect children from maltreatment.[14]

4.10 The Ministry of Justice also submitted to the Committee that Article 16 of the Convention is not contravened by the Bill which aims to protect the welfare of children and places restrictions upon access to information contained on the register.[15] In its submission to the Committee, the Child Protection Unit, Princess Margaret Hospital, Western Australia ("CPUPMH") suggested that the Bill is more in keeping with Article 3 of the Convention which requires that children be provided with the care and protection necessary for their well-being.[16]

---

12 Healey, J (ed), 'The Rights of the Child', *Issues in Society*, Vol 113 (Spinney Press Australia, 1999).

13 Submission 9, HALO, p 5; Submission 11, JCPCAC, p 2; and Submission 7, LASECA, p 11.

14 Submission 3A, FCS, p 13.

15 Submission 10, Ministry of Justice, p 2.

16 Submission 13, CPUPMH, p 6.

Comment

4.11 In Australia, an international treaty does not have the force of law unless a Federal or State Parliament passes it into legislation. An international treaty has certain legal force in that the courts can take a treaty into account where there are uncertainties or ambiguities with regard to a particular piece of legislation. It cannot however override the legislation.

4.12 The Committee considers that the Bill does not breach the Convention.

Natural Justice considerations

Overview

4.13 Natural justice equates to fairness between the parties. What is required to achieve fairness depends on the circumstances of each case.

4.14 Generally, when a decision is to be made which will affect the rights, interests or legitimate expectations of a person, that person is to be accorded the procedural fairness of knowing about the pending decision and having an opportunity to make a submission.[17]

4.15 The rules of natural justice are variable according to the context in which the decision-maker is acting.[18]

Submissions

4.16 Concerns were expressed to the Committee that the Bill does not accord natural justice to either victims or offenders.[19]

4.17 In its submission to the Committee, CPUPMH noted that although there is a mechanism under the Bill for the removal of juvenile offender's details upon application to a Judge, the stigma of being on the register in the first place could detrimentally affect the juvenile's chances of employment. CPUPMH argued that this was of concern where juveniles have been involved in consensual sexual relations and then subsequently convicted of unlawful carnal knowledge.[20]

---

17 Kioa v West (1985) 159 CLR 550 [60 ALJR 113; 62 ALR 321].

18 Astor H and Chinkin CM, *Dispute Resolution in Australia* (Sydney: Butterworths, 1992), ch 6, 135; Heatley v Tasmanian Racing & Gaming Commission (1977) 137 CLR 487 [51 ALJR 703; 14 ALR 519]; Dixon v Commonwealth (1981) 55 FLR 34 [61 ALR 173; 3 ALD 289] (FC Fed Ct).

19 Submission 11, JCPCAC, p 4. See also Submission 7, LASECA at p 16.

20 Submission 13, CPUPMH, p 8.

4.18 CPUPMH is additionally concerned with the Bill's current inclusion of spent convictions. They argue that if such convictions were included there may be an unjust effect upon employment. On the other hand, CPUPMH argued, if the references to spent convictions are removed, then that may allow serious offenders access to children through employment.[21] CPUPMH submitted to the Committee that provision should be made in the Bill for an appeal procedure whereby persons with spent convictions may apply to have such information removed from the register. These issues are discussed at paragraphs 8.23 to 8.26 and 8.29 to 8.34.

4.19 FCS submitted to the Committee that the Bill addresses natural justice considerations in several ways. For example:[22]

- Details of persons responsible for child maltreatment are not placed on the register unless a conviction has been recorded against them in respect of the offence.[23] Whilst FCS notes the difficulty in obtaining convictions in cases of child maltreatment, the presumption of innocence is said to be an overriding consideration.
- There is an avenue of appeal in circumstances where children or parents are denied access to information,[24] convicted offenders are juveniles[25] or where a conviction has been quashed or set aside.[26]
- There is provision for alterations to be made to the register to maintain the accuracy of its information.
- The Bill specifies the purposes for and the method by which information on the register may be accessed.[27]
- There is an obligation to notify children and parents where a report concerning them has been made to the register.[28]

---

21 SNP 2 / 4 and 3 / 4.

22 Submission 3A, FCS, p 15.

23 ##120D(1)(a)(ii) and (1)(c) Bill.

24 ##120L Bill.

25 ##120D(4) Bill.

26 ##120O Bill.

27 ##120I Bill.

28 ##120G Bill.

- Information relating to a child is to be removed once the child attains the age of eighteen.[29]
- A report may only be made once an investigation has been completed.

[29] ##120D(2) Bill.

CHAPTER 5
SPECIFIC PROVISIONS OF THE BILL – CLAUSE 4, ##120A INTERPRETATION

INTRODUCTION

5.1 Proposed section 120A defines various words and expressions in proposed Part VIIIA. The main issue of interest in this clause are the definitions of 'approved person' and 'reporting agency' which in turn affect the extent to which the reporting obligations and rights of access to the register under the Bill apply.

DEFINITION OF 'APPROVED PERSON'

Overview

5.2 'Approved person' is defined in ##120A of the Bill as meaning:

> *"a person who holds an office or position in the reporting agency that is prescribed, or belongs to a class that is prescribed, for the purposes of this definition."*

5.3 'Approved persons' are subject to reporting obligations and are given rights of access to the register pending managerial discretion. For example, ##120F(1) of the Bill requires an 'approved person' to make a report to the manager where he or she is satisfied "…*following an assessment or investigation that a child has been maltreated or is at serious risk of being maltreated*".

Submissions

5.4 Submissions received by the Committee argue that the definition of 'approved person' is too broad, leaving doubt in the community as to the precise extent of access to confidential information. The concerns relate mainly to the potential for misuse of such access. In addition, it is argued that there is potential for there to be numerous approved persons who would then pass on the information to their respective agencies thereby effectively creating a free flow of confidential information.[30] These issues relate to access to information contained on the register which is considered in Chapters 13 and 14.

---

30 Submission 9, HALO, p 2, and also Submission 7, LASECA, p 5.

5.5 FCS informed the Committee that reasons provided for leaving such definition to the regulations included the following:

- **Dynamic character of agencies.** The administrative structure of government agencies is subject to frequent change.[31] Each government agency therefore requires flexibility in identifying positions within the agency that have the responsibility of dealing with children and who are therefore suitable 'approved persons'.[32]
- **Regulations may be disallowed.** Regulations prescribing a certain class of persons as 'approved' are still subject to scrutiny by Parliament in that they are disallowable instruments.[33]
- **Agency screening procedures.** Government agencies involved in the care or welfare of children have screening procedures in place to assess a potential employee's suitability. Thus convictions for offences against children would be immediately detected.[34]

5.6 The Health Department of WA, the Ministry of Justice and CPUPMH agree with the reasons of the FCS. They further stated to the Committee that:

- each agency ought to be involved in determining which persons or classes of persons are deemed 'approved' for their particular agency;[35] and
- once the 'approved persons' have been prescribed there needs to be training in order for there to be consistency of interpretation of the relevant guidelines.[36]

5.7 Concerns were also expressed about:

- the definition of 'approved person' particularly in view of the reporting requirements contained in ##120F. These concerns are discussed in Chapter 10; and
- the view of most submissions that the Bill will impose mandatory reporting on 'approved persons'. This has been discussed at paragraphs 10.5 to 10.16 and 10.27 to 10.29.

---

31 Submission 3A, FCS, pp 6 & 7.

32 Ibid, p 8.

33 Ibid.

34 Ibid.

35 Submission 6, Health Department of WA; Submission 10, Ministry of Justice, p 1; and Submission 13, CPUPMH, p 3.

36 Submission 13, CPUPMH, p 3.

Comment

5.8 The Committee notes that the prescription of who may be an 'approved person' will be decided by regulations made under the Principal Act.[37] Regulations are subject to parliamentary scrutiny as delegated legislation.

5.9 Guidelines which may be issued under ##120R would not be subject to parliamentary scrutiny however ##120R does not empower the prescription of an 'approved person' by way of guidelines.

5.10 The Committee finds that it is essential that there be consultation with 'reporting agencies' in determining which persons or classes of persons are deemed 'approved'.

5.11 The Committee emphasises the importance of training to ensure that 'approved persons', once identified, understand clearly the nature and extent of their responsibilities under the provisions of the Act proposed by the Bill.

DEFINITION OF 'REPORTING AGENCY'

Overview

5.12 Proposed section 120A defines 'reporting agency' as referring to FCS, the Police Force, the Education Department of WA ("EDWA"), the Health Department of WA, Ministry of Justice, Disability Services Commission, the Western Australian Alcohol and Drug Authority, and public and private hospitals that are prescribed.

5.13 FCS has identified these agencies as being primary providers of services to children. In one of its submissions to the Committee, FCS advised that it was considered necessary that such agencies have reporting responsibilities and access rights to the register in order to facilitate inter-agency co-operation and therefore enhance the level of services provided to children and families. At present, the two external agencies principally involved in making reports to FCS are the Police and Princess Margaret Hospital.[38]

Submissions

5.14 Submissions received by the Committee indicated the following concerns with the definition of 'reporting agency':

- the provision for private hospitals to be prescribed as a 'reporting agency';

---

37 s 149 of the Principal Act empowers the making of regulations.

38 Submission 3B, FCS, p 7.

- the exclusion of non-government and private organisations (apart from private hospitals);
- the reference to 'Police Force of WA';
- the perceived imposition of an investigative role on EDWA; and
- the exclusion of non-government schools and children enrolled in home education.

Private hospitals

5.15 CPUPMH noted that the definition includes government agencies except insofar as private hospitals may be prescribed as a 'reporting agency' and that this "*appears out of place with the other reporting agencies as there are no other non-government agencies such as independent schools etc mentioned as being reporting agencies*".[39]

5.16 In respect of this matter, FCS has advised the Committee that:

- The Bill aims to create a register of children whose maltreatment has been substantiated and an information exchange mechanism between a limited number of Government departments for the purposes of protecting children.
- A wider network of agencies both government and non-government exists. This network of agencies has access to mechanisms to bring about the protection of children through reporting concerns to either the Police or FCS. The register is not expected to replace or duplicate that network or the mechanisms in place for these agencies to report their concerns.
- Further, the register does not aim to replace the legislatively prescribed role of FCS in assessing allegations of concern about the well-being of children. A major benefit of the register will be in identifying children the subject of maltreatment who have been reported by a number of agencies or the same agency over a number of years.
- A risk of the register, if it includes too many 'reporting agencies', is that the definition of substantiated abuse will broaden. For example, cases which would now be regarded as indicative of poor parenting may be labelled as abuse.
- FCS believe, given the limited number of agencies able to register cases and the 'approved persons' structure within the 'reporting agency', that this risk will be reduced. Additionally if the scope of the agencies reporting is

[39] Submission 13, CPUPMH, p 4.

increased a much larger infrastructure would need to be provided to the register, at the possible expense of resources being devoted to services.

- The agencies selected to participate in the operation of the register are part of the Government and as such each has a Chief Executive Officer who can provide direction to staff within their administration.
- The intent of including private hospitals within the interpretation of 'reporting agencies' (subsection (h) of the definition in ##120A) is to enable reporting by 'approved persons' in hospitals such as Joondalup which is managed by a private provider contracted by Government to provide services to the public.[40]

5.17 FCS advised the Committee that it is not intended to broaden the operation of the register to agencies outside of the Public Sector and the controls associated with the Public Sector.[41]

Non-government and private organisations

5.18 Concern was raised in LASECA's submission to the Committee regarding the exclusion of private organisations.[42]

5.19 In its submission to the Committee, CPUPMH noted that:

> *"… significant service delivery takes place to abused children in the non-government sector and other service deliverers that will not be recorded in this system. Furthermore as FCS have increasingly contracted out and funded agencies such as Wanslea, Mofflyn, Relationships Australia, Ngala etc to provide core child protection services any data collected from the Register will be skewed as this data will not be collected."*[43]

5.20 FCS advised the Committee that non-government agencies are not included in the definition as they currently have procedures in place whereby relevant incidents are reported to FCS.[44] The comments of FCS, noted by the Committee at paragraphs 5.16 and 5.17, are also relevant to this issue.

---

40 Submission 14, FCS, pp 1 – 2.

41 Ibid, p 2.

42 Submission 7, LASECA, p 6.

43 Submission 13, CPUPMH, p 4.

44 Submission 3A, FCS, p 9.

Reference to 'Police Force of WA'

5.21 In its submission to the Committee, the WA Police Service raised a potential difficulty with the present reference to the "Police Force of WA" as a reporting agency.[45] The Committee was advised that two bodies currently comprise the Police Service; namely the Police Force[46] and the Police Service.[47]

5.22 The WA Police Service noted that the current language of the Bill excludes public servants employed in the Police Service from fulfilling reporting functions and participating in the mutual exchange of information between agencies.[48]

5.23 After consultation with the Committee, FCS have advised that:

> *"The intent behind inclusion of "the Police Force of Western Australia" was the understanding that only 'sworn' officers had responsibility for investigating whether a child is being or has been maltreated and whether an offence has been committed against a child.*
>
> *The department has discussed this issue with the Police Service and the matter of amending the Bill to capture the Police Service as well as the Police Force will be pursued with Parliamentary Counsel."*[49]

The perceived imposition of an investigative role on EDWA

5.24 In their submission to the Committee, EDWA expressed concerned as to what they perceived to be an 'investigative' role allocated to teachers and reporting agencies under the Bill.[50] This matter is discussed in relation to ##120F of the Bill in Chapter 10 of this report.

Children enrolled at non-government schools and under home education

5.25 EDWA also raised concerns with the Committee as to how the reporting agency status would operate in practice, in view of the fact that some children are enrolled at non-government schools and some under home education.[51]

---

45 Submission 5, WA Police Service.

46 Established under the *Police Act 1892.*

47 Established under the *Public Sector Management Act 1994.*

48 Submission 5, WA Police Service, p 1.

49 Submission 14, FCS, p 2.

50 Submission 8, EDWA, p 1.

51 Ibid, p 2.

5.26 FCS have argued that non-government schools are outside of the public sector and they cannot be held accountable in the same way.[52] FCS also stated that:

- reciprocal reporting arrangements are currently in place with government agencies; and
- FCS is involved in negotiations with representatives of some non-government schools to facilitate a similar arrangement.[53]

Other issues

5.27 The Ministry of Justice is satisfied with the current definition of 'reporting agency' as it relates to them[54] although it notes a potential difficulty should juvenile justice issues be administered by a separate agency at a later date.[55]

5.28 The Ministry of Justice advised the Committee that if this occurred the definition would not then cover the department responsible for adult offenders. The definition would therefore need to be extended to refer to the agency assisting in the administration of the *Sentence Administration Act 1995* and the *Prisons Act 1981*.[56]

Comment

5.29 The Committee finds that it is appropriate for there to be provision for private hospitals to be prescribed as a 'reporting agency'.

5.30 The Committee emphasises the importance of there being reciprocal arrangements in place with regard to non-government organisations, including non-government schools, for the purposes of the protection of children.

5.31 The Committee is not convinced by the argument of FCS discussed at paragraph 5.26 and considers that non-government schools should be accountable. This accountability may be provided through this Bill or other relevant Acts.

5.32 The Committee notes that subparagraph (c) of the definition of 'reporting agency' in ##120A of the Bill refers to the *Education Act 1928* which has been replaced by the *School Education Act 1999*.

---

52 Submission 14, FCS, pp 2 – 3.

53 Ibid.

54 Namely "the department of the Public Service principally assisting with the administration of the *Young Offenders Act 1994*".

55 Submission 10, Ministry of Justice, p 1.

56 Ibid.

5.33 The Committee believes that there ought to be an amendment to the Bill to include the 'Police Service' as a 'reporting agency' as well as the 'Police Force'.

RECOMMENDATIONS

Recommendation 1

The Committee recommends that the definition of 'reporting agency' in proposed section 120A of clause 4 of the Bill be amended in the following manner –

Page 3, after line 23 - To insert the following new subclause –

" (ba) the department of the Public Service principally assisting with the administration of the *Police Act 1892*; "

Recommendation 2

The Committee recommends that the definition of 'reporting agency' in proposed section 120A of clause 4 of the Bill be amended in the following manner –

Page 3, lines 26 to 28 - To delete "*Education Act 1928*" and substitute the following–

" *School Education Act 1999* "

CHAPTER 6
SPECIFIC PROVISIONS OF THE BILL – CLAUSE 4, ##120B
THE MANAGER

INTRODUCTION

6.1 Proposed section 120B provides for the appointment and functions of the manager of the register.

APPOINTMENT OF MANAGER

Overview

6.2 Proposed section 120B(1) provides that "*The Minister shall, in writing, designate an officer of the Department as the manager of the register*."

Submissions

6.3 Ms Young submitted to the Committee that the public should be notified of potential appointments for the position of Register Manager.[57]

POWERS AND ACCOUNTABILITY

Overview

6.4 Proposed section 120B sets out the functions of the manager. Other functions are conferred in other sections of the proposed Part. The Bill seeks to regulate managerial power whilst allowing room for discretion. In the view of FCS, such discretion is required to enable the manager to make decisions in the 'best interests of the child'.[58]

Submissions

6.5 Submissions received by the Committee evidenced concerns relating to:

- accountability for the exercise of managerial discretion; and
- a perceived conflict of interest.

---

57 Submission 12, Brenda Young, p 1.

58 Submission 3A, FCS, p 14.

Managerial Discretion and Accountability

6.6 In its submission to the Committee, CPUPMH considered managerial discretion to be excessive, open to misuse and resulting in potentially arbitrary decisions.[59] CPUPMH submitted that the parameters of managerial power have not been adequately defined in the Bill, in particular that:

- it is unclear whether the power to 'facilitate and coordinate' is to include a level of authority over other government agencies; [60] and
- it is unadvisable to add further administrative layers upon an already complex system.[61]

6.7 In one of its submissions to the Committee, FCS advised that:

- No legislative mechanism or framework currently exists to support and facilitate the exchange of child protection information between, and co-ordination of services provided by, core government agencies who have a responsibility toward the protection of children. The Bill is designed to do this.
- The register is not superordinate to any department. It is intended that the manager will work with an interdepartmental committee. This will assist 'facilitation and co-ordination'. Further, a meeting of senior officers of reporting agencies on a regular basis (eg. bi-monthly meetings) at which matters concerning the register can be discussed, including legislative requirements, identification of concerns and gaps and how these might be addressed, will be critical to implementation and monitoring of the Bill.
- It is also intended that reporting agencies receive regular data/information reports (eg. quarterly) on the operation of the register.
- From time to time as necessary, the manager will communicate with Chief Executive Officers of other agencies through the Chief Executive Officer of FCS.
- The manager will also prepare an annual report on the operation and effectiveness of the register for presentation to the Minister.[62]

6.8 Some submissions supported the requirement that the manager record his decisions and his reasons for such decisions, thereby providing a greater level of accountability.

---

59 Submission 13, CPUPMH, p 4.

60 ##120B(2)(d) Bill.

61 Submission 13, CPUPMH, p 7.

62 Submission 14, FCS, p 6.

This issue is discussed later in this report in relation to ##120F (Chapter 10), ##120G (Chapter 11) and ##120J (Chapter 13).

Conflict of interest

6.9 Submissions received by the Committee have queried the criteria for the appointment of the manager especially as it is alleged that the position of the ministerially appointed manager of the register will be occupied by a person who is also the FCS appointed records screening manager for other FCS information.[63]

6.10 FCS has advised the Committee that:

- the manager is responsible to the Executive Director, Industry Development and Services Specification, FCS;[64] and
- whilst there is administrative responsibility to management within FCS, there is also a line of accountability to the Minister and therefore to the Parliament.[65]

6.11 Submissions received by the Committee also queried the accountability of register staff where they are employed by and are therefore responsible to FCS.[66] Of particular concern to witnesses is the position in which both the manager and Minister are placed where FCS is not adequately performing its statutory obligations. It has been suggested that conflicts of interest could result in corrupt practices.[67]

6.12 The Committee was advised by FCS that at present, register staff do have other responsibilities within the Department. In a submission to the Committee, FCS stated that "[o]*nce the Register becomes fully operational alternative assignment of these duties will be considered by the Executive of the Department*".[68]

COMMENT

6.13 The Committee notes that there are procedures in place whereby all proposed appointments are subject to scrutiny in the public sector but that nowhere in the public sector is there provision for public scrutiny. The Committee believes that it would be impracticable for there to be provision for public scrutiny of proposed appointments.

---

63 Submission 11, JCPCAC, pp 3 & 4; and submission 7, LASECA, p 15.

64 Submission 3B, FCS, p 6. The Executive Director is the second most senior officer in FCS.

65 Submission 3A, FCS, p 14.

66 Submission 11, JCPCAC, p 3 and Submission 13, CPUPMH, p 7.

67 Submission 13, CPUPMH, p 7.

68 Submission 3B, FCS, p 7.

6.14 The Committee considers that once the register become fully operational adequate resources should be allocated to enable a separation of function between employees involved in the operation of the register and employees with other responsibilities within FCS.

CHAPTER 7
SPECIFIC PROVISIONS OF THE BILL – CLAUSE 4, ##120C REGISTER TO BE KEPT

INTRODUCTION

7.1 Proposed section 120C describes how the manager must keep the register, the name of the register and the form or medium in which it may be kept.

7.2 It is generally agreed between all parties involved or interested in the register that security is of primary importance in the establishment and maintenance of the register. It can be said that security considerations need to address the issues of:

- unauthorised access;
- misuse of information;
- privacy; and
- alteration of information.

7.3 In addition, it is also necessary to consider ancillary issues such as the backing up of data, data corruption by software and hardware failures, fire or other destruction of information, and the production of statistical reports for educational purposes.

SUBMISSIONS

7.4 It is a common argument within the submissions that there should be mechanisms in place to maintain the security of the register. Perhaps the question to be asked is: "*Are there appropriate technical and organisational measures in place against unauthorised or unlawful processing of or access to personal data?"*

7.5 In their submission to the Committee, HALO suggested that security is not ensured as there is little regulation of such matters in the Bill and the Minister is able to determine in which form the register is kept.[69]

7.6 CPUPMH argued in their submission to the Committee that the sharing of information, which is crucial to the successful operation of the register, inevitably limits the level of security available to such information. In addition, it is argued that

[69] Submission 9, HALO, p 3.

restricting the flow of information to reporting agencies effectively negates the role played by non-government organisations in the child protection arena.[70]

7.7 Other submissions have queried the security of information held by government agencies prior to entry upon the register.[71] This is outside the scope of the Bill and this report.

General security measures

7.8 In evidence to the Committee, FCS provided the following information concerning the security measures currently in place:

7.8.1 *Location of register* [72]

- The register is in the form of an electronic database contained on a stand-alone computer without online or network access.
- The area housing the register is secured via an electronic identity card and combination locks with a log created of all personnel gaining access. Access is authorised and monitored by the manager.
- There is no signage to indicate the office containing the register.
- The FCS building is also secured by way of electronic identity cards and camera surveillance.

7.8.2 *Back-up of information* [73]

- Data is backed up onto a Zip disc that is stored in the same area.
- As at June 2000 FCS was investigating the possibility of backing up information by way of CD-ROM.
- To ensure the protection of data from fire, FCS is also considering off-site storage or alternatively a fire proof safe located in the same area.

---

70 Submission 13, CPUPMH, p 4.

71 Submission 12, Brenda Young, p 1. See also Submission 7, LASECA at p 7.

72 Submission 3A, FCS, pp 2 & 10.

73 Submission 3B, FCS, p 1.

7.8.3 *Data Security*

- Access to the database is password protected.[74] Access to passwords is restricted to the manager, Relieving Manager, Assistant Manager and one administrative support officer.[75]
- Data administration and Information Technology ("IT") support is currently provided by Computer Sciences Corporation and DMR Consulting Pty Ltd. Contracts with these companies contain confidentiality provisions and contractors are subjected to state, national and at times international conviction record checks prior to employment. All IT support is conducted within the secure area under the supervision of register staff.[76]

7.8.4 *Entry of Information onto the register*

- Reports from government agencies are provided to FCS via post or facsimile machine housed within the secure area. After each report is numbered and recorded manually, the Assistant Manager enters its information onto the register.[77]
- A file copy is kept of the information to ensure accuracy. These files are kept in the same secure area and destroyed on a rolling cycle of three months.[78]
- The Assistant Manager transfers information deriving from within FCS via Zip disk from the FCS Client Information Management System to the register.[79]

7.8.5 *Access to and Transfer of information* [80]

- Reporting agencies are currently provided with information from the register in two instances:-
  1. In order to confirm the agency's report of maltreatment or to advise that the child has been the subject of a report by another agency: details provided in such instances include the child's personal details, the nature and dates of reported maltreatment

74 Submission 3A, FCS, p 10.

75 Submission 3B, FCS, p 2.

76 Ibid, p 2.

77 Ibid.

78 *Evidence*, FCS (Perth, June 21 2000) p 13.

79 Submission 3B, FCS, p 2.

80 Ibid, p 3.

events, the services provided to the child and the agencies providing them, and contact details for the person who made the report.

2. In order to advise a requesting agency of whether a person has had criminal convictions in respect of offences against children: this information is provided where the person is suspected of maltreating a child who is the subject of an inquiry.

- Such information is communicated to the relevant agency either verbally, by confidential facsimile or by post.

7.8.6 *Search capabilities and statistical reports* [81]

- The register has name search capabilities. To obtain an accurate name match, details such as date of birth or parents' names need to be entered.
- Statistical reports may be generated by way of a non-networked printer. FCS suggests that the following information be made available to reporting agencies via aggregated information reports:
  - number and nature of reports;
  - the number of reports made by each agency;
  - percentage of children the subject of one or more report;
  - the number of 'approved persons', parents and children accessing information on the register;
  - complaints received; and
  - trends indicated and gaps identified.
- FCS also suggests that daily reports be produced to identify children who are the subject of multiple reports, identify services provided and those required, and alert reporting agencies as to multiple reports, notification requirements and the need for interagency communication.

Unauthorised access and transfer of information.

7.9 In its submission to the Committee, WAGRO expressed concern in relation to the potential disclosure of confidential information by FCS staff to unauthorised persons. WAGRO cited an example (anonymous) where this has occurred.[82]

---

81 Ibid, p 4.

7.10 Currently, an 'approved person' is required to identify him or herself when making an inquiry. Information required includes their name, employing agency, position, contact number and reasons for the request. If any doubt as to their identity remains, they are asked to provide a request in writing addressed to the manager.[83] In addition, FCS maintains that register staff and 'approved persons' will be subject to a criminal record check.[84] Such precautions combined with the penalty provisions in the Bill are, in the opinion of FCS, sufficient to deter unauthorised or improper access or disclosure.[85]

7.11 FCS have advised the Committee that:

- All issues of security will be reviewed with the Interdepartmental Officers Committee including the consideration of a Personal Identification Number ("PIN") for approved persons.
- The issuing of a PIN or a similar code to large numbers of 'approved persons' is administratively cumbersome and may not be viewed by agencies as viable.[86]

Access by parents and guardians of maltreated child

7.12 In its submission to the Committee, CPUPMH expressed concern with the provision of access to information on the register to parents or guardians of the maltreated child. This is due to the potential for parents or guardians to be involved in some way with the maltreatment of the child.[87] In this respect the Committee notes that the Bill grants a discretion to the manager to defer or dispense with notification (##120G(3)) or decline access (##120K(3)) if it is in the 'best interests of the child'. These issues are discussed in Chapters 11 and 14 respectively.

COMMENTS

7.13 The Committee notes that there appears to be appropriate technical and organisational measures in place against unauthorised or unlawful access to data maintained on the register.

---

82 Submission 4, WAGRO.

83 Submission 3B, FCS, p 3.

84 Ibid, p 4 and also Submission 14, FCS, p 7.

85 Submission 3A, FCS, p 10.

86 Submission 14, FCS, p 7.

87 Submission 13, CPUPMH, p 5.

7.14 The Committee finds that there may be highly sensitive material on the register and accordingly considers that there needs to be a greater level of accountability in place to minimise the risk of access to the register by unauthorised persons through avenues such as impersonation.

7.15 The Committee considers that an approved person ought to be given a PIN to add a further barrier to impersonation. This would enhance organisational measures proposed by FCS to prevent unauthorised or unlawful access to data on the register.

CHAPTER 8
SPECIFIC PROVISIONS OF THE BILL - CLAUSE 4, ##120D CONTENT OF REGISTER

INTRODUCTION

8.1 Proposed section 120D details:

- the content of the register, which will include data from when the pilot register commenced operation in July 1996 (##120D(1));
- rights of removal of information on details of children (##120D(2));
- rights of removal of information on details of offenders (##120D(3), (4)); and
- what constitutes 'conviction of an offence' (##120(5)).

CONTENT OF REGISTER: ##120D(1)

Submissions

8.2 Issues of concern related to the description of the content of the register and the inclusion of convicted offender details.

Content of the register

8.3 In evidence to the Committee, Hon Norm Kelly MLC advised that restrictions should be placed on managerial discretion in terms of the type of information recorded on the register, requiring that such information be prescribed in the regulations.[88] Hon Norm Kelly further stated that such restrictions on discretion are a response to community concerns as to the extent of the manager's powers.

Convicted offender details

8.4 Hon Norm Kelly also advised the Committee that there was scope under ##120D for the inclusion of convicted offender details as information to be recorded on the register. In evidence to the Committee, Hon Norm Kelly advised that the current provisions would facilitate an offender database that may not necessarily be related to a child named on the register. He stated that amendments to the Bill could be designed to remove the possibility of a general offender database (which he

88 *Evidence*, Hon Norm Kelly MLC (Perth, June 28 2000) p 3 and see SNP 1 / 4.

considered to be beyond the scope of the Bill) whilst retaining the registration of offenders with some connection to a registered child.[89]

8.5 In this respect the Committee notes that the FCS submission assumes that the role of the register is limited to the extent that it will record only the names of people convicted of offences against children whose names are on the register.[90]

Comment

8.6 The Committee notes that although ##120D(1)(c)(i) enables the entry of the name of a person convicted of an offence involving maltreatment, such entry must be "*in respect of a child who has been the subject of a report*", such report being one made under ##120F(1). Accordingly the entry of the convicted person's name will relate to a child on the register as that child will have been the subject of a report. This accords with the understanding of FCS discussed at paragraph 8.5.

8.7 The Committee notes that ##120D(1)(a)(ii) enables the entry of information held by FCS immediately before the commencement of the *Child Welfare Amendment Act 1998* concerning the "*conviction of a person for an offence involving maltreatment of a child*".[91] There is no statutory requirement for a nexus between the convicted person and a child whose name may appear on the register. For example, FCS may hold information relating to the name of a person convicted of an offence against a child. The name may be entered on the register even if the child has never been or is no longer being supported by FCS or other government agencies. This does not accord with the understanding of FCS discussed at paragraph 8.5.

8.8 The Committee recognises that passage of time will result in the names of convicted offenders remaining on the register after the name of the child has been removed when they reach 18. The Committee notes, however, that the necessary nexus with an *offence against the child* will still exist due to the retention of the information referred to in ##120D(1)(c).

8.9 Proposed section 120D(1)(a)(ii) has the potential to enable the registration of the names of offenders convicted of an offence against a child without the necessary nexus with a child on the register or with a child to whom support is being provided. The Committee suggests that the Legislative Council consider the scope of ##120D when debating the Bill.

---

89 *Evidence*, Hon Norm Kelly MLC (Perth, June 28 2000) p 4.

90 Submission 3A, FCS, p 2.

91 ##120D(a)(ii) Bill.

RIGHTS OF REMOVAL – DETAILS OF CHILDREN: ##120D(2) AND 120O

Overview

8.10 The right to remove children's details becomes significant in two circumstances:

- where a child who is initially thought to be a victim of maltreatment is subsequently proven not to be; and
- where the child attains the age of 18.

Submissions

8.11 With regard to the situation where a child who is initially thought to be a victim of maltreatment is subsequently proven not to be, FCS submitted to the Committee that ##120(O)(1) adequately addresses such circumstances by imposing an obligation upon the manager to make necessary alterations to the register to maintain its accuracy.[92]

8.12 With regard to the circumstance where the child attains the age of 18, some submissions received by the Committee endorsed the automatic removal of children's details at this stage.[93] HALO, however has suggested to the Committee that the details of child victims should remain on the register beyond adulthood due to the potential for victims to become offenders.[94]

8.13 HALO also submitted to the Committee that despite the erasure of information from the register upon the victim attaining the age of 18, records would still exist in other forms. It was submitted that such information should be destroyed so as to maintain the privacy of the individual.[95]

8.14 In response FCS submitted to the Committee that:

- The Bill provides for the removal of the child's 'identifying' information from the register database and allows for other non-identifying information to be retained for statistical purposes in order that data reports can be prepared and historical patterns and trends identified.
- Individual agencies maintain their own confidential client files and records. The destruction of these files and access to their content is governed by legislation eg. *Library Board of WA Act 1951* and the *Freedom of Information*

92 Submission 3A, FCS, p 11.

93 Submission 13, CPUPMH, p 5.

94 Submission 9, HALO, p 3.

95 Ibid, p 4.

Act 1992. In the view of FCS, agencies need to retain their own records in accordance with legislative requirements and for the purpose of enabling access by current/past clients to their own records.[96]

8.15 In its submission to the Committee, JCPCAC expressed concerned about the extent to which managerial discretion is permitted by the Bill in determining whether information is to be removed from the register.[97]

Comment

8.16 The Committee considers that there is no matter of concern regarding the extent of managerial discretion in relation to the removal of children's details from the register as:

8.16.1 proposed section 120D(2) expressly states that when a child reaches the age of 18 years specified information "*is then to be removed*"; and

8.16.2 proposed section 120O:

- requires the manager to cause such amendments, alterations, or corrections to the register to be made as are necessary to ensure that it is and continues to be an accurate record (##120O(1)); and
- expressly states that the manager shall cause to be removed from the register information referred to in section 120D(1)(a)(ii) or (c) if the conviction is set aside or quashed on appeal (##120O(2).

RIGHTS OF REMOVAL – DETAILS OF OFFENDERS: ##120D(3), (4) AND 120O(2)

Overview

8.17 The Bill provides for the removal of the details of an offender where:

- sixty years have passed since the date of conviction;
- the offender is a juvenile and applies for the removal of such information; or
- where a conviction has been quashed or set aside.[98]

96 Submission 14, FCS, p 7.

97 Submission 11, JCPCAC, p 4.

98 See ##120D (3), (4) and 120O (2) Bill.

Submissions

8.18 There is support for the registration of offender details for sixty years.[99]

8.19 There are concerns relating to the removal of juvenile offender details. In its submission to the Committee, the WA Police Service considered that the Bill should require notification to be given to the injured party to allow them the opportunity to be heard on the matter.[100] CPUPMH, on the other hand, suggests that the registration of juvenile details in the first place could constitute a breach of natural justice. Natural Justice is discussed in Chapter 4.

8.20 With regard to the proposal of the Police Service of WA, FCS has observed to the Committee that ##120D(4) of the Bill permits an application to be made to a Judge of the Children's Court for the removal of juvenile offender details. In any application the Judge may have regard to the nature and seriousness of the offence and other matters considered by her/him to be appropriate, including victim statements.[101] The Committee notes that the process for, and decision regarding the removal of, the information is a judicial one.

8.21 With respect to convictions that have been quashed or set aside, HALO is of the view that such convictions should remain on the register.[102]

CONVICTION OF AN OFFENCE: ##120D(5)

Overview

8.22 The Committee received evidence on ##120D(5) relating to:

- the deletion of references to spent conviction orders; and
- the inclusion on the register of persons against whom misconduct and violence restraining orders have been made.

Submissions

Spent conviction orders

8.23 Proposed sections 120D(5)(a) and 120E allow the registration of details of convicted offenders notwithstanding the making of a spent conviction order.

---

99 Submission 13, CPUPMH, p 5.

100 Submission 5, WA Police Service, p 1.

101 Submission 14, FCS, pp 7 – 8.

102 Submission 9, HALO, p 3.

8.24 Section 39 of the *Sentencing Act 1995* allows the court to make a spent conviction order in respect of a conviction. The result of such an order is that the conviction has no further operation and the court may then impose no sentence. Spent conviction orders are made where the court considers recidivism unlikely and that the offender should be relieved of the adverse effects of a conviction by virtue of the triviality of the offence and his or her previous good character. The *Spent Convictions Act 1988* makes unlawful any discrimination on the basis of a spent conviction and deems it unnecessary to disclose the particulars of such a conviction.

8.25 In evidence to the Committee, Hon Norm Kelly MLC suggested that the references to spent convictions in ##120D(5) and 120E should be removed to reflect natural justice considerations as well as to reflect the rationale behind spent conviction orders.[103]

8.26 In its submission to the Committee, the WA Police Service stated that the removal of any reference to spent convictions from the Bill would severely weaken the effectiveness of the register. The register, in their opinion, should contain information on any person who has been convicted of harming a child irrespective of when that occurred.[104]

Misconduct and violence restraining orders

8.27 In its submission to the Committee, the WA Police Service contended that information relating to a person the subject of a Misconduct or Violence Restraining Order taken out on behalf of a child, should be placed on the register. The WA Police Service submitted that it followed that provision ought to be made for the removal of such information upon the expiration or cancellation of such order.[105] A summary of Misconduct and Violence Restraining Orders is attached as Appendix 2 to this report.

8.28 In respect of this issue FCS submitted to the Committee that:

> *"Following legal advice a decision was made to include only persons convicted of an offence on the Register. To do otherwise would require the setting up of a parallel legal structure to ensure natural justice was accorded the person.*
>
> *The purpose of a restraining order is to protect a person from violence, threats, intimidation or misconduct of another person. The matters to be taken into account (Sections 12 and 35 of the Restraining Orders Act 1997), the standard of proof and procedures*

103 See for example SNP 2 / 4 and 3 / 4.

104 Submission 5, WA Police Service, p 2.

105 Ibid, p 1.

differ considerably from those in criminal proceedings. A person the subject of a Misconduct or Violence Restraining Order has not by virtue of that order been convicted of an offence against a child."[106]

Comment

Spent conviction orders.

8.29 Programs requiring registration of offenders raise many issues for debate. They may be seen to be inconsistent with individual liberties when an offender has paid their 'debt to society' and should not be further punished. This philosophy is reflected in State legislation in relation to spent conviction orders. However such legislation does acknowledge that there are some circumstances where this right to withhold information on a conviction is not justified and where information about a prior conviction should be made known. Specifically, where an individual is seeking a position which would place them in the care or supervision of children or young people, all convictions for offences of a sexual nature or offences of violence must be disclosed. [107]

8.30 The Committee also notes that convictions for most serious offences are not protected by spent conviction schemes, and as a result most convictions for offences against children would not receive any protection and offenders would continue to have to disclose such convictions in any context.

8.31 The Committee observes that the Bill's treatment of an adult with a spent conviction order and a young offender with a spent conviction order under the Bill is unequal. The Committee notes that ##120D(4) could enable an offender to apply for the removal of his or her information where a spent conviction order has been made under s 55 of the *Young Offenders Act 1994.*

8.32 During its inquiries the Committee explored an amendment whereby the reference to spent convictions is retained in the Bill, and provision is made for an appeal and removal of information process for people with spent convictions similar to that presently provided by the Bill in relation to offences under the *Young Offenders Act 1994*.

8.33 The Committee considers that this amendment enables the retention of the reference to spent conviction information and at the same time allows for an application to be

---

106 Submission 14, FCS, p 12.

107 For further discussion on the arguments for and against registration systems refer to: Marie Swain, *Registration of Paedophiles*, NSW Parliamentary Library Research Service, Briefing Paper No. 12/97 (July 1997).

made for removal of the information in applicable circumstances through a judicial decision making process.

8.34 The Committee believes that the Bill should be amended to enable a person convicted of an offence in relation to which a spent conviction order has been made under s 39 of the *Sentencing Act 1995*, or where the conviction has not been recorded under s 55 of the *Young Offenders Act 1994*, to apply to a Judge for the removal of information relating to the offence from the register.

Misconduct and violence restraining orders.

8.35 The Committee notes that a person the subject of a Misconduct or Violence Restraining Order has not by virtue of that order been convicted of an offence against a child. In view of matters to be taken into account in making such orders, the standard of proof and the procedures which differ considerably from those in criminal proceedings, it is not appropriate that such orders result in an entry on the register.

RECOMMENDATIONS

Recommendation 3

The Committee recommends that proposed section 120D(3), clause 4 of the Bill be amended in the following manner –

Page 6, line 14 – to delete "subsection (4)(b)" and insert instead –

" subsections (4) and (4a) "

Recommendation 4

The Committee recommends that proposed section 120D, clause 4 of the Bill be amended in the following manner –

Page 6, after line 30 - To insert the following new subclause –

"(4a) Where a person referred to in subsection (1)(a)(ii) or (c)(i) was convicted of an offence in relation to which a spent conviction order has been made under section 39 of the *Sentencing Act 1995* or where the conviction has not been recorded under section 55 of the *Young Offenders Act 1994*, a Judge may –

(a) on the application of that person; and

(b) having regard to –

(i) the nature and seriousness of the offence; and

(ii) whether the person who committed the offence was under the age of 18 years at the time it was committed, and in such case the age of the person at that time,

order the removal of the information relating to the offence from the register; and the manager shall comply with any such order. ”

CHAPTER 9
SPECIFIC PROVISIONS OF THE BILL – CLAUSE 4 , ##120E THE INCLUSION OF SPENT CONVICTIONS ON THE REGISTER

OVERVIEW

9.1 This section proposes that the register will include information, notwithstanding a 'spent conviction order' as described in the *Spent Convictions Act 1995* or where s189 of the *Young Offenders Act 1994* applies.

9.2 Both Acts allow convictions to be considered 'spent' ie they need not be disclosed when a person applies for a job other than where specified. This clause is intended to ensure that convictions for physical or sexual assaults on children will continue to be recorded on the register even though the conviction has been deemed 'spent'.[108]

COMMENT

9.3 The proposed section is consequential to ##120D(5) discussed at paragraphs 8.23 to 8.26 and 8.29 to 8.34.

9.4 If the amendments proposed by the Committee in relation to ##120D(4a) in Chapter 8 are accepted by the Legislative Council then it should be made clear that the register cannot include information ordered to be removed. This will require amendments to ##120E.

RECOMMENDATION

Recommendation 5

The Committee recommends that proposed section 120E in clause 4 of the Bill be amended in the following manner –

Page 7, line 12 - To delete "Information" and insert instead –

" Subject to any order made by a court under sections 120D(4) or 120D(4a), information "

[108] Clause Notes p 9.

CHAPTER 10
SPECIFIC PROVISIONS OF THE BILL – CLAUSE 4, ##120F DUTY OF APPROVED PERSON TO PROVIDE REPORT OF MALTREATMENT

OVERVIEW

10.1 Proposed section 120F(1) requires that an approved person must report specified information to the register where they are satisfied, following an assessment or investigation, that a child has been maltreated or is at a serous risk of maltreatment. The specified information includes:

- the name, sex, date of birth and address of the child;
- details of the maltreatment or risk of maltreatment as perceived by the reporting agency. No information can be provided which would identify the person suspected of perpetrating the maltreatment as the collation of this information could be considered a breach of natural justice;
- details of counselling or other services provided to ensure adequate co-ordination and co-operation occurs and that there is a record of services provided; and
- other information as may be prescribed.[109]

10.2 Proposed section 120F(2) enables reporting agencies to provide information to the register. Currently a number of reporting agencies do not do so due to reluctance to divulge sensitive and confidential information without the protection of legislation.[110]

10.3 Proposed section 120F(3) establishes the manner and form of the report.

SUBMISSIONS

Overview

10.4 Evidence received by the Committee indicated four main concerns with ##120F:

- the imposition of what is perceived to be mandatory reporting (##120F(1));
- the imposition of investigatory obligations on EDWA (##120F(1)); and

---

109 Clause Notes, p 10.

110 Ibid, p 11.

- the manner and form in which a report is to be made to the register (##120F(3).

Mandatory Reporting

10.5 Proposed section 120F(1) of the Bill requires that where an "*approved person … is satisfied, following an assessment or investigation carried out by that person or any other person, that a child has been maltreated or is at serious risk of maltreatment, the approved person shall make a report to the manager*".

10.6 Although many submissions were under the impression that this provision imposes a mandatory reporting requirement upon the approved person, the Committee was assured by FCS that this is not the case.

10.7 Some submissions received by the Committee also expressed concerns that 'mandatory reporting' would act as a deterrent to children and/or families in reporting incidents of maltreatment.[111]

10.8 In its submissions to the Committee, FCS has distinguished between 'mandatory reporting' and 'reporting requirements' under the Bill. Mandatory reporting imposes an obligation to report suspicions of maltreatment, which if breached attract specific penalties. On the other hand, a duty to report under the Bill arises only after an investigation has occurred and maltreatment has been substantiated.[112] In addition, failure to report under the Bill does not attract a penalty, which is more common in systems of mandatory reporting.[113]

10.9 As stated in the Second Reading Speech:

> *"The requirement to report the maltreatment of children is not to be confused with mandatory reporting. Mandatory reporting requires, by law, that nominated persons must notify the appropriate authority of any allegations of child maltreatment prior to substantiation. Although most parts of the western world have introduced mandatory reporting, research has shown it does not achieve its aim; that is, the protection of children. As the level of reporting increases, the percentage of substantiated reports does not. Frequent intrusive investigations and reinvestigations are made, particularly of*

111 Submission 9, HALO, p 4 and Submission 11, JCPCAC, p 2.

112 ##120F (1) Bill.

113 Submission 3A, FCS, p 11. And see for example ACT legislation which requires reporting and imposes 50 penalty units, imprisonment for 6 months of both; and NT legislation which imposes a $500 fine for failure to report.

> *disadvantaged families. High numbers of investigations tend to hide serious cases of maltreatment, thus placing vulnerable children at greater risk. Also, the resources necessary to investigate minor allegations are better used in family support and treatment services. The Taskforce on Families of 1994 did not recommend the introduction of mandatory reporting in Western Australia, and concluded that it was more effective to provide support to parents who are struggling with the difficult task of parenting than make unwarranted intrusions into their family life."*[114]

10.10 Currently all States and Territories except Western Australia have legislation requiring the compulsory reporting of child abuse and neglect to community service departments. In most States and Territories, only members of a few designated professions involved with children are mandated to report, although in the Northern Territory anyone who has reason to believe that a child may be abused or neglected must report this to the appropriate authority.

10.11 Information provided to the Committee by FCS indicates that mandatory reporting in Victoria has lead to the reporting of suspected abuse and the consequent use of scarce resources in investigating reports which prove groundless.[115]

10.12 While Western Australia does not have mandatory reporting, it does have protocols or guidelines in place, negotiated with key government and non-government agencies, which require certain types of professionals to report maltreatment of children. Community awareness programs and education of professional groups also contribute to identification of possible maltreatment, and action to prevent further harm from occurring.

10.13 FCS also submitted to the Committee that, following enactment of the Bill, reporting agencies will be provided with information regarding the need to promote understanding of the register and alleviate fear in children regarding reporting requirements.[116]

---

114 Second Reading Speech, Western Australia, *Parliamentary Debates (Hansard)*, Legislative Council, May 11 1999, 8068.

115 Appendix 2 to Submission 3A where FCS provides a summary of recent articles and research studies which discuss the concept of mandatory reporting. In Victoria a mandated professional who "*forms a belief on reasonable grounds that a child is in need of protection*" must make a report.

116 Submission 3A, FCS, p 12.

10.14 FCS further submitted to the Committee that there has been no decline in reports of maltreatment since the introduction of the register.[117] They do however recognise the need to monitor the impact of the register in this regard.[118]

10.15 CPUPMH submitted to the Committee that:

- it has seen no evidence to indicate that children are being deterred from reporting abuse because the matter will be reported to another agency;
- younger children do not generally understand the consequences of disclosure in terms of the investigatory process taken;
- older children may fear that they may be forced to disclose the information to the Police or FCS: and
- in the experience of CPUPMH, children are generally deterred from disclosure by parents who may be responsible for the abuse, may be incapable of coping with the consequences of a disclosure being made, or by the use of threats by the offender.[119]

10.16 LASECA, whilst agreeing that mandatory reporting is not a deterrent to reporting maltreatment, suggested to the Committee that *registration* of substantiated cases of abuse would deter both children and parents.[120]

The imposition of investigatory obligations

10.17 In their submission to the Committee, EDWA expressed concerned as to what they perceived to be an 'investigative' role allocated to teachers and reporting agencies under the Bill.[121]

10.18 EDWA advised the Committee that, traditionally, the role of the teacher was to pass on concerns and relevant knowledge to FCS for further investigation.[122] It is currently EDWA's policy that all staff working at a school are required to report to the principal any suspicions or disclosures of child abuse. It is then the responsibility of the principal to inform FCS of the report.[123] FCS or the Police then conduct the necessary investigations.

---

117 Submission 3B, FCS, p 6.

118 Submission 3A, FCS, p 12.

119 Submission 13, CPUPMH, p 5.

120 Submission 7, LASECA, p 10.

121 Submission 8, EDWA, p 1.

122 Ibid.

10.19 Proposed section 120F(1) requires that:

> *"If an approved person in a reporting agency is satisfied, following an assessment or investigation carried out by that person or any other person, that a child has been maltreated or is at serious risk of maltreatment, the approved person shall make a report to the manager … " (Committee emphasis)*

10.20 In its submission to the Committee, EDWA was concerned that:

- teaching staff do not possess the necessary skills to investigate suspicions of maltreatment;
- extending the responsibility of school staff to include investigation would reduce their capacity to effectively support the educational development of students;
- an investigative role would significantly widen EDWA's 'core business' beyond the provision of education;
- recording suspicions on the register without thorough and skilled investigation would be against the principles of natural justice and may reduce the willingness of children to discuss incidents of maltreatment;
- teachers may also be disinclined to report incidents due to the ability of parents or guardians to request access to information on the register; and
- there is ambiguity in the nature and extent of the reporting requirement and does not provide an adequate framework by which teaching staff may ascertain their investigative responsibilities. [124]

10.21 EDWA advised the Committee that it would prefer therefore to continue the current practice of referring incidents to the Police or FCS for investigation.

10.22 In the opinion of FCS, the Bill makes available to government agencies, reporting options that currently do not exist. This reporting option does not diminish the role of FCS or that of the Police. Over time it will assist the FCS and Police in effecting their statutory responsibilities to protect children.[125]

---

123 Submission 14, FCS, p 1.

124 Submission 8, EDWA, p 1.

125 Submission 14, FCS, p 4.

The manner and form of report

10.23 Proposed section 120F(3) provides:

> *"Subject to any guidelines issued under section 120R, the report is to be made in such manner and form as the manager determines."*

10.24 In evidence to the Committee Hon Norm Kelly MLC submitted that the manager's discretion in relation to the manner and form of report should be restricted and could be made subject to guidelines issued pursuant to ##120R.[126] Whilst the manager would have considerable input into the guidelines to which reports must conform, discretion would be eliminated once the guidelines were established.[127]

10.25 Proposed section 120R of the Bill enables the manager to issue guidelines on certain matters after consultation with reporting agencies (refer to Chapter 17).

10.26 The Health Department, CPUPMH and FCS stated that they would support an amendment to reduce managerial discretion as to the manner and form of the report.[128]

COMMENT

The imposition of what is perceived to be mandatory reporting (##120F(1))

10.27 The Committee notes that the Bill seeks to distinguish the 'reporting requirements' under the Bill from 'mandatory reporting' which applies in other jurisdictions. Mandatory reporting imposes an obligation to report suspicions of maltreatment, which if breached attract specific penalties. The Committee notes that a duty to report under the Bill arises only after an investigation has occurred and maltreatment has been substantiated. In addition, failure to report does not attract a penalty.

10.28 The Committee observes that:

- In order to complement any compulsory requirement it is necessary to have compulsion at law by creating an offence.
- The legislative statement of a penalty is the 'trigger' for the creation of an offence and the availability of legal proceedings and enforcement.

126 SNP 4 / 4.

127 *Evidence,* Hon Norm Kelly MLC (Perth, June 28 2000) pp 5 & 6.

128 See Submissions 6, Health Dept WA; Submission 13, CPUPMH; and Submission 3B, FCS p 5.

- As no penalty provision attaches for failure to comply with ##120F there is no compulsion at law, laid down by either the Principal Act or the Bill, on an 'approved person' to comply with the requirements of ##120F.
- However administrative mechanisms may exist or be put into effect to promote compliance, for example, the Protocols or departmental directives incorporating the reporting requirements of ##120F into the duty statements or job descriptions of 'approved persons'.

10.29 Information provided to the Committee by FCS indicates that mandatory reporting in Victoria has led to the reporting of suspected abuse and the consequent use of scarce resources in investigating reports which have proven groundless.[129]

The imposition of investigatory obligations on EDWA (##120F(1))

10.30 As discussed, the Bill enables prescription of 'approved persons' or 'classes of approved persons' to occur. FCS advised the Committee that it intends, prior to proclamation of regulations, to discuss with relevant agencies the prescription of approved persons.[130]

10.31 The regulations regarding 'approved persons' are disallowable providing an opportunity for scrutiny of 'approved persons' or 'classes of persons' by Parliament.[131]

10.32 As the definition of 'reporting agency' includes EDWA, ## 120F(1) *could* include teachers reporting on maltreatment of school children if they were prescribed as an 'approved person'. The Committee notes that the current Protocols, which were developed in consultation with government agencies, identify 'Principals and district superintendents' as 'approved persons' as opposed to 'teachers'.

10.33 The Committee considers that teachers should not be designated as 'approved persons' under the Bill.

10.34 The Committee notes that ##120F(1) does not require the 'approved person' to investigate or to form a belief about the veracity of information. It is only 'if' an 'approved person' is "*satisfied following an assessment or investigation carried out by that person or any other person that a child has been maltreated or is at serious risk of maltreatment*" that they 'shall' make a report to the manager.

---

129 Supra, note 115.

130 Submission 14, FCS, p 4.

131 Submission 14, FCS, p 4.

10.35 Although ##120F(1) still appears to impose a duty on reporting agencies and approved persons to make a report, there is no penalty attached for failure to do so. (Refer to the discussion of this point at paragraphs 10.27 to 10.28 of the report).

10.36 The Committee notes ##120F(1) is drafted such that although 'any other person' (for example, FCS) may make an assessment or investigation, the onus is still on the 'approved person' in the 'reporting agency' to be satisfied and to make a report to the manager.

The manner and form in which a report is to be made to the register (##120F(3).

10.37 The Committee notes that evidence received by the Committee seeks a reduction in the manager's discretion as to the form and content of the report. However the Committee also notes ##120F(3) commences with the words "*Subject to any guidelines* …". Thus the manager's discretion is already constrained by the possibility of guidelines and the amendment mooted during the Committee's inquiry does not reduce the manager's discretion.

CHAPTER 11
SPECIFIC PROVISIONS OF THE BILL – CLAUSE 4, ##120G NOTIFICATION OF REPORT

OVERVIEW

11.1 Proposed section 120G sets out the notification requirements to advise the parent, guardian or other person responsible for the day to day welfare and development of a child, that the child's name has been recorded on the register. A summary of the contents of the report containing the essential elements is to be provided.[132]

11.2 Proposed sections 120G(3) and 120G(4) provide for circumstances where notification can be delayed or dispensed with.

SUBMISSIONS

Overview

11.3 Concerns submitted to the Committee focussed on:

- the form and process of notification;
- decisions to defer or dispense with notification; and
- the manager's accountability for decisions to defer or dispense with notification.

Form and process of notification

11.4 In its submission to the Committee, the WA Police Service suggested that the sensitivity of the information on the register requires specific provision in the Bill as to the timing of and procedure to be followed for notifications.[133] In illustration it was suggested that the Bill require notifications to be served as soon as practicable by registered mail, security post or personal service.

11.5 Additionally, FCS submitted to the Committee that the parameters governing access to and use of information on the register are clearly outlined in ##120(D), 120(F), 120(I), 120(J) and 120(K) of the Bill. These sections also provide clear direction as to the circumstances under which information can be disclosed or released, the purpose for which information is contained on the register, the content requirements of

132 Clause Notes, p 11.

133 Submission 5, WA Police Service, p 1.

information to be contained within a report made and the purposes for which access to this information can occur.[134]

11.6 FCS have advised the Committee that:

1. The avenue of notifying parents via letter, which was the initial approach trialled in the early days, was abandoned because of the danger of letters going to people that they should not go to, particularly where the families were mobile.

2. There are 4 000 names on the register and it is simply not possible to physically check the addresses. It would be extraordinarily expensive and time-consuming.

3. Currently, FCS and other agencies, verbally notify the family, parent and child at the time the reporting officer or agency substantiates the initial investigation and is to make a report to the register.

4. There are however, many cases involving an officer who believes it is appropriate to provide written information. It depends on whether the family is mobile and the contents of the letter.

5. The intention is to make it a human notification and for the manager to ensure that it occurs, but not in a bureaucratic way, and to ensure privacy of notification.[135]

Decisions to defer or dispense with notification

11.7 One submission received by the Committee stated that it was imperative that parents are notified when authorities suspect or are aware that their child has been sexually abused.[136] Another submission received by the Committee asserted that the Bill grants more rights to the convicted abuser than the child.[137]

11.8 The Committee notes that ##120F(3) states that notification may be deferred or dispensed with "*if the manager is satisfied that it is in the best interests of the child to do so*." However the Clause Notes state that: "*The decision not to notify a child's parent of registration would only be made if the 'approved person' satisfied the*

134 Submission 14, FCS, p 11.

135 *Evidence*, FCS (Perth, June 21 2000) pp 14 & 18 and submissions 3A, 3B and 14 (FCS).

136 Submission 2, T & J Van Aalst.

137 Submission 11, JPCAC, p 2.

manager it was in the best interest of the child to do so or the danger to the reporter and/or agency was of a level to cause concern." [138] (Committee emphasis).

11.9 The Bill does not enable notification to be deferred or dispensed with in the latter case.

Manager's accountability for decisions to defer or dispense with notification

11.10 In evidence to the Committee Hon Norm Kelly MLC submitted that the manager should be required to record, in the prescribed manner, any decision made in respect of the dispensing with or deferral of notification of a report being made and the reasons for such decision.[139]

11.11 In response to the argument that such obligations might strain resources, Hon Norm Kelly suggested that accountability is an even more important consideration where resources are tight. There needs to be some assurance that decisions have been made in the interests of the child rather than of expediency.[140]

11.12 The WA Police Service would support an amendment along these lines as it would allow decisions of previous managers to be recorded and made available should the need arise.[141] FCS, Health Department, and CPUPMH would also support such amendments.[142]

COMMENT

Form and process of notification

11.13 The Committee notes that a balance needs to be achieved when determining what directive form to employ to establish practical procedures: the Bill, regulations or administrative guidelines such as the Protocols.

11.14 The Committee notes that there is a danger in overprescribing practical procedures by way of the Bill or regulations in that if they do not work and need to be amended this cannot occur or improvements introduced without proceeding through the process of amending the Principal Act or regulations.

---

138 Clause Notes p 12.

139 See for example, SNP 5 / 4.

140 *Evidence*, Hon Norm Kelly MLC (Perth, June 28 2000) p 7.

141 Submission 5, WA Police Service, p 2.

142 See Submission 13, PMH; Submission 3B, FCS, p 5; and Submission 14, FCS, p 13.

Manager's accountability for decisions to defer or dispense with notification

11.15 The Committee considers that it is desirable that amendments be made to the Bill to require the manager to record his or her decision to defer or dispense with notification and the reasons for that decision.

RECOMMENDATION

Recommendation 6

The Committee recommends that proposed section 120G, clause 4 of the Bill be amended in the following manner –

Page 9, after line 20 - To insert the following new sub-clause -

"

(5) If the manager decides to exercise a power given by subsection (3), the manager shall record the decision and the reasons for it in the prescribed manner. "

CHAPTER 12
SPECIFIC PROVISIONS OF THE BILL – CLAUSE 4, ##120H NOTIFICATION OF INFORMATION RECORDED UNDER S120D(1)(C)

OVERVIEW

12.1 Proposed section 120H sets out notification requirements, similar to proposed section 120G but in relation to persons who have been convicted of an offence against a child who is the subject of a report made pursuant to ##120F(1).

12.2 The notification is to include a summary of the information relating to recorded criminal matters: ##120H(2).

12.3 Those under the age of 18 years are to be advised of their rights to seek removal of their name and conviction under section 120D(4): ##120H(3).

COMMENT

12.4 The Committee notes that if ##120D is amended to enable a person with a spent conviction to apply to a judge for removal of their details from the register then ##120H also needs to be amended. The amendment will require that a new subsection be inserted (##120H(4)) to require that a statement of the right to apply to seek removal of their name and conviction, be sent with the notification.

12.5 The Committee also notes that whilst ##120H requires notification where information relating to the conviction of a person is recorded under ##120D(1)(c) it does not require notification where information relating to the conviction of a person is recorded under ##120D(1)(a)(ii).

RECOMMENDATIONS

Recommendation 7

The Committee recommends that proposed section 120H(1), clause 4 of the Bill be amended in the following manner -

Page 9, after line 25 - to insert before "120D(1)(c)" the following –

" 120D(1)(a)(ii) or …."

Recommendation 8

The Committee recommends that proposed section 120H, clause 4 of the Bill be amended in the following manner -

Page 10, after line 5 - To insert the following new sub-clause -

"(4) If, at the time of notification, a spent conviction order has been made under section 39 of the *Sentencing Act 1995* or the conviction has not been recorded under section 55 of the *Young Offenders Act 1994* in relation to the offence, then notification under subsection (1) is to include a statement of the person's right to apply for the removal of the information under section 120D(4a). "

CHAPTER 13
SPECIFIC PROVISIONS OF THE BILL – CLAUSE 4, ##120J ACCESS FOR APPROVED PERSONS

OVERVIEW

13.1 Proposed section 120J sets out the mechanism whereby access to information in the register in respect of a child is provided to:

- an 'approved person' when that person makes a report to the register (##120J(1)(a)); and
- any other 'approved person' (##120J(1)(b)).

13.2 Access to information about a 'suspected person' may also be provided to an 'approved person' if the suspected person has been convicted of maltreatment of a child: ##120J(2).

SUBMISSIONS

Manager's accountability for decisions

13.3 In evidence to the Committee Hon Norm Kelly MLC submitted that the Bill should be amended to ensure managerial accountability by requiring any decision made to permit an approved person to have access to certain information contained on the register and the reasons for such decision to be recorded.[143] In response to the argument that such obligations might strain resources, Hon Norm Kelly suggested that accountability is an even more important consideration where resources are tight and that there needed to be some assurance that decisions have been made in the interests of the child rather than of expediency.[144]

13.4 The WA Police Service support an amendment along these lines as it would allow decisions of previous managers to be recorded and made available should the need arise.[145] FCS and CPUPMH would also support such amendments.[146]

---

143 *Evidence*, Hon Norm Kelly MLC (Perth, June 28 2000) p 7; and see SNP 6 / 4.

144 Ibid.

145 Submission 5, WA Police Service, p 2.

146 See Submission 13, PMH; Submission 3B, FCS, p 5; and Submission 14, FCS, p 13.

COMMENT

Manager's accountability for decisions

13.5 The Committee considers that it is desirable that amendments be made to the Bill to require the manager to record his or her decision to defer or dispense with notification and the reasons for that decision.

Proposed section 120J(3)

13.6 The Committee observes that there is a drafting error in ##120J(2). The Clause Notes state that "*The manager shall advise the approved person that the convicted person's name is recorded <u>if the manager is satisfied the provision of this information is in the best interests of a child concerned</u>*." (Committee emphasis).[147] This evidences an intention to grant the manager discretion to afford access to an approved person, which discretion is linked to the best interests of the child.

13.7 Proposed section 120J(3) appears to deem that it is in the best interest of the child concerned: "*Where the manager receives an inquiry … the manager shall in the best interest of the child…*".

13.8 The Committee observes that, to conform with the explanation in the Clause Notes, ##120J(3) should read:

> *"Where the manager receives an inquiry … the manager shall, <u>if the manager is satisfied that it is</u> in the best interest<u>s</u> of the child concerned <u>to do so-</u>"*. (Amendments marked up).

13.9 This would also be consistent with other provisions of the Bill including ##120J(1) and ##120K(3)

[147] Clause Notes, p 15.

RECOMMENDATIONS

Recommendation 9

The Committee recommends that proposed section 120J(2), clause 4 of the Bill be amended in the following manner -

Page 11, lines 7 to 8 – after the words "manager shall" to delete the remaining lines and substitute the following–

" , if the manager is satisfied that it is in the best interests of the child concerned to do so - ".

Recommendation 10

The Committee recommends that proposed section 120J, clause 4 of the Bill be amended in the following manner -

Page 11, after line 13 - To insert the following new sub-clause -

" (3) If the manager permits an approved person to have access to information under subsection (1) or (2), the manager shall record the decision and the reasons for it in the prescribed manner. "

CHAPTER 14
SPECIFIC PROVISIONS OF THE BILL- CLAUSE 4, ##120K ACCESS FOR CHILDREN, PARENTS ETC

OVERVIEW

14.1 Proposed section 120K:

- sets out the general circumstances under which a parent, guardian or a person who has day to day care of a child can access information in the register in respect of the child (##120K(1);
- sets out the circumstances under which a child who has reached the age of 12 years can access information about themselves (##120K(2));
- provides that the manager may refuse access if he/she believes that access to information may not be in the child's best interest (##120K(3));
- provides that the manager may refuse access where the manager is satisfied that the child would not understand the information or the circumstances to which it relates (##120K(4));
- provides that if access is refused, written notice of the decision is to be provided (##120K(5); and
- provides that notice of refusal to provide access must include a statement as to the person's right of appeal under ##120L (##120K(6).

14.2 The Bill provides for an avenue of appeal under ##120L where a person is refused access to information on the register.[148]

COMMENT

14.3 The Committee notes that its proposed amendments to ##120G and ##120J seek to ensure managerial accountability by requiring reasons for certain decisions to be recorded. The Committee considered whether there should be a similar requirement for reasons to be recorded where access to information in the register is denied to children or parents.[149]

---

148 There is no right of appeal where the manager deems it appropriate to defer or dispense with notification requirements. Nor is a person able to appeal against registration of personal information unless he or she is a juvenile offender.

149 Proposed amendments to ##120G require a record of a decision and the reasons to dispense with notifications. Proposed amendments to 120J require a record of a decision and the reasons for approval of access to an approved person.

14.4 In this respect the Committee notes that:

- there may be difficulties in the recording of reasons for a decision as such record may in fact disclose information intended to remain confidential;
- ##120K(5) requires that if access is refused the manager shall give written notice of the decision to the person who requested access within 14 days after the decision is made; and
- if access to a parent, guardian or child is denied, they may lodge an appeal pursuant to ##120L.

14.5 The Committee mooted an amendment to ##120K whereby the manager is required to record his or her decision (and reasons for that decision) to refuse access by a child, parent, guardian or other person to information in the register in respect of the child.

14.6 In this respect, FCS have informed the Committee that they agree with such a proposal as it is consistent with proposed amendments to record decisions made and the reasons for decision to provide for greater accountability and regulation of the manager's discretionary powers.[150]

RECOMMENDATIONS

Recommendation 11

The Committee recommends that proposed section 120K, clause 4 of the Bill be amended in the following manner –

Page 12, lines 3 to 6 – delete subsection (5) and insert instead –

" If the manager decides to refuse access, the manager shall -

(c) record the decision and the reasons for it in the prescribed manner; and

(d) give written notice of the decision to the person who requested access within 14 days after the decision is made. "

[150] Submission 14, FCS, p 13. Refer to SNP 5 / 4 and 6 / 4.

Recommendation 12

The Committee recommends that proposed section 120K, clause 4 of the Bill be amended in the following manner –

Page 12, line 7 – to delete "subsection (5)" and insert instead –

" subsection (5)(b) "

CHAPTER 15
SPECIFIC PROVISIONS OF THE BILL – CLAUSE 4, ##120M OFFENCE

OVERVIEW

15.1 Proposed section 120M details the penalties for the misuse of information which has been gained from the register without the permission of the manager. Proposed section 120Q creates an offence in relation to the disclosure of information provided or obtained otherwise than in accordance with the proposed Part.

15.2 Issues raised in evidence to the Committee included:

- a requirement that permission to access information be in writing or recorded; and
- protection for persons providing information.

SUBMISSIONS AND COMMENT

Permission to access information

15.3 The WA Police Service suggested to the Committee that ##120M, which deems unauthorised access an offence, should specifically state that permission from the manager be in writing or recorded in some manner.[151] This suggestion was made with a view to ensuring that the person gaining permission to access information had some form of written approval as opposed to just verbal approval – such a requirement providing safeguards to both the manager and persons requiring or gaining information from the register.[152]

15.4 The Committee notes that:

- ##120I to 120K relates to access permitted by the manager and does not, as presently drafted, require any element of the manager's permission to be in writing;
- however amendments proposed by the Committee with regard to ##120J(3) and ##120K(5) require that the manager record a decision to allow someone access and the reasons for it in the prescribed manner.

---

151 Submission 5, WA Police Service, p 2.

152 Submission 15, WA Police Service, p 1.

15.5 The Committee raised the above issue with the WA Police Service who advised that, provided sufficient reporting requirements are prescribed, a proposal to require that the manager's decision be recorded in writing would be suitable to address their concerns.[153]

Protection for information providers

15.6 In its submission to the Committee, the WA Police Service suggested that there be legislative protection for agencies that provide inaccurate information in good faith in compliance with their reporting obligations.[154] The WA Police Service does not consider that ##120F(2) is sufficient.

15.7 The Committee notes that whilst ##120F(2) of the Bill provides for protection for approved persons who may breach ordinary requirements and duties of confidentiality, ethics and professional standards when complying with the reporting obligation, that proposed section is an enabling provision only.

15.8 The Committee notes that s146C of the Principal Act provides for a 'good faith protection' which would extend to reports made under ##120F. Section 146C of the Principal Act provides:

> ***"146C.****(1) A person who occupies or has occupied the office of Minister, Director-General, or officer of the Department, or who otherwise carries out or has carried out any duty or function under this Act, is not personally liable for anything done or omitted in good faith in, or in connection with, the exercise or purported exercise of any power conferred or which purports to be conferred, or the carrying out of any duty imposed or which purports to be imposed, by this Act.*
>
> *(2) For the purposes of subsection (1), anything done or omitted to be done by a person therein mentioned, in good faith and for reasonable or probable cause in promoting the welfare of a child, is deemed to have been done pursuant to a duty imposed by this Act.*
>
> *(3) A person who on reasonable grounds and in good faith for the purposes of facilitating the enforcement of the provisions of this Act makes a report with respect to the circumstances of a child is not*

153 Submission 15, WA Police Service, p 1.

154 With reference to ##120N refer to Submission 5, WA Police Service, p 2.

liable to any action for damage or any other legal proceeding in respect of that report."

15.9 After consultation with the Committee, the WA Police Service and the FCS agree that s146C of the Principal Act, particularly s146C(3), offers suitable protection for 'approved persons' who provide information in good faith, even though it may turn out to be incorrect at a future date.[155]

15.10 FCS has observed that:

- ##120O(1) of the Bill places an obligation on the manager to correct incorrect information contained on the register to ensure that "*it is and continues to be an accurate record*";[156] and
- section 146C of the Principal Act may not apply to actions taken against a department or the State of Western Australia, however "*given the nature of the Register, the fact that the names of only convicted persons are recorded as perpetrators of abuse, and there is adequate provision for correction of inaccuracies, it is difficult to envisage what sort of cause of action could be successfully brought against a department or the State*."[157]

155 Submission 15, WA Police Service, p 2 and Submission 14, FCS, p 14.

156 Submission 3A, FCS, p 11.

157 Submission 14, FCS, p 15.

CHAPTER 16
SPECIFIC PROVISIONS OF THE BILL – CLAUSE 4, ##120P MANAGER TO REPORT ANNUALLY TO MINISTER

OVERVIEW

16.1 Proposed clause 120P sets out the annual reporting requirements for the manager to the Minister.

16.2 The Clause Notes observe that:

> *"The report will contain data surrounding the nature and extent of maltreatment, the names of agencies reporting to the register and their compliance to the Reciprocal Child Protection Procedures. The report will provide information in respect to the level of cooperation and coordination between agencies. The regulations will set out in some detail the information to be provided and the manner in which it will be reported."*[158]

SUBMISSIONS

Overview

16.3 The issue of reporting and possible review raised comments from witnesses with regard to:

- reporting to the responsible Minister; and
- review of the current administrative register.

Report to Minister

16.4 Reporting agencies have suggested to the Committee that continuous feedback from FCS to other agencies is vital to ensure continuous monitoring and thus efficiency of the register.[159]

16.5 In one of its submissions to the Committee, FCS has agreed that feedback is essential and intended that:

---

158 Clause Notes, p 19.

159 See for example, submission 13, CPUPMH, p 3.

- regular feedback to reporting agencies occurs: and
- senior agency staff form an interdepartmental committee which meets on a regular basis (bi-monthly) to facilitate effective implementation of the Bill and its smooth operation.[160]

16.6 As presented in the submission of FCS to the Committee:

> *"From an administrative view point the Register will ensure that there is a forum whereby the agencies in Government with a key responsibility for the protection of children will need to meet and work together to keep their relationship with respect to the Register and its requirements under review. This will facilitate the Manager of the Register ensuring that there is a lead agency appointed where it is evident that there are coordination problems."*[161]

16.7 In evidence to the Committee Hon Norm Kelly MLC submitted that the Minister should cause any report made under ##120P to be laid before each House of Parliament within 7 days of being received. Such an amendment to the Bill would ensure that Parliament is kept informed of the progress of the register given community concern in relation to its existence.[162]

Review of the current administrative register

16.8 The question of review of the current administrative register was raised in Legislative Council debate. As yet there has not been a comprehensive review of the current register. This has been attributed by FCS to the presence of legal impediments to the sharing of information resulting in a limitation upon the effective operation of the register.[163]

16.9 In addition, FCS asserted that it has not been in the position to promote the register nor provide adequate information to agencies whilst the Bill has been the subject of Parliamentary debate.[164]

---

160 Submission 14, FCS, p 11.

161 Submission 3A, FCS, p 2.

162 *Evidence*, Hon Norm Kelly MLC (Perth, June 28 2000) p 9; and see SNP 7 / 4.

163 Submission 3A, FCS, p 8.

164 Ibid.

COMMENT

16.10 The Committee considers that any report prepared and presented to the Minister pursuant to ##120P, should be tabled before each House of Parliament within 7 sitting days of being received.

RECOMMENDATION

Recommendation 13

The Committee recommends that proposed section 120P, clause 4 of the Bill be amended in the following manner -

Page 14, after line 3 - To insert the following new sub-clause –

" (2) The Minister is to cause the report to be laid before each House of Parliament within 7 sitting days of being received. "

CHAPTER 17
SPECIFIC PROVISIONS OF THE BILL – CLAUSE 4, ##120R GUIDELINES

OVERVIEW

17.1 Proposed section 120R provides that:

> *"The manager may, after consultation with the reporting agencies, issue guidelines to those agencies concerning –*
>
> *(a) the procedures to be followed, and criteria to be applied, by an approved person in assessing whether a report is required to be made under section 120F;*
>
> *(b) the manner and form in which a report is to be made for the purposes of section 120F;*
>
> *(c) the ways in which access is to be given to an approved person under section 120J; and*
>
> *(d) any other matter relating to the operation of the register in respect of which the manager consider guidelines to be necessary or desirable."*

SUBMISSIONS

17.2 The Committee received evidence that it should be mandatory for guidelines to be issued after consultation between the manager and the reporting agencies. An appropriate amendment could provide for the deletion of the word "may" in the first line and the insertion of "shall".[165]

17.3 The Health Department and CPUPMH stated that they would support such an amendment.[166]

---

165 SNP 8 / 4.

166 The amendment would require guidelines to be issued following consultation with reporting agencies. See Submissions 6, Health Dept WA and 13, CPUPMH.

17.4 The WA Police Service expressed concern about such an amendment in that it would appear to require that the manager must in *all* circumstances issue guidelines after consultation irrespective of whether it is necessary.[167]

17.5 In one of its submissions to the Committee FCS advised that it is supportive of such an amendment stating that:

> *"It is important that guidelines in addition to regulations documenting practical procedures and processes are developed in consultation. This will alleviate the possible adoption of arbitrary process or practice, allow for clarity between and within agencies and transparency. The following examples illustrate where practical guidelines are necessary:*
>
> - *procedures for notification;*
> - *identification of the need for approved persons to discuss with the manager any decision to defer or dispense with notification prior to that decision being made;*
> - *grievance/complaint mechanisms to enable resolution of complaints/grievances by persons the subject of a report to the Register;*
> - *the assessment/investigation framework adopted by agencies which will result in a report being made to the Register;*
> - *the procedures to be followed, and criteria to be applied, by an approved person in assessing whether a report is required to be made under section 120F (ie duty of approved person to provide a report of maltreatment);*
> - *the manner and form in which a report is to be made for the purposes of section 120F;*
> - *the ways in which access is to be given to an approved person; and*
> - *any matter relating to the operation of the Register in respect to which the manager and agencies consider guidelines to be necessary or desirable."*[168]

---

[167] Submission 5, WA Police Service, p 3.

COMMENT

17.6 Child protection policy and practice is constantly evolving. In most Australian jurisdictions the legislative framework provides merely a 'loose guide for practice' with departmental directives and policy documents providing the critical details.[169]

17.7 In Western Australia referrals about possible harm to children are facilitated by a series of reciprocal protocols that have been negotiated with key government and non-government agencies. The Bill requires regulations to be developed, which set out administrative requirements, and the development of guidelines to provide direction to operational processes.

17.8 The Committee considers that ##120R of the Bill should be amended to ensure that after consultation has occurred between the manager and the reporting agencies in relation to any of the matters expressed in ##120R(1), that guidelines should be issued.

RECOMMENDATION

Recommendation 14

The Committee recommends that proposed section 120R, clause 4 of the Bill be amended in the following manner –

Page 15, line 2 - To delete the word "may"

and

line 3 - after "agencies," insert the following words -

" is to ".

168 Submission 14, FCS, p 13.

169 'Part 17.10 - Child Welfare: Chapter 1, Part A, Introduction', *Laws of Australia* (Butterworths, 1999).

CHAPTER 18
OTHER ISSUES

INTRODUCTION

18.1 This Chapter considers Clause 6 of the Bill and also whether there should be provision for review of the legislation.

CLAUSE 6

Overview

18.2 Clause 6 provides for consequential amendments to:

18.2.1 the *Freedom of Information Act 1992* (to ensure information provided under ##120Q is regarded as 'exempt' and therefore not subject to a claim for access under the FOI Act);

18.2.2 the *Spent Convictions Act 1988* (to allow convictions which could otherwise be regarded as 'spent' to be recorded on the register); and

18.2.3 the *Young Offenders Act 1994* (to provide for the collection of information which could not otherwise be recorded, such as a first offence or other findings of guilt that a court may decide should not be recorded).[170]

Comment

18.3 The Committee notes that an amendment is required to clause 6(1) so that "120P(1)" is substituted with "120Q(1)".

REVIEW OF THE ACT

Overview

18.4 In evidence received by the Committee there was support for the proposed provisions in the Bill which facilitate a review subsequent to commencement. However concerns were raised as to whether three years was a sufficient time period in which to accurately gauge the effectiveness of the amendments to the Principal Act.[171]

---

170 Clause Notes, p 21.

171 *Evidence*, FCS (Perth, June 21 2000) p 5; and Submission 10, Ministry of Justice, p 1.

18.5 Evidence received by the Committee also explored the possibility for provision in the Bill for a review clause and for a 'sunset clause'.

Submissions

Provision in the Bill for a review clause

18.6 The Committee considered amendments proposed by witnesses to insert a new section to impose a requirement on the Minister:

- to carry out and complete a review of the operation and effectiveness of the Part within six months after the expiration of three years from the commencement date of the Bill; and
- to prepare a report based on the review and cause the report to be laid before each House of Parliament as soon as practicable after it is completed, and in any event not later than 12 months after the expiration of the three year period.[172]

Provision in the Bill for a 'sunset clause'

18.7 The Committee considered amendments to insert a new section to provide for:

- regulations to address any matter of a transitional nature that arise because of expiry of this Part of the Principal Act which is proposed to be inserted by the Bill; and
- the automatic expiry of the Part, five years after the commencement of the Bill, except for transitional regulations which expire six years after the commencement of the Bill.

18.8 In evidence to the Committee Hon Norm Kelly MLC stated that the addition of a sunset clause may provide a safety mechanism in response to community concern. [173]

Comment

18.9 The Committee finds that it is not necessary for there to be both a provision for review of the legislation and a sunset clause.

18.10 The Committee finds that a clause requiring review of the Part after a certain period is more appropriate than a 'sunset clause' and therefore does not support the insertion of a 'sunset clause'.

---

172 SNP 9 / 4.

173 *Evidence,* Hon Norm Kelly MLC (Perth, June 28 2000) p 10.

18.11 The Committee supports the inclusion of a provision for review of the Part after five years.

RECOMMENDATIONS

Recommendation 15

The Committee recommends that Clause 6 of the Bill be amended in the following manner –

Page 16, line 5 - To delete "section 120P(1)" and substitute the following–

" section 120Q(1) "

Recommendation 16

The Committee recommends that the Bill be amended in the following manner –

Page 15, after line 19 - To insert the following new sub-clause -

" 120S. Review of Part

(1) The Minister is to carry out and complete a review of the operation and effectiveness of this Part within 6 months after the expiration of 5 years from the commencement of this Part.

(2) Without limiting the scope of the review provided for in subsection (1), the Minister is to have regard to -

(a) the need for the continuation of the register; and

(b) the functions of the manager.

(3) The Minister is to prepare and present to each House of Parliament a report based on the review as soon as practicable after it is completed, and in any event not later than 6 years of the date on which this Part commenced."

B.K. Donaldson.

Hon Bruce Donaldson MLC, Chairman **Date: November 16 2000**

APPENDIX 1

SUBMISSIONS RECEIVED BY THE COMMITTEE

1 C Williams, Sussex Street Community Law Service Inc dated June 15 2000.

2 T & J Van Alst dated June 19 2000.

3A FCS, undated, received June 21 2000.

3B FCS dated July 3 2000.

4 J Coltish, WAGRO dated June 22 2000.

5 D H McCaffery, WA Police Service, undated, received June 23 2000.

6 A Bansemer, Health Department of WA dated June 23 2000.

7 A Hansbury-Sparrow, LASECA dated June 30 2000.

8 P Browne, EDWA, undated, received June 30 2000.

9 K McDonald, HALO dated July 4 2000.

10 R Fitzgerald, Ministry of Justice dated July 4 2000.

11 M Pritchett, A Ellis and J Lowe, JCPCAC, undated, received July 4 2000.

12 B Young, undated, received July 4 2000.

13 P Langdon, CPUPMH, undated, received July 5 2000.

14 FCS dated October 10 2000.

15 D H McCaffery, WA Police Service, dated October 6 2000.

16 S Hollingworth, EDWA, dated October 11 2000.

HEARINGS CONDUCTED BY THE COMMITTEE

June 21 2000 FCS

- Ms Anne McMullan, Relieving Manager, Child Protection Services Register;
- Mr Bill Budiselik, Executive Director, Industry Development and Service Specification;
- Ms Rae Markham, Senior Policy/Project Officer;
- Mr James Laffer, Regional Manager, Procurement Social Services Unit; and
- Ms Tara Gupta, Director Legal Services.

June 28 2000 Hon Norm Kelly MLC

APPENDIX 2
VIOLENCE AND RESTRAINING ORDERS UNDER THE *RESTRAINING ORDERS ACT 1997* (WA)

Summary

A person (usually under threat or the guardian of someone under threat) may apply for a restraining order. There are two types, a violence restraining order ("VRO") and a misconduct restraining order ("MRO"). The former protects against potential violence towards the applicant, while the latter restrains intimidating or offensive behaviour.

A VRO may be obtained in the absence of the respondent. However, if the period of operation exceeds 72 hours then the order is deemed interim pending a final hearing in which the respondent is given the right of reply. The *Restraining Orders Act 1997* does not limit the period for which a VRO may operate, however, if there is no term specified, the order is deemed to continue in operation for two years.

There is no provision in the *Restraining Orders Act 1997* for a MRO to be ordered in the absence of the respondent. Once an application is made, a hearing is set and the respondent is summoned. Again, there is no statutory limit to its period of operation, and if no period is specified, the order remains in force for one year.

In terms of court records, VRO's made under s 63 of the *Restraining Orders Act 1997* (which concern restraining orders against persons charged with an offence) are to be recorded in the prescribed form.[174] There are no similar provisions relating to the recording of other VRO's or MRO's.

Violence Restraining Order

Under s 11 of the *Restraining Orders Act 1997*, the court may make a VRO where it is satisfied that a respondent is likely to commit a violent personal offence or act in a manner likely to cause the applicant to fear the committal of such an offence.

A restraining order (whether VRO or MRO) may be made by a court of Petty Sessions, the Children's Court, an authorised magistrate or a judicial officer acting in a bail application.

Procedure:

1. Certain persons may apply for a VRO in the prescribed manner.[175]
2. The court, in making a VRO, is to have regard to the factors set out in s 12 of the *Restraining Orders Act 1997* including:[176]

---

174 Regulations 8 and 9 of the *Restraining Orders Regulations 1997*. There is a similar provision in s 21 of the *Restraining Orders Act 1997* and Reg 6 relating to Telephone Orders.

175 ss 18 & 25 *Restraining Orders Act 1997 (WA).*

- the need to protect the applicant from personal violence;
- the welfare of children likely to be affected by the person's behaviour;
- potential hardship on the respondent if a VRO is made;
- prior similar behaviour of the respondent; and
- any legal proceedings involving the respondent.

3. The applicant has a choice of whether to hold an initial hearing in the absence of the respondent, or whether to proceed directly to the final hearing.[177]
4. If an initial hearing is held in the absence of the respondent, the court may order a VRO, dismiss the application or adjourn the matter. If a VRO is made to be operational for more than 72 hours, the order is deemed an interim order.[178]
5. A VRO becomes operational upon service on the respondent.[179]
6. Where a VRO for 72 hours or less is made at an initial hearing the order remains in force for that period.[180]
7. An interim order remains in force until a final order is made, a final order hearing is concluded without order, the interim order is cancelled or expires, or in the case of a telephone order, three months from commencement.[181]
8. A final VRO remains in force for the period specified or if not specified then for two years.[182]

Misconduct Restraining Order

Section 34 of the *Restraining Orders Act* allows a court to make a MRO if satisfied that, unless restrained, the respondent is likely to behave in an intimidating or offensive manner towards the applicant, cause damage to the property of the applicant or cause a breach of the peace.

---

176 s 12 *Restraining Orders Act 1997 (WA)* for a VRO.

177 s 26 *Restraining Orders Act 1997 (WA).*

178 s 29 *Restraining Orders Act 1997 (WA.)*. Within 21 days of being served with an interim order a respondent may object (s 31). If there is no objection, the interim order becomes a final order (s 32). If the respondent does object, a final order hearing is set to determine the matter (s 33).

179 s 16(1) *Restraining Orders Act 1997 (WA).*

180 s 16(3) *Restraining Orders Act 1997 (WA).*

181 s 16(4) *Restraining Orders Act 1997 (WA).*

182 s 16(5) *Restraining Orders Act 1997 (WA)*. A telephone order lasts for three months from the time it becomes operational. A telephone order is made in circumstances of urgency or inconvenient location.

Procedure

1. Specified persons may apply for an MRO in the prescribed form.[183]
2. Once an application is made, a hearing is fixed and the respondent is summonsed.[184]
3. The court is to consider factors in s 35 of the *Restraining Orders Act 1997* including:[185]
    - the need to protect the applicant from intimidatory or offensive behaviour;
    - the need to protect the applicant's property from damage;
    - the welfare of potentially affected children; and
    - prior similar behaviour.
4. An MRO commences operation upon service to the respondent or at a later time specified in the order.[186]
5. The MRO remains in force for the period specified in the order or for one year (if no period is specified).

183 s 38 *Restraining Orders Act 1997 (WA).*

184 s 39 *Restraining Orders Act 1997 (WA).*

185 s 35 *Restraining Orders Act 1997 (WA).*

186 s 37(1) *Restraining Orders Act 1997 (WA).*