40TH PARLIAMENT

Report 44

STANDING COMMITTEE ON LEGISLATION

Children and Community Services Amendment Bill 2019

Presented by
Hon Dr Sally Talbot MLC (Chair)

September 2020

Standing Committee on Legislation

Members as at the time of this inquiry:

Hon Dr Sally Talbot MLC (Chair)

Hon Pierre Yang MLC

Hon Jacqui Boydell MLC (substitute member for Hon Colin deGrussa MLC)

Hon Nicolas Goiran MLC (Deputy Chair)

Hon Simon O'Brien MLC

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EXECUTIVE SUMMARY

1 The Legislative Council referred the Children and Community Services Amendment Bill 2019 (Bill) to the Standing Committee on Legislation (Committee), with the power to inquire into policy.

2 The Bill implements some recommendations from the 2017 statutory review of the *Children and Community Services Act 2004* (Act), progresses some recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse (Royal Commission), and provides stronger powers for enforcing compliance with the Act.

3 The policy of the Bill includes to work more closely with Aboriginal and Torres Strait Islander (ATSI) people and community-controlled organisations to better implement the ATSI Child Placement Principle and build stronger connections to family, culture, community and country for ATSI children in care.

4 The Bill effects positive changes for ATSI children and families, and the Committee is of the view that it goes some way toward its objective of working more closely with ATSI community-controlled organisations. However, the Committee respects stakeholder views that the Bill falls short of fully implementing the five elements of the ATSI Child Placement Principle, and has made recommendations about ways to address these concerns.

5 A two-year trial of Aboriginal Family-Led Decision-Making was announced during this inquiry, and the Committee is of the view that consideration should be given to a legislative provision for this process in the next statutory review of the Act. This will help to facilitate ATSI self-determination in decision-making under the Act.

6 Certain people, including doctors, nurses and teachers, are already required by the Act to report child sexual abuse. The Bill aims to contribute to protecting children from harm by extending that requirement to ministers of religion.

7 While the Bill will likely contribute to child safety, it fails to fully implement recommendation 7.3 of the Royal Commission, which provides that states and territories should include five groups as mandatory reporters at a minimum—one of which is people in religious ministry. Western Australia is currently the only jurisdiction where none of the five recommended categories are mandatory reporters.

8 The Bill specifies that ministers of religion will be subject to mandatory reporting requirements, and that information obtained during religious confession should not provide an exemption. This has attracted opposition from Catholic and Orthodox stakeholders on a number of grounds, including that priests risk excommunication for breaking the seal of confession, and victims who access the confessional value its absolute confidentiality.

9 The Bill expands enforcement powers for authorised officers to investigate a broader range of offences under the Act. The powers are consistent with those provided to licensing officers under the *Child Care Services Act 2007*. Issues pertaining to the ability to enter, search and seize without a warrant or consent and abrogation of the privilege against self-incrimination are raised in the report for Members' consideration.

10 The Committee made findings and recommendations to improve the operation of the Bill.

Findings and recommendations

Findings and recommendations are grouped as they appear in the text at the page number indicated:

FINDING 1 Page 5

More than half of the children in Western Australian out-of-home care are Aboriginal or Torres Strait Islander, despite Aboriginal and Torres Strait Islander people making up only three percent of the Western Australian population.

RECOMMENDATION 1 Page 6

Clause 4 to be amended as follows:

Page 3, line 13 — To delete "Aboriginal child —" and insert:

Aboriginal child or Torres Strait Islander child —

Page 3, lines 17 to 20 — To delete the lines.

FINDING 2 Page 11

Recognising that the best interests of the child are paramount, it may sometimes be the case that placing an Aboriginal or Torres Strait Islander child with an Aboriginal or Torres Strait Islander carer away from the child's community is preferable to placing the child with a non-Aboriginal or Torres Strait Islander carer close to home.

FINDING 3 Page 12

Clause 11 does not align with the placement element of the Aboriginal and Torres Strait Islander Child Placement Principle, which provides that placement with a non-Aboriginal or Torres Strait Islander carer should be a last resort.

RECOMMENDATION 2 Page 13

Clause 11 to be amended as follows:

Page 10, line 21 — To insert before "placement":

placement with a person who is an Aboriginal person or Torres Strait Islander or

Page 11, lines 1 and 2 — To delete the lines.

RECOMMENDATION 3 Page 13

If recommendation 2 is not agreed to, that the Minister representing the Minister for Child Protection inform the Legislative Council how the amended clause 11 is intended to align with the placement element of the Aboriginal and Torres Strait Islander Child Placement Principle.

FINDING 4 Page 16

Neither the current *Children and Community Services Act 2004*, nor the *Children and Community Services Act 2004* as amended by the Children and Community Services Amendment Bill 2019, fully implements the Aboriginal and Torres Strait Islander Child Placement Principle.

RECOMMENDATION 4 Page 16

The next statutory review of the *Children and Community Services Act 2004* consider including:

- a statutory definition of the Aboriginal and Torres Strait Islander Child Placement Principle
- all five elements of the Aboriginal and Torres Strait Islander Child Placement Principle as principles under Part 2, Division 3.

FINDING 5 Page 21

Clause 13, proposed section 14(3), which provides that the principle of community participation does not apply to decisions about a placement arrangement or a Cultural Support Plan, is undesirable and potentially unnecessary.

RECOMMENDATION 5 Page 21

The Minister representing the Minister for Child Protection advise the Legislative Council on why clause 13 proposed section 14(3) is necessary, and if the subsection is not thought to be necessary:

Clause 13 be amended as follows:

Page 12, lines 1 to 3 — To delete the lines.

FINDING 6 Page 22

The inclusion of 'duties and responsibilities' at clause 14, proposed section 22(4AB) is a drafting error.

RECOMMENDATION 6 Page 22

Clause 14 be amended as follows:

Page 12, lines 24 and 25 — To delete "duties and responsibilities" and insert:

functions

FINDING 7 Page 23

Amendments relating to approved Aboriginal or Torres Strait Islander representative organisations, including proposed sections 22A, 81 and 98A, will commence on the same day as the relevant regulations.

FINDING 8 Page 25

The intention of clause 32 to strengthen the consultation requirements by requiring that three categories of individuals or organisations are consulted prior to making a placement decision about an Aboriginal or Torres Strait Islander child, would be made clearer by inserting the words 'each of'.

RECOMMENDATION 7 Page 25

Clause 32 be amended as follows:

Page 24, line 29 — To insert after "consult with":

each of

FINDING 9 Page 26

It is not the intention of clause 32 of the Children and Community Services Amendment Bill 2019 to limit consultation to one family member.

RECOMMENDATION 8 Page 26

Clause 32 be amended as follows:

Page 24, lines 30 and 31 — To delete the lines and insert:

(a) members of the child's family;

RECOMMENDATION 9 Page 27

The Minister representing the Minister for Child Protection inform the Legislative Council of whether it would be appropriate, before making a placement arrangement in relation to any child, that the Chief Executive Officer of the Department of Communities consult with members of the child's family.

FINDING 10 Page 30

A two-year trial will pilot the operation of Aboriginal Family-Led Decision-Making in Western Australia.

RECOMMENDATION 10 Page 30

The Department of Communities evaluate the outcomes of the Aboriginal Family-Led Decision-Making trial and include the results of the evaluation in the next Departmental annual report immediately following the conclusion of the trial.

RECOMMENDATION 11 Page 31

The next statutory review of the *Children and Community Services Act 2004* consider including a legislative provision for Aboriginal Family-Led Decision-Making.

FINDING 11 Page 36

A majority of the Committee, consisting of Hons Nick Goiran, Jacqui Boydell and Hon Simon O'Brien MLCs, finds that consultation on clauses 51 to 53 of the Children and Community Services Amendment Bill 2019 was inadequate.

FINDING 12 Page 37

A minority of the Committee, consisting of Hons Dr Sally Talbot and Pierre Yang MLCs, finds that it was clear from June 2018 onwards that the Western Australian Government intended to proceed with legislation implementing recommendations 7.3 and 7.4 of the Royal Commission into Institutional Responses to Child Sexual Abuse. It was equally clear from June 2018 that some religious practitioners would oppose the implementation of recommendations 7.3 and 7.4. The minority of the Committee further notes that recommendations 7.3 and 7.4 were formulated after extensive consultation with all stakeholders, including religious organisations and victims of child sexual abuse, as part of the Royal Commission into Institutional Responses to Child Sexual Abuse work. See, especially, Criminal Justice Report Parts 3 – 6, chapter 16.

RECOMMENDATION 12 Page 37

That in developing legislation, the Government of Western Australia consult with stakeholders as per the Public Sector Commission's guidelines for the review of legislation.

FINDING 13 Page 43

While clauses 51 and 52 of the Children and Community Services Amendment Bill 2019 are likely to contribute to child safety, they fail to achieve the minimum national consistency of reporter groups recommended by the Royal Commission into Institutional Responses to Child Sexual Abuse.

RECOMMENDATION 13 Page 43

Clause 51 be amended as follows:

Page 34, after line 15 — To insert:
(1A) In section 124A insert in alphabetical order:
early childhood worker means —
(a) an adult who is any of the following under the *Education and Care Services National Law (Western Australia)* —
(i) an approved provider;
(ii) a nominated supervisor for an approved education and care service;
(iii) a staff member of an approved education and care service who is employed, appointed or engaged as an educator, a family day care co-ordinator or a family day care educator;
Or

(b) an adult who is any of the following —
(i) a licensee under the *Child Care Services Act 2007*;
(ii) a supervising officer under that Act;
(iii) a member of staff of a child care service (as defined in section 4 of that Act) whose duties include the provision of education and care to children;

Page 34, after line 28 — To insert:
(1B) In section 124A insert in alphabetical order:
out-of-home care service provider means a person who has entered into an agreement under section 15(1) for the provision of placement services;
out-of-home care worker means —
(a) an assessor; or
(b) an authorised officer; or
(c) an officer who holds an office or position that is prescribed, or of a class prescribed, for the purposes of this paragraph;
or
(d) a person who holds an office or position at a residential facility or secure care facility the duties of which include the care of children living at the facility; or
(e) a person who holds an office or position, with an out-of-home care service provider, the duties of which include the provision of social services to —
(i) children who are under a placement arrangement; or
(ii) carers of those children;

Page 34, after line 28 — To insert:
(1C) In section 124A insert in alphabetical order:
psychologist means a person registered under the *Health Practitioner Regulation National Law (Western Australia)* in the psychology profession;

Page 35, line 10 — To delete "section 51" and insert:
section 51(1)

Page 35, after line 12 — To insert:
(3) In section 124A in the definition of ***commencement day***:
(a) in paragraph (c) delete "operation;" and insert:
operation; or
(b) insert in alphabetical order according to paragraph designation:
(d) in relation to an early childhood worker — the day on which the *Children and Community Services Amendment Act 2019* section 51(1A) came into operation;
(4) In section 124A in the definition of ***commencement day***:
(a) in paragraph (d) delete "operation;" and insert:
operation; or
(b) insert in alphabetical order according to paragraph designation:
(e) in relation to an out-of-home care worker — the day on which the *Children and Community Services Amendment Act 2019* section 51(1B) came into operation;
(5) In section 124A in the definition of ***commencement day***:
(a) in paragraph (e) delete "operation;" and insert: operation; or
(b) insert in alphabetical order according to paragraph designation:
(f) in relation to a psychologist — the day on which the *Children and Community Services Amendment Act 2019* section 51(1C) came into operation;

Clause 52 be amended as follows:
Page 35, after line 13 — To insert:

(1A) In section 124B(1)(a) and (c)(i) after "doctor," insert:
psychologist,
(1B) In section 124B(1)(a) and (c)(i) after "midwife," insert:
out-of-home care worker,
(1C) In section 124B(1)(a) and (c)(i) after "police officer," insert:
early childhood worker,

Page 35, after line 23 — To insert:
(aa) after "doctor," insert:
psychologist,
(ab) after "midwife," insert:
out-of-home care worker,
(ac) after "police officer," insert:
early childhood worker,

RECOMMENDATION 14 Page 45

The Minister for Child Protection expedite consultation to include youth justice workers and school counsellors as mandatory reporters under the *Children and Community Services Act 2004*.

FINDING 14 Page 45

There is support from ministers of religion outside of the Catholic and Orthodox faiths for becoming mandatory reporters.

FINDING 15 Page 46

According to evidence received, the passing of clause 53 of the Children and Community Services Amendment Bill 2019, which implements Recommendation 7.4 of the Royal Commission, would create a serious conflict for ministers of religion of the Catholic and Orthodox faiths.

FINDING 16 Page 48

With the exception of information contained during religious confession, there is support from Catholic and Orthodox ministers of religion to become mandatory reporters.

FINDING 17 Page 48

Excommunication is one possible outcome for Catholic and Orthodox priests arising from the fact that there is a conflict between church law and clause 53 of the Bill, which implements recommendation 7.4 of the Royal Commission into Institutional Responses to Child Sexual Abuse.

FINDING 18 Page 50

Submitters made the point that the absolute confidentiality of religious confession is an important benefit for victims who use the confessional.

RECOMMENDATION 15 Page 52

That the Minister representing the Minister for Child Protection advise the Legislative Council if there would be any detriment to replacing 'a child' with 'a person who is a child' at section 124B(1)(b) of the *Children and Community Services Act 2004*.

RECOMMENDATION 16 Page 52

That the Department of Communities issue public guidelines as part of its training for ministers of religion, and all other mandatory reporters, to confirm that the duty to report under section 124B(1) applies only in relation to a person who is currently a child.

The Committee, being a majority consisting of Hons Simon O'Brien, Jacqui Boydell and Nick Goiran MLCs, makes the following recommendation:

RECOMMENDATION 17 Page 60

a) Ministers of religion be excused from criminal responsibility only when the grounds of their belief is based solely on information disclosed during religious confession; and

b) the Government of Western Australia consult with ministers of religion on non-statutory provisions that would facilitate the effective use of information received during religious confession.

The minority of the Committee consisting of Hons Dr Sally Talbot and Pierre Yang MLCs, recommend that clause 53 be enacted in full.

FINDING 19 Page 62

Clause 71, proposed section 241C(3) allows authorised officers to enter premises and search for, or seize documents or other property, without consent or warrant in order to investigate a suspected offence under Part 7.

FINDING 20 Page 63

The enforcement powers contained in new Part 10A of the Children and Community Services Bill 2019 are consistent with those provided to licensing officers under the *Child Care Services Act 2007*.

RECOMMENDATION 18 Page 63

The Minister representing the Minister for Child Protection explain, in relation to clause 71, proposed section 214C(4), the justification for providing an authorised officer with the power to enter a place in the absence of the occupier's informed consent or an entry warrant.

RECOMMENDATION 19 Page 65

That the Minister representing the Minister for Child Protection provide to the Legislative Council:

a) an explanation of whether the lack of compliance may be admissible evidence in proceedings for the offence of failing to comply with a direction

b) justification for the abrogation of the privilege against self-incrimination in relation to all offences under the *Children and Community Services Act 2004*.

RECOMMENDATION 20 Page 66

The next statutory review of the *Children and Community Services Act 2004* expressly consider whether there is a need for the privilege against self-incrimination to be abrogated by sections 241E(4) and (5).

RECOMMENDATION 21 Page 66

The Department of Communities include in its annual report, in relation to proposed Part 10A, a report on the number of:

- times those powers were used
- complaints received about the use of those powers
- complaints investigated, sustained, and those that remain under investigation.

RECOMMENDATION 22 Page 67

Clause 74 be amended as follows:

Page 54, after line 19 — To insert:
(1A) Without limiting subsection (1), the first review under that subsection must address —
(a) recommendations 4 and 11 set out in Report 44 (*Children and Community Services Amendment Bill 2019*) of the Standing Committee on Legislation of the Legislative Council; and

(b) the need for the continuation of section 241E(4) and (5).

CHAPTER 1
Introduction

Referral and procedure

1.1 The Children and Community Services Amendment Bill 2019 (Bill) was referred to the Standing Committee on Legislation (Committee) on 25 June 2020. The referral motion as passed was:

> (1) That the Children and Community Services Amendment Bill 2019 be discharged and referred to the Standing Committee on Legislation for consideration and report by no later than 15 September 2020.
>
> (2) That the committee has the power to inquire into and report on the policy of the bill.[1]

1.2 Pursuant to Standing Order 163, Hon Jacqui Boydell MLC substituted for Hon Colin de Grussa MLC for the duration of the inquiry. The President of the Legislative Council reported this substitution to the Legislative Council on 11 August 2020.[2]

1.3 The Committee received 606 submissions, and made 568 public (see Appendix 1). Approximately 93 percent of submissions were specifically about three clauses in the 75-clause Bill that relate to ministers of religion. The majority of the remaining 7 percent of submissions tended to focus on concerns associated with the Aboriginal and Torres Strait Islander Child Placement Principle and Aboriginal Family-Led Decision-Making.

1.4 Public hearings were held over two days on 6 and 10 August 2020. The witnesses who appeared at these hearings are listed in Appendix 1.

1.5 The Committee extends its appreciation to those who made submissions and gave evidence at hearings.

The Bill

Children and Community Services Act 2004

1.6 The Bill amends the *Children and Community Services Act 2004* (Act), which is administered by the Department of Communities (Department). The Act provides for:

- the protection and care of children in certain circumstances
- the provision of social services
- financial and other assistance
- other matters concerning the wellbeing of children, other individuals, families and communities in Western Australia (WA).

Purpose

1.7 The purpose of the Bill is to implement:

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1 Hon Sue Ellery MLC, Leader of the House, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 25 June 2020, p 4275.

2 Hon Kate Doust MLC, President, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 11 August 2020, p 4497.

- 40 of the 53 legislative recommendations of the 2017 statutory review of the Act[3]
- recommendations of the Final Report of the Royal Commission into Institutional Responses to Child Sexual Abuse (Royal Commission) related to persons in religious ministry becoming mandated reporters of child sexual abuse[4]
- stronger powers for enforcing compliance with the Act
- other amendments to address oversights, clarify provisions or remedy concerns in relation to the operation of the Act.[5]

Policy

1.8 The Department advises that the Bill reflects four key policy themes:

- promoting long term continuity and stability for children in the care of the Chief Executive Officer (CEO) of the Department
- strengthening service and support responses for children in care and those who have transitioned out of care to adulthood
- working more closely with Aboriginal and Torres Strait Islander (ATSI) people and community-controlled organisations to better implement the ATSI Child Placement Principle and build stronger connections to family, culture, community and country for ATSI children in care
- promoting greater systemic accountability for the implementation of the Department's legislative and policy requirements.

1.9 The Bill also aims to contribute to protecting children from harm by introducing further categories of individuals who are required to report a reasonable belief that a child has been or is being sexually abused. The Department advises that the Bill represents the first phase of this commitment, by requiring ministers of religion to report child sexual abuse.[6]

1.10 The Department notes that all amendments in the Bill will be subject to the best interests of the child.[7]

Consideration of fundamental legislative principles

1.11 As with previous inquiries, the Committee's method of scrutinising the Bill included an assessment as to whether its provisions are consistent with fundamental legislative principles (FLPs).[8]

1.12 FLPs are the principles relating to legislation that underlie a parliamentary democracy based on the rule of law. They fall under two broad headings:

- Does the Bill have sufficient regard for the rights and liberties of individuals? (FLPs 1–11)
- Does the Bill have sufficient regard to the institution of Parliament? (FLPs 12–16).

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3 Department of Communities, *Statutory review of the Children and Community Services Act 2004*, November 2017.

4 Royal Commission into Institutional Responses to Child Sexual Abuse, *Final report: preface and executive summary*, Commonwealth of Australia, Barton, ACT, 2017.

5 Submission 547 from the Department of Communities, 24 July 2020, p 1.

6 ibid, p 2.

7 Section 7 of the *Children and Community Services Act 2004* provides that in performing a function or exercising a power under the Act in relation to a child, a person, the Court or the State Administrative Tribunal must regard the best interests of the child as the paramount consideration.

8 The fundamental legislative principles are set out in Appendix 2.

1.13 The Committee has routinely used FLPs as a convenient and informal framework for scrutinising proposed legislation since 2004. They are not enshrined in Western Australian law, and for some bills, many FLPs do not apply. The question the Committee asks is not whether there is strict compliance with FLPs, but whether a bill has sufficient regard to them.

1.14 The Committee has considered FLP 5, 6 and 11 in relation to the Bill:

- whether the Bill confers power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer
- whether the Bill provides appropriate protection against self-incrimination
- whether the Bill is unambiguous and drafted in a sufficiently clear and precise way.

The Report

Clauses considered by the Committee

1.15 To reflect the evidence received in submissions, the Committee has elected to report on selected clauses in the Bill rather than comment on each clause individually.

Structure of the Report

1.16 The report is structured as follows:

- **Chapter 2** considers clause 11, which relates to the ATSI Child Placement Principle
- **Chapter 3** considers clauses 13, 15, 32 and 38 relating to participation and consultation on decisions about ATSI children
- **Chapter 4** considers clauses 51, 52 and 53 of the Bill, which extend mandatory reporting requirements to ministers of religion
- **Chapter 5** deals in brief with clause 71, which inserts proposed Part 10 of the Act to expand the enforcement powers of workplace inspectors and authorised officers
- **Chapter 6** sets out the Committee's concluding comments.

Procedural matter

1.17 As part of this inquiry, the Committee received a submission from a child. In deciding to assign a private status to this submission, the Committee considered that care should be taken to protect and respect the right of children to be heard by the Committee, while also safeguarding them as potentially vulnerable witnesses.

1.18 The Committee considers that evidence from children is an area worthy of further consideration. Members were authorised to explore this matter in other forums.

CHAPTER 2
Aboriginal and Torres Strait Islander Child Placement Principle

Introduction

2.1 A major theme emerging from the 2017 statutory review of the Act was the need to reduce the over-representation of ATSI children in the child protection system.

2.2 Chapter 2 and 3 will focus on amendments arising from term of reference 2 of the 2017 statutory review of the Act:

> The principles relating to Aboriginal and Torres Strait Islander children in sections 12 to 14 and the consultation requirements in section 81.[9]

2.3 Specifically, the Committee will consider whether the amendments are likely to achieve the policy objective of working more closely with ATSI people and community-controlled organisations to better implement the ATSI Child Placement Principle and build stronger connections to family, culture, community and country for ATSI children in care.

2.4 This Chapter focusses specifically on clause 11 of the Bill, which amends the ATSI Child Placement Principle at section 12.

Background

The Statutory Review

2.5 The Department commenced the second statutory review under section 249 of the Act (Review) on 1 December 2016. The Review's terms of reference were to examine the operation and effectiveness of the Act and in particular:

- changes to support the introduction of consistent high-quality foster carer standards through a single decision-maker for approvals and revocation
- the principles relating to ATSI children in sections 12 to 14 and the consultation requirements in section 81
- any changes necessary to support the safety and wellbeing of adults and children subject to family and domestic violence
- the provisions relating to secure care arrangements for children at high-risk
- issues relating to the intersection between child protection proceedings under Part 5 of the Act and proceedings in the Family Court.[10]

2.6 The Review also incorporated some amendments deferred from the 2015 consultation on out-of-home care reforms, which were unable to be implemented before the change of Government in March 2017.[11]

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9 Department of Communities, *Statutory review of the Children and Community Services Act 2004*, November 2017, p 1.

10 ibid.

11 Submission 547 from the Department of Communities, 24 July 2020, p 2.

Aboriginal and Torres Strait Islander children in the child protection system

2.7 Despite ATSI people making up only 3 percent of the Western Australian population,[12] ATSI children represent 55 percent of children in out-of-home care in WA.[13] Statistically, ATSI children are 17 percent more likely to be placed in out-of-home care than non-ATSI children.[14]

2.8 The Aboriginal Legal Service of WA expanded on the context behind these figures:

> Removals of children happen against a background which is well known – the experience of intergenerational trauma from the historical impacts of dispossession, social exclusion, racism, disadvantage and policies sanctioning the involuntary removal of Aboriginal children from their families, leading to the stolen generation.[15]

FINDING 1

More than half of the children in Western Australian out-of-home care are Aboriginal or Torres Strait Islander, despite Aboriginal and Torres Strait Islander people making up only three percent of the Western Australian population.

General comment on the Bill from Aboriginal and community stakeholders

2.9 In general, Aboriginal and community service stakeholders told the Committee that the Bill contains positive amendments for ATSI children and families. However, a consistent theme through evidence to the inquiry is that the Bill falls short of what is required to improve outcomes for ATSI children in the WA child protection system, and implement self-determination for ATSI people. [16]

Definition of family (cl 4)

2.10 Clause 4 of the Bill replaces the defined term 'relative' with the defined term 'family'. The Department advises that 'family' is the term preferred by many ATSI people, and the Aboriginal Legal Service of WA submit that the amendment recognises kinship connections.[17] The Aboriginal Health Council of WA submitted that the use of the term 'family' at clause 4 is an example of positive reframing of language throughout the Bill.[18]

2.11 The Committee notes that the only change proposed by clause 4 is to replace the term 'relative' with 'family'—the definition itself is not proposed to change. However, in its scrutiny of the Bill, the Committee queried two elements of the definition.

Consanguinity

2.12 The Committee has identified that the use of the term 'consanguinity' in the definition of 'family' may not align with FLP 11, which relates to clear and unambiguous legislation.

---

12 Australian Bureau of Statistics, *Snapshot of Australia 2016, Aboriginal and Torres Strait Islander people by State or Territory*, June 2018.

13 Department of Communities, *Child Protection Activity Performance Information 2018-19*, p 18.

14 Australian Institute of Health and Welfare, *Child protection Australia 2018-19*, 2020, p 53.

15 Submission 587 from Aboriginal Legal Service of Western Australia, 28 July 2020, p 3.

16 See, for example, Submission 214 from Secretariat of National Aboriginal and Islander Child Care, National Voice for our Children and Noongar Family Safety and Wellbeing Council, 22 July 2020 and Submission 549 from Aboriginal Health Council of Western Australia, 23 July 2020.

17 Submission 587 from Aboriginal Legal Service of Western Australia, 28 July 2020, p 8.

18 Submission 549 from the Aboriginal Health Council of Western Australia, 23 July 2020, p 4.

Consanguinity means 'relation by blood or birth'.[19] The term has featured in the definition of 'relative' since the Act commenced in 2006.

2.13 The Committee queried whether a more well-known term, such as 'ancestry', could be used instead. The Department discussed this with Parliamentary Counsel's Office. Unlike 'ancestry', consanguinity captures relatives such as siblings and cousins who are people from whom the child is descended. No suitable alternative to 'consanguinity' was identified.[20]

2.14 The Committee acknowledges the advice, but notes that in the context of an amendment to make the defined term 'family' more accessible to the community, the inclusion of a word that is not readily understood by members of the public is unfortunate.

Customary law or tradition of the child's community

2.15 The Committee queried why the wording in paragraph (c) of the definition of family does not include reference to 'the child's community', as at paragraph (b):

> family, of a child, means —
>
> ...
>
> (b) for an Aboriginal child — each person regarded under the customary law or tradition of the child's community as the equivalent of a person mentioned in paragraph (a); or
>
> (c) for a Torres Strait Islander child — each person regarded under the customary law or tradition of the Torres Strait Islands as the equivalent of a person mentioned in paragraph (a)

2.16 Given the passage of time since the Act commenced, the Department has not been able to establish why the reference to 'a child's community' was not included in relation to Torres Strait Islander children when the Act was originally drafted. The Department is not aware of any reason why paragraph (c) should not mirror paragraph (b).[21]

2.17 The Committee considers that subparagraph (c) is unnecessary, and subparagraph (b) could apply to both Aboriginal and Torres Strait Islander children.

RECOMMENDATION 1

Clause 4 to be amended as follows:

Page 3, line 13 — To delete "Aboriginal child —" and insert:

Aboriginal child or Torres Strait Islander child —

Page 3, lines 17 to 20 — To delete the lines.

Aboriginal and Torres Strait Islander Child Placement Principle (cl 11)

Background

2.18 To support their wellbeing and sense of identity, it is important that ATSI children who enter the child protection system are able to develop and maintain connections to culture,

[19] Department of Communities, Answer to question on notice 1 asked at hearing held 10 August 2020, dated 19 August 2019, p 1.

[20] ibid., p 2.

[21] Department of Communities, Answer to question on notice 2 asked at hearing held 10 August 2020, dated 19 August 2020, p 2.

community and country.[22] The ATSI Child Placement Principle has developed over the last four decades, and can be found in policy and legislation across all Australian jurisdictions.[23]

2.19 The ATSI Child Placement Principle often presents as a 'hierarchy' to guide placement decisions when an ATSI child is unable to remain in the care of their parents.[24] Generally, placement hierarchies will stipulate that care within family and kinship groups is the first priority, and placement with a non-ATSI carer away from the child's community is a last resort.

2.20 The national peak body for ATSI children, Secretariat of National Aboriginal and Islander Child Care - National Voice for our Children (SNAICC) state that the aims of the ATSI Child Placement Principle are as follows:

- recognise and protect the rights of ATSI children, family members and communities
- increase the level of self-determination for ATSI people in child welfare matters
- reduce the disproportionate representation of ATSI children in the child protection system.

2.21 The ATSI Child Placement Principle is made up of five core and interrelated elements, which are summarised in Table 1.

Table 1. *Core elements of the Aboriginal and Torres Strait Islander Child Placement Principle*

Element	**Description**
Prevention	Each Aboriginal and Torres Strait Islander child has the right to be brought up within their own family and community.
Partnership	The participation of Aboriginal and Torres Strait Islander community representatives, external to the statutory agency, is required in all child protection decision-making, including intake, assessment, intervention, placement and care, and judicial decision-making processes.
Placement	Placement of an Aboriginal or Torres Strait Islander child in out-of-home care is prioritised in the following way: 1. with Aboriginal or Torres Strait Islander relatives or extended family members, or other relatives or extended family members; or 2. with Aboriginal or Torres Strait Islander members of the child's community; or 3. with Aboriginal or Torres Strait Islander family-based carers. If the preferred options are not available, as a last resort the child may be placed with 4. a non-Indigenous carer or in a residential setting.

[22] Secretariat of National Aboriginal and Islander Child Care, *Aboriginal and Torres Strait Islander Child Placement Principle: Aims and core elements*, July 2013, p 2.

[23] Australian Institute of Family Studies, *Enhancing the implementation of the Aboriginal and Torres Strait Islander Child Placement Principle*, August 2015, See https://aifs.gov.au/cfca/publications/enhancing-implementation-aboriginal-and-torres-strait-islander-child/aboriginal-and. Viewed 3 September 2020.

[24] ibid.

Element	Description
	If the child is not placed with their extended Aboriginal or Torres Strait Islander family, the placement must be within close geographic proximity to the child's family.
Participation	Aboriginal and Torres Strait Islander children, parents and family members are entitled to participate in all child protection decisions affecting them regarding intervention, placement and care, including judicial decisions.
Connection	Aboriginal and Torres Strait Islander children in out-of-home care are supported to maintain connection to their family, community and culture, especially children placed with non-Indigenous carers.

Source: Secretariat of National Aboriginal and Islander Child Care, *Aboriginal and Torres Strait Islander Child Placement Principle: Aims and Core Elements*, June 2013, p 8.

Placement hierarchy at section 12

2.22 Section 12 of the Act legislates for the ATSI Child Placement Principle:

> **12. Aboriginal and Torres Strait Islander child placement principle**
>
> (1) The objective of the principle in subsection (2) is to maintain a connection with family and culture for Aboriginal children and Torres Strait Islander children who are the subject of placement arrangements.
>
> (2) In making a decision under this Act about the placement under a placement arrangement of an Aboriginal child or a Torres Strait Islander child, a principle to be observed is that any placement of the child must, so far as is consistent with the child's best interests and is otherwise practicable, be in accordance with the following order of priority —
>
> (a) placement with a member of the child's family;
>
> (b) placement with a person who is an Aboriginal person or a Torres Strait Islander in the child's community in accordance with local customary practice;
>
> (c) placement with a person who is an Aboriginal person or a Torres Strait Islander;
>
> (d) placement with a person who is not an Aboriginal person or a Torres Strait Islander but who, in the opinion of the CEO, is sensitive to the needs of the child and capable of promoting the child's ongoing affiliation with the child's culture, and where possible, the child's family.

2.23 The Department commented on the intent of section 12:

> The ATSICPP [ATSI Child Placement Principle] is not simply about where and with whom a child in care should be 'placed': its intent in broad terms is to enhance and preserve Aboriginal children's connection to their family and community, culture and Country while they are in care.[25]

[25] Submission 547 from Department of Communities, 24 July 2020, p 5.

2.24 In 2016-17, 64 percent of ATSI children in care in WA were placed in accordance with the first three placement options in the hierarchy. Thirty six percent of ATSI children in care had non-ATSI carers.[26]

Proposed amendment to placement hierarchy (cl 11)

2.25 Clause 11 of the Bill amends section 12 by including two new options into the placement hierarchy. Current options (c) and (d) become options (e) and (f), due to the insertion of these two new options:

> (c) placement with a person who is an Aboriginal person or Torres Strait Islander who lives in close proximity to the child's Aboriginal or Torres Strait Islander community;
>
> (d) placement with a person who is not an Aboriginal person or Torres Strait Islander but who —
>
> (i) lives in close proximity to the child's Aboriginal or Torres Strait Islander community; and
>
> (ii) is responsive to the cultural support needs of the child and is willing and able to encourage and support the child to develop and maintain a connection with the culture and traditions of the child's family or community;

2.26 The effect of the proposed amendment is that option (d) (placement with a non-ATSI person who lives in close proximity to the child's community) is given a higher priority in the hierarchy than (e) (placement with an ATSI person who does not live in close proximity to the child's community).

Consultation by the Department of Communities

2.27 During the course of the Review, the Department held a series of regional consultations with ATSI community members, Aboriginal Community Controlled Organisations and service providers. ATSI people in the following locations expressed general support for keeping children with non-ATSI carers in close proximity to the child's community if the first three placement options were not available, in preference to sending children far away from their community with an ATSI-carer:

- Broome, 1 December 2016 and 16-17 March 2017
- Karratha, 2 March 2017
- Kalgoorlie, 10 March 2017
- Geraldton, 14 March 2017
- Derby, 14-15 March 2017
- Fitzroy Crossing, 29 March 2017
- Kununurra 21 March 2017
- Wyndham, 22 March 2017
- Halls Creek, 28 March 2017.[27]

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[26] Department of Communities, *Statutory review of the Children and Community Services Act 2004*, November 2017, p 39.

[27] Department of Communities, Answer to question on notice 4 asked at hearing held 10 August 2020, dated 19 August 2020, p 3.

2.28 This view was particularly held in relation to children on time-limited orders, where reunification with parents is a possibility.[28] The Department advised that the proposed amendment was based on the outcomes of broad consultation, and acknowledges that there are different views across Aboriginal communities, peak bodies and representative groups.[29]

Views on the proposed amendment to placement hierarchy

2.29 The Committee heard diverse views on the proposed amendments to Section 12. The Aboriginal Legal Service of WA support the inclusion of new option (c):

> That is quite useful. The court and the department must look to, if not a family member, if not a person within the child's community, then the next step would be close proximity, so we do think (c) is quite important. [30]

2.30 The placement of new option (d) before current option (c) was more controversial. This amendment would see an ATSI child placed with a non-Aboriginal carer who lives close to the child's community over placement with an Aboriginal carer who lives in a different part of the state.

2.31 The Department provides the following rationale in the Explanatory Memorandum:

> The amendments are intended to keep Aboriginal children in care in closer proximity to family and community if the first two placement priorities are unable to be achieved.
>
> With the geographical size and cultural diversity of Western Australia, current paragraph (c) can result in an Aboriginal child being placed with an Aboriginal person with very different cultural traditions at opposite ends of the state and far from the child's family and community. This can impose barriers to maintaining the child's family and cultural connections and the possibility of reunification with parents where appropriate.[31]

2.32 Several stakeholders, including the Aboriginal Legal Service of WA and Legal Aid WA, support the amendment and submit that children do need to remain close to their community and country. According to Legal Aid WA, the amendment will help prevent the type of situation where an ATSI child is placed with an ATSI carer in a distant location, which makes it very difficult for the child to maintain a relationship with family, community and country.[32]

2.33 However, Pioneers Aboriginal Corporation strongly object to the prospect of an ATSI child being placed with a non-ATSI carer:

> A community meeting was held with 17 senior lore women in Kununurra mostly aged 70+ to discuss this issue and provide them with an opportunity to have their voices heard. The women in broken English became very distressed and emotional. They expressed how it pained them to watch their grandchildren in their community being cared for "white" (not meant to be derogatory) women falling down drunk at the Kimberley Moon festival and other social events in the presence

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28 ibid.

29 Michelle Andrews, Director General, Department of Communities, transcript of evidence, 10 August 2020, p 10.

30 Kathryn Russell, Managing Lawyer, Family Law Unit, Aboriginal Legal Service of Western Australia, transcript of evidence, 6 August 2020, p 16.

31 Children and Community Services Amendment Bill 2019, *Explanatory Memorandum*, Legislative Council, p 5.

32 Submission 589 from Legal Aid Western Australia, 28 July 2020, p 7.

> of the children. They stated, "We don't drink, why can't we care for our own children?" They went to say our kids aren't even allowed to look at us in the town".
>
> The women expressed their concerns about their culture dying out and not being able to pass it on with the increase in the numbers of their children being removed. Evidence clearly demonstrates that not only "culture and identity" are important to Aboriginal people, placement in a non-Aboriginal placement breaks down by the age of 15. The non-Aboriginal family is not able to understand the child's struggle with racism and discrimination as they mature and become exposed to it at school, publicly etc.[33]

2.34 When appearing before the Committee, Dr Hannah McGlade, Member of the Noongar Family Safety and Wellbeing Council (NFSWC), outlined her concerns about the change:

> In terms of the other provision about changing the Aboriginal child placement principle, we are concerned obviously that a non-Aboriginal carer would be placed above an Aboriginal person.
>
> ...
>
> We are very concerned about non-Aboriginal carers making promises to have contact ongoing with families but moving outside of the region or deciding later that they do not want contact. I hear reports from where my family are in Albany of non-Aboriginal carers who cover children's faces when they see Aboriginal people approaching them because they do not want the children to see their family.[34]
>
> ...
>
> We understand full well what this is about. We also know that there is systemic and structural discrimination in the practices of the department, where perfectly appropriate Aboriginal family members have not been contacted to become carers. I think the worry would be that somehow a non-Aboriginal person then may become identified as a primary carer. [35]

2.35 Richard Weston, CEO of SNAICC, told the Committee that it would be difficult to give a definitive answer about whether it was better to place a child with a non-ATSI carer in the area, as opposed to with an ATSI carer out of the area. The important element is the ability to involve the family and come to a decision in the best interests of the child. [36]

FINDING 2

Recognising that the best interests of the child are paramount, it may sometimes be the case that placing an Aboriginal or Torres Strait Islander child with an Aboriginal or Torres Strait Islander carer away from the child's community is preferable to placing the child with a non-Aboriginal or Torres Strait Islander carer close to home.

Derogation from the Aboriginal and Torres Strait Islander Child Placement Principle

2.36 The Committee notes that the hierarchy expressed in the ATSI Child Placement Principle (see Table 1) specifies that placement with a non-ATSI carer or in a residential setting

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33 Submission 48 from Pioneers Aboriginal Corporation, 16 July 2020, p 6.

34 Dr Hannah McGlade, Member, Noongar Family Safety and Wellbeing Council, transcript of evidence, 6 August 2020, p 14.

35 Ibid., p 15.

36 Richard Weston, Chief Executive Officer, Secretariat of National Aboriginal and Islander Child Care, transcript of evidence, 6 August 2020, p 14.

should be the last resort. Under clause 11, placement with a non-ATSI carer is not a last resort. The Committee notes that clause 11 is inconsistent with the ATSI Child Placement Principle in this regard.

FINDING 3

Clause 11 does not align with the placement element of the Aboriginal and Torres Strait Islander Child Placement Principle, which provides that placement with a non-Aboriginal or Torres Strait Islander carer should be a last resort.

Providing greater flexibility

2.37 The Committee notes that the best interests of the child are the paramount consideration in all decisions made under the Act, including placement decisions.[37] With reference to clause 32, proposed new section 81(1), a placement decision will always be made in consultation with a family member and an approved ATSI representative organisation.

2.38 In this sense, the placement hierarchy does already allow for some flexibility. However, the fact that proposed section 12 operates as a hierarchy indicates that option (d), unless actively proven not to be in the best interests of the child, will be preferred over option (e).

2.39 Kathryn Russell, Managing Lawyer of the Aboriginal Legal Service of WA, Family Law Unit, questioned the requirement to place one option above the other:

> **Ms RUSSELL**: I wonder whether that needs to always be (d) and (e) in family consultation. Some of our families that we represent, for example in the western Kimberley, would be devastated if their child was removed from the whole family to be with somebody down here, which is such a long way removed. But other families would prefer that their child was with an Aboriginal person down here than a non-Aboriginal person up there.
>
> If (d) and (e) were to be retained, then it does not necessarily need to be an order in them, but more that the two of them should be with family consultation.[38]

2.40 Witnesses from SNAICC and the NFSWC supported this suggestion.[39]

2.41 Ms Nayantara Gupta, General Counsel for the Department, advised that the Department had discussed this option with Parliamentary Counsel's Office, and did not think the suggestion would work from a drafting perspective:

> because it is a hierarchy. To put two things that are quite different on the same level, I think, could potentially be confusing and somewhat difficult.[40]

2.42 The Committee acknowledges that the suggestion may disrupt the logistical flow of the hierarchy, but notes Aboriginal stakeholders do not think that either option should be assigned priority over the other.

2.43 The Committee is of the view that what should be set out is a range of options, all of which are informed by the best interests of the child. Specifically, the Committee considers that clause 11, proposed subsections (d) and (e), could be combined in one option, to be

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37 *Children and Community Services Act 2004* s 7.

38 Kathryn Russell, Managing Lawyer, Family Law Unit, Aboriginal Legal Service of Western Australia, transcript of evidence, 6 August 2020, p 16.

39 Witnesses, Secretariat of National Aboriginal and Islander Child Care and Noongar Family Safety and Wellbeing Council, transcript of evidence, 6 August 2020, p 16.

40 Nayantara Gupta, General Counsel, Advisory Services and Legislation, Department of Communities, transcript of evidence, 10 August 2020, p 9.

decided with reference to the best interests of the child on a case-by-case basis. Such an approach would address the concerns of Aboriginal stakeholders who perceive that the flow of the hierarchy is being accorded more importance than the best interests of the child.

RECOMMENDATION 2

Clause 11 to be amended as follows:

Page 10, line 21 — To insert before "placement":

placement with a person who is an Aboriginal person or Torres Strait Islander or

Page 11, lines 1 and 2 — To delete the lines.

2.44 In making this recommendation, the Committee acknowledges that its consultation on this amendment has not been as extensive as the Department's. The viewpoints expressed through this inquiry were mainly from the Perth or South West, while support for the proposed amendment through the Department's consultations came mainly from the Kimberley, Mid West and Goldfields.[41] However, the Committee is of the view that nothing of substance is lost by providing greater flexibility, especially where that decision flexibility is coupled with broader consultation.

RECOMMENDATION 3

If recommendation 2 is not agreed to, that the Minister representing the Minister for Child Protection inform the Legislative Council how the amended clause 11 is intended to align with the placement element of the Aboriginal and Torres Strait Islander Child Placement Principle.

Full implementation of the ATSI Child Placement Principle

Recommendation 12.20 of the Royal Commission

2.45 The Royal Commission recommended that each state and territory government, in consultation with appropriate ATSI organisations and community representatives, should develop and implement plans to fully implement the ATSI Child Placement Principle.[42] The Explanatory Memorandum to the Bill provides that some amendments align with this recommendation.[43]

2.46 As a party to the National Framework for Protecting Australia's Children 2009-20 (the National Framework), WA has committed to applying the five elements of the ATSI Child Placement Principle to implementation of the strategies and actions identified in the National Framework's Third three-year action plan 2015–18.

Requiring compliance with all five elements

2.47 SNAICC and the NFSWC submit that some amendments proposed by the Bill, such as cultural support planning requirements, will further enable the ATSI Child Placement Principle. However, the Bill lacks a specific requirement to comply with each of the five elements of the ATSI Child Placement Principle:

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41 Department of Communities, Answer to question on notice 4 asked at hearing held 10 August 2020, dated 19 August 2020, p 3.

42 Royal Commission into Institutional Responses to Child Sexual Abuse, *Final report recommendations*, Commonwealth of Australia, Barton, ACT, 2017, p 40.

43 Children and Community Services Amendment Bill 2019, *Explanatory Memorandum*, Legislative Council, p 1.

- prevention
- partnership
- placement
- participation
- connection.[44]

Queensland

2.48 The Queensland legislation was suggested as a potential model of best practice. Section 5C(2) of the *Child Protection Act 1999* (Qld) specifically sets out a principle for each of the five elements of the ATSI Child Placement Principle, and provide that these apply in relation to ATSI children:

- The principle (the prevention principle) that a child has the right to be brought up within the child's own family and community.
- The principle (the partnership principle) that ATSI persons have the right to participate in significant decisions under this Act about ATSI children.
- The principle (the placement principle) that, if a child is to be placed in care, the child has a right to be placed with a member of the child's family group.
- The principle (the participation principle) that a child and the child's parents and family members have a right to participate, and be enabled to participate, in an administrative or judicial process for making a significant decision about the child.
- The principle (the connection principle) that a child has a right to be supported to develop and maintain a connection with the child's family, community, culture, traditions and language, particularly when the child is in the care of a person who is not an ATSI person.[45]

Stakeholder recommendation

2.49 SNAICC and the NFSWC submit that embedding all five elements in legislation, as Queensland have, would be a significant step towards ensuring accountability for the full implementation of the ATSI Child Placement Principle.

2.50 To this end, they recommend amending the Bill to include additional principles to align with each of the five elements of the ATSI Child Placement Principle.[46] The Youth Affairs Council of WA also supported this recommendation.[47] The Aboriginal Health Council of WA also recommend including a requirement to comply with each of the five elements.[48]

The Department's response

2.51 The Department advised that the Review considered the five elements of the ATSI Child Placement Principle by considering which sections of the Act align with each of the five elements (see Figure 1).

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44 Submission 214 from Secretariat of National Aboriginal and Islander Child Care and Noongar Family Safety and Wellbeing Council, 22 July 2020, p 5.

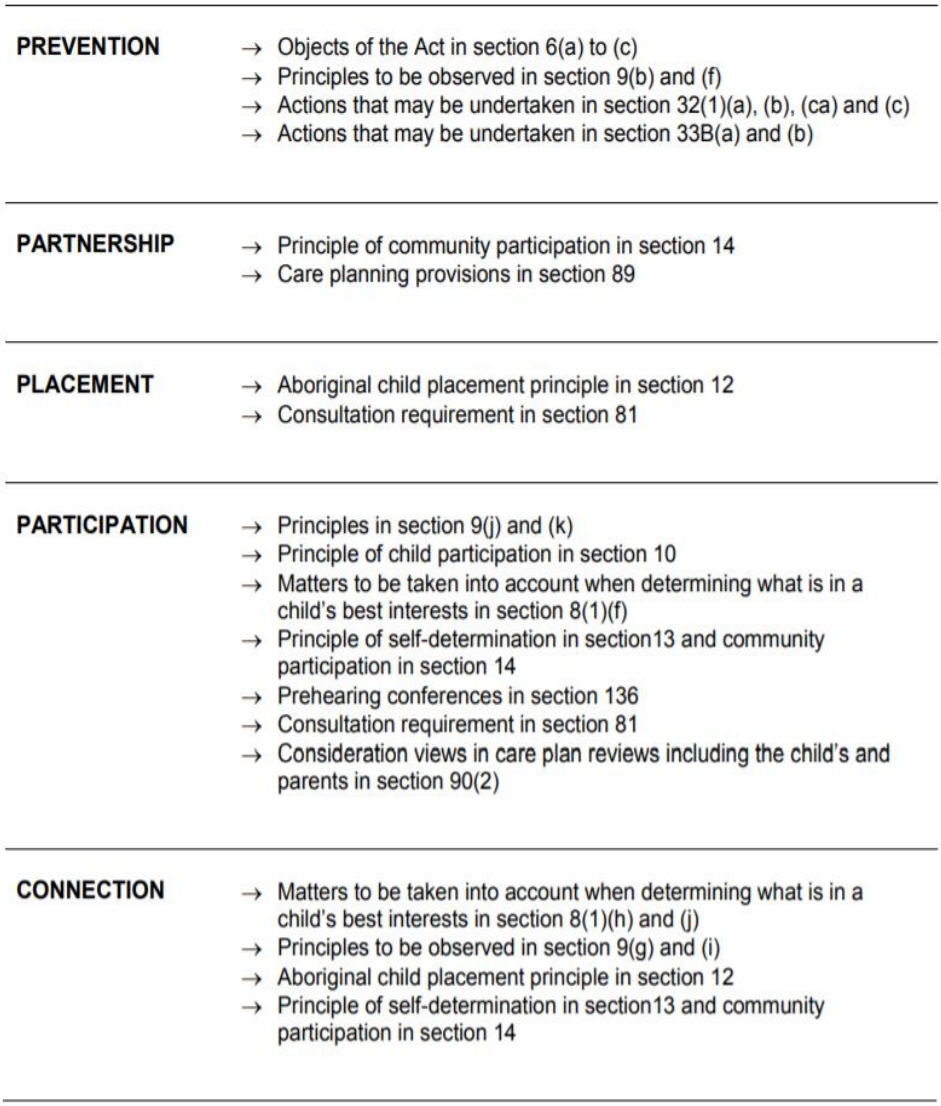
45 *Child Protection Act 1999* (QLD) s 5C(2).

46 Submission 214 from Secretariat of National Aboriginal and Islander Child Care and Noongar Family Safety and Wellbeing Council, 22 July 2020, p 6.

47 Submission 455 from Youth Affairs Council of Western Australia, 24 July 2020, p 5.

48 Submission 549 from Aboriginal Health Council of Western Australia, 23 July 2020, p 4.

Figure 1. *Provisions in the Children and Community Services Act 2004 which align with the five elements of the Aboriginal and Torres Strait Islander Child Placement Principle*



Source: Department of Communities, *Statutory review of the Children and Community Services Act 2004*, November 2017, p 179.

2.52 The Department noted that while the Queensland approach represents one way of implementing the ATSI Child Placement Principle, the Act already has a number of provisions that reflect the five elements.[49]

2.53 In terms of whether the Bill fully implements recommendation 12.20 of the Royal Commission, the Department has been clear that full implementation cannot be achieved through legislation alone:

> In terms of how the act might be amended to fully implement the child placement principle, it should be noted that legislation is just one means by which jurisdictions can achieve full implementation of the principle. The changes in the bill will certainly need to be supported and implemented alongside the development of more policy guidance, programs that align with the principles,

[49] Rosemary Williamson, Principal Legislation Officer, Department of Communities, transcript of evidence, 10 August 2020, p 8-9.

processes and ongoing learning and development of staff to improve cultural competency.[50]

Committee's comment

2.54 Unlike in Queensland, the five elements of the ATSI Child Placement Principle are not specifically or separately enunciated in the WA Act. For example, prevention was said to be a notable gap, with SNAICC submitting that there are no requirements in the Act or the Bill to provide support services to families to prevent child removal or support reunification when a child has been removed from their family.[51]

2.55 The Committee is of the view that while reviewing the Act to determine which sections align with the ATSI Child Placement Principle is a useful exercise, it is not the same as developing legislation which is informed specifically by the five elements. Until this occurs, the perception will continue that there are gaps and inconsistencies between the five elements and the administration of the Act.

2.56 Part 2, Division 3 of the Act specifically provides for principles relating to ATSI children. This Division appears to the Committee to be the appropriate vehicle for expressing each of the five elements of the ATSI Child Placement Principle as a standalone principle. Such a reform will require a wholesale review of the Act.

FINDING 4

Neither the current *Children and Community Services Act 2004*, nor the *Children and Community Services Act 2004* as amended by the Children and Community Services Amendment Bill 2019, fully implements the Aboriginal and Torres Strait Islander Child Placement Principle.

RECOMMENDATION 4

The next statutory review of the *Children and Community Services Act 2004* consider including:

- a statutory definition of the Aboriginal and Torres Strait Islander Child Placement Principle
- all five elements of the Aboriginal and Torres Strait Islander Child Placement Principle as principles under Part 2, Division 3.

2.57 Recommendation 4 can be implemented by recommendation 22, which proposes to amend clause 74 to require that specific matters be considered during the next statutory review of the Act.

Conclusion

2.58 The policy objective behind the Bill includes to work more closely with ATSI people and community controlled organisations to better implement the ATSI Child Placement Principle and build stronger connections to family, culture, community and country for ATSI children in care.

2.59 Clause 11 of the Bill relates to one element of the ATSI Child Placement Principle—placement—and provides additional options in the hierarchy at section 12 of the Act for placing an ATSI child in care. The Committee acknowledges that the amendment proposed by clause 11 was based on broad community consultation, and attracted support in the regions.

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50 ibid., p 9.

51 Submission 214 from Secretariat of National Aboriginal and Islander Child Care and Noongar Family Safety and Wellbeing Council, 22 July 2020, p 5.

2.60 However, the Committee is not convinced that in its current form, clause 11 will achieve the stated objective of better implementing the ATSI Child Placement Principle, primarily because placement with a non-ATSI carer will no longer be a last resort. The Committee has made recommendations about ways to address these concerns.

2.61 While the inclusion of additional options is welcomed, the Committee recommends allowing for greater flexibility by providing that options (d) and (e) are collapsed into one option, to be decided always with primary reference to the best interests of the child, and in consultation with the family. To more fully implement the ATSI Child Placement Principle, the Committee also recommends that the next statutory review consider embedding each element in the principles section of the Act.

CHAPTER 3
Participation, consultation and Aboriginal Family-Led Decision-Making

Introduction

3.1 As mentioned in Chapter 2, the Committee heard that involving ATSI families and communities in decisions about ATSI children is fundamentally important to reducing the over-representation of ATSI children in the child protection system.[52]

3.2 This Chapter continues to examine clauses that relate to the policy objective of working more closely with ATSI people and community-controlled organisations to better implement the ATSI Child Placement Principle and build stronger connections to family, culture, community and country for ATSI children in care. These include:

- Clause 13 – principle of community participation
- Clause 15 – approval of ATSI representative organisations for consultation
- Clause 32 – consultation before placement of ATSI child
- Clause 38 – Cultural Support Plans.

Table 2. *Aboriginal and Torres Strait Islander participation requirements proposed by the Bill*

Proposed or amended section	Subject of decisions	Family participation required?	Representative organisation participation required?
Cl 13, s 14	All decision-making processes under the Act	No – 1 of 3 options, and only 'where appropriate'	No – 1 of 3 options, and only 'where appropriate'
Cl 32, s 81	Placement in out-of-home care	No – only one family member required	Yes
Cl 38, s 89A	Cultural Support Plans	No	Yes

Source: Submission 214 from Secretariat of National Aboriginal and Islander Child Care and Noongar Family Safety and Wellbeing Council, 22 July 2020, p 2.

3.3 Within the context of these provisions, this Chapter also examines the concept of Aboriginal Family-Led Decision-Making.

Principle of community participation (cl 13)

Section 14

3.4 Section 14 of the Act sets out the principle of community participation. Section 14 is part of Part 2, Division 3, which establishes principles relating to ATSI children. In its present form, section 14 provides:

> In the administration of this Act a principle to be observed is that a kinship group, community or representative organisation of Aboriginal people or Torres Strait

[52] Submission 214 from Secretariat of National Aboriginal and Islander Child Care and Noongar Family Safety and Wellbeing Council, 22 July 2020, p 2.

> Islanders should be given, where appropriate, an opportunity and assistance to participate in decision-making processes under this Act that are likely to have a significant impact on the life of a child who is a member of, or represented by, the group, community or organisation.

Proposed amendment

3.5 Clause 13 of the Bill proposes the following amendments to section 14:

- that a kinship group, community or approved Aboriginal Representative Organisation (ARO) must, rather than should, be given, where appropriate, opportunity and assistance to participate in decision-making
- adds new subsection 2, which provides that the wishes and views of the child must be taken into account
- adds new subsection 3, which provides that section 14 does not apply to decisions about placement (section 81) or Cultural Support Plans (section 89A).

3.6 The Committee notes that clause 13 is a departure from recommendation 16 of the Review, that section 14 be amended to provide that a kinship group, community or representative organisation 'is entitled to and should be given opportunities, and where appropriate, assistance, to participate in decision-making'.[53]

Inclusion of section 14(3)

3.7 Section 14(3) specifically provides that the section does not apply to a decision for an ATSI child about a placement arrangement or a Cultural Support Plan. The Committee notes that the Review did not recommend the inclusion of section 14(3).

3.8 The Explanatory Memorandum for the Bill provides that this is because proposed new sections 81 and 89A specifically provide that an approved ATSI representative organisation must be consulted or offered the opportunity to participate in decisions regarding placement arrangements or cultural support planning respectively (see para 3.21). The Department elaborated in its submission:

> Subsection (3) does not preclude the participation of other Aboriginal representative organisations who are not approved for the purposes of section 22A of the Act, being for placement consultation under section 81 and cultural support planning purposes under section 89A. However, who is involved in decision-making processes for a child must be manageable. For example, the involvement of multiple persons or organisations who may wish to be involved would be likely to affect timely decision-making.[54]

3.9 Section 81 (clause 32) of the Act relates to consultation before the placement of an ATSI child. Proposed new section 89A (clause 38) relates to developing cultural support plans, which contain arrangements for developing and maintaining the child's connection with the culture and traditions of the child's family or community. Both clauses are discussed later in this Chapter.

3.10 Although the Committee accepts that subsection (3) will not necessarily preclude anyone from being involved, it is unaware of a mechanism in the Act that would provide for such consultation. In other words, consultation further than that provided for at clauses 32 and

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53 Department of Communities, *Statutory review of the Children and Community Services Act 2004*, November 2017, p 4.

54 Submission 547 from Department of Communities, 24 July 2020, p 8.

38 would likely only occur if the Department initiated it. This has led to a perception from stakeholders that they will, effectively, be excluded from these decisions in practice.

3.11 According to Western Australian Council of Social Services (WACOSS), this is an insufficient reason as to why the principle of community participation should not apply to placement arrangements.[55] The Law Society of WA elaborated:

> Section 14 provides a guiding principle for those carrying out the administration of the Act and there is no reason why section 14 is not able to co-exist with and complement specific enabling provisions like section 81.[56]

3.12 Stakeholders including WACOSS, Aboriginal Legal Service of WA, The Law Society of WA, SNAICC and the NFSWC told the Committee that they did not support proposed section 14(3). According to Aboriginal Legal Service of WA:

> To avoid doubt, this section must not be excluded from applying to decisions about placement arrangements or cultural plans. While it is acknowledged that the Bill has other provisions about participation in these two decisions, there is no reason to exclude this section from applying to those decisions.[57]

3.13 Because section 14 is a guiding principle in the administration of the Act, Greg McIntyre SC, in his memorandum of advice in the SNAICC/NFSWC submission, submits that there is no reason that it cannot co-exist with, and complement, provisions such as section 81(1).[58]

3.14 SNAICC and the NFSWC noted that section 14(3) will serve to limit family and community participation in decisions about placement and cultural support plans. This is because placement decisions will only require consultation with one family member, and Cultural Support Plans do not require any family participation:

> **Dr McGLADE:** This proposed provision is highly problematic. The family particularly, and the community, are the people who have the right and the knowledge to inform the cultural support plan, and that, I would say, would be Aboriginal cultural law. So then to say, "Oh, no, an Aboriginal regional organisation can take on your role", is like a breach of our Aboriginal law, which is ongoing, even though it is not a codified law in the sense of the Westminster legal system.[59]

3.15 On the basis of evidence received, the Committee is concerned that proposed section 14(3) is undesirable, and asked the Department about the effect of deleting proposed section 14(3):

> **Hon NICK GOIRAN:** Does the department see that there would be any harm or detriment to the bill or the act if proposed section 14(3) was simply deleted? In other words, we would not be going out of our way to say that the principle of community participation does not apply to a decision for an Aboriginal and Torres Strait Islander child about a placement arrangement or cultural support plan, which I do not understand anybody is actually meaning in practice?[60]

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55 Submission 128 from Western Australian Council of Social Services, 21 July 2020, p 5.

56 Submission 596 from Law Society of Western Australia, 31 July 2020, p 6.

57 Submission 587 from Aboriginal Legal Service of Western Australia, 28 July 2020, p 11.

58 Submission 214 from Secretariat of National Aboriginal and Islander Child Care and Noongar Family Safety and Wellbeing Council, 22 July 2020, p 17.

59 Dr Hannah McGlade, Member, Noongar Family Safety and Wellbeing Council, transcript of evidence, 6 August 2020, p 11.

60 Hon Nick Goiran MLC, Deputy Chair, Standing Committee on Legislation, transcript of evidence, 10 August 2020, p 11.

3.16 The Committee notes the proposed changes moved by the Hon Alison Xamon MLC in the Supplementary Notice Paper, which includes, amongst other changes, the deletion of section 14(3).[61]

3.17 At the Committees request, the Department committed to confer with the Minister for Child Protection about the effect of deleting proposed section 14(3) from the Bill:

> Excluding decisions about an Aboriginal or Torres Strait Islander child's placement arrangement or cultural support plan from the principle of community participation was introduced to emphasise and not undermine the primary importance of the consultation role of family and approved Aboriginal representative organisations under sections 81 and 89A.
>
> Subsection (3) does not, and was not intended to, remove the ability of the Department to consult with community or other Aboriginal representative organisations in section 14 in relation to a child's placement arrangement or cultural support plan.
>
> Removing subsection (3) from section 14 may impact on the number of persons who seek to be involved in placement consultations and cultural support planning for Aboriginal children in care. This has the potential for unintended consequences that may be contrary to the child's [best] interests including a delay in timely decision-making or adversarial processes if participants have conflicting views.[62]

3.18 The Committee acknowledges the Department's evidence that removing subsection (3) could have potential unintended consequences for making timely decisions about a child's placement. However, given that proposed section 14 states that a kinship group, community or organisation must be given the opportunity to participate 'where appropriate', and noting that the best interests of the child is the paramount consideration, the Committee is not persuaded that subsection (3) is necessary.

FINDING 5

Clause 13, proposed section 14(3), which provides that the principle of community participation does not apply to decisions about a placement arrangement or a Cultural Support Plan, is undesirable and potentially unnecessary.

RECOMMENDATION 5

The Minister representing the Minister for Child Protection advise the Legislative Council on why clause 13 proposed section 14(3) is necessary, and if the subsection is not thought to be necessary:

Clause 13 be amended as follows:

Page 12, lines 1 to 3 — To delete the lines.

3.19 The Committee is of the view that this amendment will go some way to addressing concerns raised about the perceived lack of family and community involvement in the preparation of Cultural Support Plans.

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61 Children and Community Services Amendment Bill 2019, Supplementary Notice Paper No 157, Legislative Council, 17 June 2020, p 2.

62 Department of Communities, Answer to question on notice 5 asked at hearing held 10 August 2020, dated 19 August 2020, p 4.

Cooperation and assistance (cl 14)

3.20 Clause 14 amends section 22, cooperation and assistance. The Committee identified that the use of 'duties and responsibilities' at proposed new section 22(4BA) may be in error, as the term 'functions' is otherwise used throughout the section. The Department confirmed that the inclusion of 'duties and responsibilities' is a drafting error, which can be rectified by an amendment in the Legislative Council.[63]

FINDING 6

The inclusion of 'duties and responsibilities' at clause 14, proposed section 22(4AB) is a drafting error.

RECOMMENDATION 6

Clause 14 be amended as follows:

Page 12, lines 24 and 25 — To delete "duties and responsibilities" and insert:

functions

Approved Aboriginal and Torres Strait Islander representative organisations (cl 15)

3.21 Clause 15 of the Bill creates new section 22A, which provides that in accordance with regulations, the CEO may approve an ARO to be consulted on certain decisions under the Act. Those decisions include placement decisions (section 81) and Cultural Support Plans (section 89A). Therefore, clause 15 intersects with clauses 32 and 38 of the Bill.

3.22 SNAICC and the NFSWC commented that this provision represents a strengthening of participation requirements for ATSI organisations, by requiring their involvement in significant decisions, such as placements and the development of Cultural Support Plans.[64]

3.23 The Department confirmed that it intends for the amendments relating to AROs, which include proposed sections 22A, 81 and 89A, to commence on the same day as the ARO regulations.

3.24 The Aboriginal Health Council of WA raised concerns about the process associated with approving AROs:

> there is no information regarding the criteria required to be an ARO and there is no information in relation to the list of AROs or where the list can be accessed.
>
> Further, there is a lack of emphasis on partnerships with Aboriginal organisations to determine appropriate AROs. Assigning an organisation as an ARO should be done in consultation with [Aboriginal Community Controlled Organisations], rather than solely at the discretion of the CEO.[65]

3.25 Much of the process and the role of AROs is left to the regulations. The Department is currently working in partnership with the Aboriginal Cultural Council to engage with the Western Australian Aboriginal community in this regard. Consultation and co-design has

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63 Nayantara Gupta, General Counsel, Advisory Services and Legislation, Department of Communities, transcript of evidence, 10 August 2020, p 12.

64 Submission 214 from Secretariat of National Aboriginal and Islander Child Care and Noongar Family Safety and Wellbeing Council, 22 July 2020, p 2.

65 Submission 549 from Aboriginal Health Council of Western Australia, 23 July 2020, p 3.

commenced, and the Department expects to be in a clearer position about when the regulations will be implementation-ready by mid-2021.[66]

FINDING 7

Amendments relating to approved Aboriginal or Torres Strait Islander representative organisations, including proposed sections 22A, 81 and 98A, will commence on the same day as the relevant regulations.

Consultation before making a placement decision (cl 32)

Section 81

3.26 Section 81 of the Act currently reads:

> **81. Consultation before placement of Aboriginal or Torres Strait Islander child**
>
> Before making a placement arrangement in respect of an Aboriginal child or a Torres Strait Islander child the CEO must consult with at least one of the following —
>
> (a) an officer who is an Aboriginal person or a Torres Strait Islander;
>
> (b) an Aboriginal person or a Torres Strait Islander who, in the opinion of the CEO, has relevant knowledge of the child, the child's family or the child's community;
>
> (c) an Aboriginal or Torres Strait Islander agency that, in the opinion of the CEO, has relevant knowledge of the child, the child's family or the child's community.

3.27 The Department points out that a placement decision is not a decision to take a child into care—that decision can only be made by the CEO and the Court.[67]

3.28 Clause 32 of the Bill amends section 81, creating two subsections and replacing 'at least one of the following' with 'the following':

> **81. Consultation before placement of Aboriginal or Torres Strait Islander child**
>
> (1) Before making a placement arrangement in respect of an Aboriginal or Torres Strait Islander child, the CEO must consult with the following —
>
> (a) an Aboriginal person or Torres Strait Islander who is a member of the child's family;
>
> (b) subject to the regulations, an approved Aboriginal or Torres Strait Islander representative organisation;
>
> (c) an officer who is an Aboriginal person or Torres Strait Islander who, in the opinion of the CEO, has relevant knowledge of the child, the child's family or the child's community.
>
> (2) If it is not practicable, for reasons of urgency or otherwise, to consult as required under subsection (1) before making a placement arrangement, the consultation must take place as soon as practicable after the placement arrangement is made.

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66 Michelle Andrews, Director General, Department of Communities, transcript of evidence, 10 August 2020, p 15.

67 Submission 547 from Department of Communities, 24 July 2020, p 5.

Section 81(1) to be read conjunctively

3.29 The Department submits that the amendments to section 81 significantly strengthen consultation requirements by providing that 'all three' categories of individuals/organisations are consulted.[68] However, several submitters expressed concern that it is unclear whether the new section 81 requires consultation with all three categories, or only one.[69] This gives rise to FLP 11, that the legislation is unambiguous and drafted in a sufficiently clear way.

3.30 The Law Society of WA submitted that inserting the words 'each of' would make it clear that subparagraphs 81(1)(a), (b) and (c) are to be read conjunctively, requiring the CEO to consult with each category of person or organisation.[70]

3.31 In the submission from SNAICC and the NFSWC, Greg McIntyre SC provided the following opinion about interpretative risk:

> A Court might interpret the amendment deleting the words "at least one of" as leading to the implication of an intention that consultation must be with each of the three new categories in sub-paragraphs (a), (b) and (c), which are to be read conjunctively. That may be reinforced by the addition of a proposed new sub-section (2) –
>
> (2) If it is not practicable, for reasons of urgency or otherwise, to consult as required under subsection (1) before making a placement arrangement, the consultation must take place as soon as practicable after the placement arrangement is made.
>
> It suggests that the legislature has taken into account that the consultation requirement may be onerous if it required consultation with more than one person or agency.
>
> However, the usual rule of interpretation of subparagraphs, not joined with the conjunctive "and", is that they are to be read disjunctively. The consequence of that rule being applied is that the CEO's obligation is satisfied if consultation occurs with any one of the three categories in sub-paragraphs (a) to (c).[71]

3.32 The Department confirmed in its hearing with the Committee that consultation with all three categories is required. Parliamentary Counsel's Office advised the Department that it is their practice not to include a conjunction between statutory provisions that are introduced by 'the following'. This practice is reflected across the Act.[72] The Committee is of the view that this requirement could be clearer, and makes recommendation 7.

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68 Submission 547 from Department of Communities, 24 July 2020, p 7.

69 See, for example, Submission 587 from Aboriginal Legal Service of Western Australia, 28 July 2020; Submission 596 from Law Society of Western Australia, 31 July 2020 and Submission 214 from Secretariat of National Aboriginal and Islander Child Care and Noongar Family Safety and Wellbeing Council, 22 July 2020.

70 Submission 596 from Law Society of Western Australia, 31 July 2020, p 7.

71 Submission 214 from Secretariat of National Aboriginal and Islander Child Care and Noongar Family Safety and Wellbeing Council, 22 July 2020, p 18.

72 Nayantara Gupta, General Counsel, Advisory Services and Legislation, Department of Communities, transcript of evidence, 10 August 2020, p 4.

FINDING 8

The intention of clause 32 to strengthen the consultation requirements by requiring that three categories of individuals or organisations are consulted prior to making a placement decision about an Aboriginal or Torres Strait Islander child, would be made clearer by inserting the words 'each of'.

RECOMMENDATION 7

Clause 32 be amended as follows:

Page 24, line 29 — To insert after "consult with":

each of

Consultation required with only one family member

3.33 Proposed new section 81(1)(a) requires that the CEO consult with an ATSI member of the child's family prior to making a placement decision. While stakeholders broadly support the inclusion of family in section 81, the Committee heard that consultation with one family member is insufficient:

> Consultation with one family member is entirely at odds with Aboriginal and Torres Strait Islander cultural definitions of family and protocols regarding family relationships, responsibilities and decision-making.[73]

> This approach...does not take into consideration Aboriginal cultural understanding of family and kinship.[74]

> This does not meet the standard set by the examples from other jurisdictions. It also does not reflect the decisions arrived at as part of the review discussions, as outlined in the Statutory review of the Children and Community Services Act 2004.[75]

3.34 In the submission from SNAICC and the NFSWC, Greg McIntyre SC opined that requiring consultation with only one family member is inconsistent with the sentiment of the Review:

> The Review reported that "Consultation with family should become a separate requirement under section 81. This reflects current practice and majority feedback, particularly from community consultations. Linking the meaning of family to the definition of relative in section 3 of the Act will also provide for consultation with a broad range of people within an Aboriginal child's extended family and kinship network."

> Given this view expressed in the Report, it is difficult to understand why no amendment was proposed to require consultation with more than one family member. This limited [...] form of family participation in placement decision making can be directly contrasted to the legislation in Queensland and Victoria.[76]

3.35 The Committee notes that the Victorian and Queensland legislation use different words to describe 'family'. Section 12 of the *Children, Youth and Families Act 2005* (Vic) refers to

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73 Submission 214 from Secretariat of National Aboriginal and Islander Child Care and Noongar Family Safety and Wellbeing Council, 22 July 2020, p 3.

74 Submission 549 from Aboriginal Health Council of Western Australia, 23 July 2020, p 3.

75 Submission 128 from Western Australian Council of Social Services, 21 July 2020, pp 4-5.

76 Submission 214 from Secretariat of National Aboriginal and Islander Child Care and Noongar Family Safety and Wellbeing Council, 22 July 2020, p 19.

'members of the extended family of the child' and section 83 of the *Child Protection Act 1999* (Qld) refers to 'the child's family'.

3.36 Stakeholders had several ideas for how section 81 could better align with broader ATSI notions of family, kinship and self-determination. For example:

- Yorganop and the Aboriginal Health Council of WA recommend amending proposed section 81(1)(a) to require consultation with the 'extended family'[77]
- SNAICC and the NFSWC recommend requiring consultation with 'the child's family group'[78]
- The Law Society of WA recommend requiring consultation with 'the child's family'[79] (a change moved by the Hon Alison Xamon MLC as part of Supplementary Notice Paper number 157).[80]

3.37 The Department confirmed that it is not the intention of clause 32 to limit consultation to one family member, and noted that there were issues with trying to reflect this in the drafting:

> if you say "one or more", does that mean two; and if you say "two or more", does it mean three?[81]

3.38 Parliamentary Counsel's Office has advised the Department that the provision could be amended to read 'members of a child's family', although the concern remains about exactly how many family members that would mean in practice.

3.39 The Committee notes this concern, and acknowledges that if the provision stated 'members of the child's family', this may in practice be interpreted as two family members. Though imperfect, the Committee considers this less prescriptive provision to better align with the outcomes of the Review. The Committee therefore makes a statutory form recommendation at recommendation 8 in this regard.

FINDING 9

It is not the intention of clause 32 of the Children and Community Services Amendment Bill 2019 to limit consultation to one family member.

RECOMMENDATION 8

Clause 32 be amended as follows:

Page 24, lines 30 and 31 — To delete the lines and insert:

(a) members of the child's family;

3.40 The Committee notes that the intent of clause 32 is to include ATSI people in placement decisions. It questions whether the effect of clause 32 may be the exclusion of non-ATSI family members. The Committee invites the Minister representing the Minister for Child

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77 Submission 434 from Yorganop Association Incorporated, 24 July 2020, p 1 and Submission 549 from Aboriginal Health Council of Western Australia, 23 July 2020, p 4.

78 Submission 214 from Secretariat of National Aboriginal and Islander Child Care and Noongar Family Safety and Wellbeing Council, 22 July 2020, p 1.

79 Submission 596 from the Law Society of Western Australia, 31 July 2020, p 6.

80 Children and Community Services Amendment Bill 2019, Supplementary Notice Paper No 157, Legislative Council, 17 June 2020, p 2.

81 Nayantara Gupta, General Counsel, Advisory Services and Legislation, Department of Communities, transcript of evidence, 10 August 2020, p 19.

Protection to inform the Legislative Council about whether it would be appropriate to require the CEO, before making a placement decision about any child, to consult with members of the child's family.

RECOMMENDATION 9

The Minister representing the Minister for Child Protection inform the Legislative Council of whether it would be appropriate, before making a placement arrangement in relation to any child, that the Chief Executive Officer of the Department of Communities consult with members of the child's family.

Cultural Support Plans (cl 38)

3.41 Clause 38 inserts proposed section 89A, which provides for Cultural Support Plans to outline arrangements for developing and maintaining the child's connection to culture and tradition. Proposed section 89A provides that subject to the regulations, an ARO must be given the opportunity to participate in the preparation of a Cultural Support Plan for an ATSI child.

3.42 The Committee heard broad support for enshrining Cultural Support Plans in legislation. However, several stakeholders, including Derbarl Yerrigan, SNAICC, NFSWC, The Law Society of WA and the Aboriginal Health Council of WA, expressed concern that family and community participation was not required.[82]

3.43 The Committee is of the view that recommendation 5, that clause 13 be amended to remove proposed subsection 14(3), if it is thought to be unnecessary, assists in addressing this concern.

Aboriginal Family-Led Decision-Making

3.44 Aboriginal Family-Led Decision-Making (AFLDM) is a shared decision-making process facilitated by a preferably independent ATSI convenor and involves the child, family and other significant people in the child's life.[83] According to the Department, AFLDM supports the right to self-determination and creates a forum for family members to have input in decisions.[84]

3.45 The Committee heard strong support for establishing AFLDM in the Act:

> The AFLDM program presents one of the most significant opportunities to meaningfully involve families in decision-making and ensure that the process undertaken is led by Aboriginal people.[85]
>
> AFLDM ensures the child's extended family is included in decisions, which is key for self-determination and empowerment of Aboriginal people...AFLDM must also be enshrined within the amendments to ensure best practice within child

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82 See, for example, Submission 148 from Derbarl Yerrigan Health Service, 21 July 2020; Submission 214 from Secretariat of National Aboriginal and Islander Child Care and Noongar Family Safety and Wellbeing Council, 22 July 2020; Submission 596 from Law Society of Western Australia, 31 July 2020 and Submission 549 from Aboriginal Health Council of Western Australia, 23 July 2020.

83 Queensland Government, Child safety practice manual. See: https://cspm.csyw.qld.gov.au/practice-kits/safe-care-and-connection/participation-in-planning-and-decision-making/seeing-and-understanding/aboriginal-and-torres-strait-islander-family-led-d#What_is_Aboriginal_and_Torres_Strait_Islander_family_led_decision_making . Viewed 3 September 2020.

84 Submission 547 from Department of Communities, 24 July 2020, p 8.

85 Submission 214 from Secretariat of National Aboriginal and Islander Child Care and Noongar Family Safety and Wellbeing Council, 22 July 2020, p 4.

> protection, and alignment with the Aboriginal and Torres Strait Islander Child Placement Principle.[86]
>
> While these new provisions represent an improvement of sorts on the existing provisions, WACOSS does not consider them to correspond to best practice in other jurisdictions, or the expectations of Aboriginal families and communities to have a greater role in keeping their children safe in community. In order to do that, Aboriginal Family-Led Decision-Making must be embedded into the legislation.[87]

Other jurisdictions

3.46 The Committee heard that AFLDM is practicable in WA, given that it has been successfully implemented in other Australian jurisdictions. Submitters pointed to legislation from Victoria and Queensland as models of best practice.[88]

Victoria

3.47 Section 12(1)(b) of the *Children, Youth and Families Act 2005* (Vic) requires that significant decisions involving an Aboriginal child should involve a meeting convened by an Aboriginal convenor and attended, wherever possible, by:

- the child
- the child's parent
- members of the child's extended family
- other appropriate members of the Aboriginal community, as determined by the child's parent.

3.48 Richard Weston, CEO of SNAICC, is based in Victoria and gave an overview of how the process works in practice. AFLDM starts with a referral from the Department to the Aboriginal Community Controlled Organisation (ACCO). The Department and the ACCO work in partnership to convene a meeting with the family and departmental representative. An independent facilitator is used throughout:

> It engages the family early on in the process and that creates a dynamic where the family is part of the decision-making process and has input, a role to play, some ownership and also some responsibility and accountability, which is also really important in this process.
>
> At the end of the day, the department still makes a decision, but it has a range of different views and a different dynamic and a different process in place than simply leaving it to one departmental officer to make a call on the future of a child's life, particularly an Aboriginal child.[89]

Queensland

3.49 The *Child Protection Act 1999* (Qld) provides for ATSI-facilitated family group meetings to be held in relation to any significant decision under the Act.

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86 Submission 549 from Aboriginal Health Council of Western Australia, 23 July 2020, p 5.

87 Submission 128 from Western Australian Council of Social Services, 21 July 2020, p 4.

88 See, for example, Submission 128 from Western Australian Council of Social Services, 21 July 2020 and Submission 214 from Secretariat of National Aboriginal and Islander Child Care and Noongar Family Safety and Wellbeing Council, 22 July 2020.

89 Richard Weston, Chief Executive Officer, Secretariat of National Aboriginal and Islander Child Care, transcript of evidence, 6 August 2020, p 6.

3.50 Queensland has trialled three models of AFLDM that have been evaluated by SNAICC. Wanslea suggests that these models should be considered as options for WA.[90]

3.51 Mr Weston told the Committee that in both Victoria and Queensland, legislative entrenchment of AFLDM had been accompanied by investment to grow and develop the ACCO sector.[91]

Aboriginal Family-Led Decision-Making in Western Australia?

3.52 The provisions that have been examined so far in this Chapter have tended to relate only to particular decisions, such as placements and Cultural Support Plans. The Bill contains no provision to adopt AFLDM.

The review

3.53 AFLDM was considered as part of the Review. The Review concluded that legislative entrenchment may be premature in WA, and should be re-examined after a period of implementation. Mr Weston disagreed:

> It is not premature. Western Australia leads the country in the proportion of Aboriginal children in out-of-home care at 56 per cent; nationally it is 40 per cent. If anything, this decision, these amendments, are coming too late rather than being premature.[92]

3.54 The Department submitted that AFLDM is already possible under the Act. This statement attracted criticism from stakeholders who pointed out that 'allowing' AFLDM is different from requiring, or even enabling it:

> there is a big difference between something being a policy that maybe people might aspire to than being the law, which is actually required.[93]

3.55 Brenda Yelland, State Director of the Child and Family Alliance WA noted that without a legislative requirement, the delivery of AFLDM will be inconsistent across locations.[94]

The trial

3.56 On Monday 10 August 2020, the day that the Committee heard from the Department, the Minister for Child Protection announced a $715 million trial of AFLDM, for which new funding has been appropriated.[95] According to the WA Government, the two-year trial will:

- be co-designed and led by Aboriginal Western Australians
- expand on changes in the Bill to strengthen Aboriginal participation and consultation, and cultural support planning within the child protection system

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90 Submission 405 from Wanslea Limited, 24 July 2020, p 1.

91 Richard Weston, Chief Executive Officer, Secretariat of National Aboriginal and Islander Child Care, transcript of evidence, 6 August 2020, p 8.

92 ibid., p 3.

93 Dr Hannah McGlade, Member, Noongar Family Safety and Wellbeing Council, transcript of evidence, 6 August 2020, p 5.

94 Brenda Yelland, State Director, Child and Family Alliance Western Australia, transcript of evidence, 6 August 2020, p 3.

95 Michelle Andrews, Director General, Department of Communities, letter, 19 August 2020, p 1.

- look at training and workforce capability to support ongoing implementation, in partnership with ACCOs.[96]

FINDING 10

A two-year trial will pilot the operation of Aboriginal Family-Led Decision-Making in Western Australia.

3.57 Dr McGlade told the Committee that we do not need a trial to know that better outcomes will be achieved through processes that enable ATSI families to participate in decisions about their children.[97] This comment aligns with the recommendation from SNAICC and the NFSWC that a provision similar to the Victorian provision enabling AFLDM be adopted in the Bill.[98]

3.58 From an operational perspective, the Department wants to be clear about the capacity to deliver before introducing a legislative requirement:

> If we are going to make it a requirement, we need to be clear about what we are actually requiring.
>
> I do not believe that we are at that point yet because we have not done sufficient work with the Aboriginal community and worked through issues of capacity, resourcing, how would it best work, what processes we need to have in place. That is the intention of the pilot, to really understand that, so that when we make a decision about requiring a particular way of working or a particular piece of legislation, that we actually are very clear about what it is we are requiring, rather than just enabling it.[99]

Moving forward

3.59 On the balance of the evidence received, the Committee agrees that to facilitate self-determination, WA must adopt AFLDM in legislation. However, it is also apparent to the Committee that the Department and the ACCO sector could benefit from some lead-in time to prepare for its delivery.

3.60 Much of this work needs to happen alongside legislation, and will involve significant investment in the ACCO sector. The Committee considers the recently announced trial of AFLDM to be a useful vehicle for progressing this work.

RECOMMENDATION 10

The Department of Communities evaluate the outcomes of the Aboriginal Family-Led Decision-Making trial and include the results of the evaluation in the next Departmental annual report immediately following the conclusion of the trial.

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96 Hon Simone McGurk MLA, Minister for Child Protection, *New trial to help address the number of Aboriginal children in care*, media statement, 10 August 2020.

97 Dr Hannah McGlade, Member, Noongar Family Safety and Wellbeing Council, transcript of evidence, 6 August 2020, p 3.

98 Submission 214 from Secretariat of National Aboriginal and Islander Child Care and Noongar Family Safety and Wellbeing Council, 22 July 2020, p 5.

99 Melanie Samuels, Acting Executive Director, Statewide Services, Regional and Remote, Department of Communities, transcript of evidence, 10 August 2020, p 21.

RECOMMENDATION 11

The next statutory review of the *Children and Community Services Act 2004* consider including a legislative provision for Aboriginal Family-Led Decision-Making.

3.61 Recommendation 11 can be implemented by recommendation 22, which proposes to amend clause 74 to require that specific matters be considered during the next statutory review of the Act.

Conclusion

3.62 The amendments discussed in this Chapter relate to consultation and participation for ATSI communities, families and community-controlled organisations. The Committee is of the view that the Bill goes some way toward achieving its policy objective of working more closely with ATSI community-controlled organisations. In relation to community and family participation, some improvements are incremental, leading stakeholders to argue that they could go much further.

3.63 The Committee heard strong evidence for implementing AFLDM in the Act. The Committee agrees that this would be an important step towards fully implementing the ATSI Child Placement Principle. While the Department is not yet ready to require AFLDM in the Act, the Committee considers that the current trial is a useful vehicle for working through implementation and capacity concerns, and recommends that the matter is revisited as part of the next statutory review of the Act.

CHAPTER 4
Mandatory reporting for ministers of religion

Introduction

4.1 The Committee received over 600 submissions to this inquiry. Over 90 percent of those submissions were in opposition to clauses 51–53 of the Bill, which propose to introduce ministers of religion as mandatory reporters of child sexual abuse.

4.2 Submitters raised three main arguments, which will be discussed in turn in this Chapter:

- there was insufficient consultation with religious communities prior to, and during, the drafting of the Bill
- the Bill is discriminatory and fails to implement recommendation 7.3 of the Royal Commission by singling out ministers of religion from a list of five recommended groups
- requiring ministers of religion to break the seal of confession in order to report child sexual abuse:
    - is inconsistent with the universal law of the Catholic Church
    - will result in the excommunication of priests
    - will be ineffective, as perpetrators will not confess, and priests will not break the seal of confession
    - will disadvantage victims, including adult survivors
    - impinges on religious freedoms.

Background

Mandatory reporting in Western Australia

4.3 Laws requiring certain people to report knowledge or suspicion of child abuse began in the United States of America in the 1960s.[100] New South Wales, South Australia and Tasmania became the first Australian jurisdictions to introduce mandatory reporting laws in the 1970s.[101]

4.4 The *Family Court Act 1997* was the first Western Australian legislation to mandate reporting of child abuse. Section 160 provides that if certain people performing functions under that Act, such as a registrar, family counsellor or arbitrator, have reasonable grounds for suspecting that a child is being abused, or is at risk of being abused, the person must notify the CEO of the government agency administering the Act.[102]

4.5 The Children and Community Services Amendment (Reporting Sexual Abuse of Children) Bill 2007 extended the Western Australian mandatory reporting scheme.[103] This Bill inserted new Division 9A, reporting sexual abuse of children, in the Act. The core provision of Division 9A is section 124B:

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100 Frank Ainsworth, 'Mandatory reporting of child abuse and neglect: does it really make a difference?', *Child and Family Social Work*, 2002, vol. 7, p 1.

101 Australian Institute of Family Studies, *History of child protection services*, 2015, See: https://aifs.gov.au/cfca/publications/history-child-protection-services. Viewed 3 September 2020.

102 *Family Court Act 1997* s 160.

103 Children and Community Services Amendment (Reporting Sexual Abuse of Children) Bill 2007.

124B. Duty of certain people to report sexual abuse of children

(1) A person who —

(a) is a doctor, nurse, midwife, police officer, teacher or boarding supervisor; and

(b) believes on reasonable grounds that a child —

(i) has been the subject of sexual abuse that occurred on or after commencement day; or

(ii) is the subject of ongoing sexual abuse; and

(c) forms the belief —

(i) in the course of the person's work (whether paid or unpaid) as a doctor, nurse, midwife, police officer, teacher or boarding supervisor; and

(ii) on or after commencement day, must report the belief as soon as practicable after forming the belief.

4.6 Teachers, doctors, nurses, midwives and police officers became mandatory reporters in 2009. Boarding supervisors became mandatory reporters in 2016.[104] The penalty for failing to report suspected child sexual abuse to the CEO is $6000, and is a criminal offence. Only one person has been prosecuted for failing to make a report since the provisions came into effect.[105]

4.7 Between 2015-16 and 2019-20, an average of 3020 mandatory reports were made to the Department each year. The majority of reports are made by school teachers and police officers.[106] Mandatory reporting statistics for the last five years are included at Appendix 3.

Royal Commission into Institutional Responses to Child Sexual Abuse

4.8 The Royal Commission into Institutional Responses to Child Sexual Abuse (Royal Commission) was announced in 2012 in response to allegations of child sexual abuse in institutional settings that had been emerging for many years, and the reluctance of the organisations involved to address the issue.[107]

4.9 Over a four-year period, the Royal Commission heard from over 1000 survivors who experienced child sexual abuse in a range of educational, recreational and religious settings.[108] The Committee would like to take the opportunity to acknowledge the extensive and important work carried out by the Royal Commission, which helped to expose a previously hidden national tragedy and enabled survivors to tell their stories.

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104 Children and Community Services Legislation Amendment and Repeal Act 2015, cl 47.

105 Nayantara Gupta, General Counsel, Advisory Services and Legislation, Department of Communities, transcript of evidence, 10 August 2020, p 24.

106 Department of Communities, Answer to question on notice 8 asked at hearing held 10 August 2020, dated 19 August 2020, p 4.

107 Royal Commission into Institutional Responses to Child Sexual Abuse, *Final report: preface and executive summary*, Commonwealth of Australia, Barton, ACT, 2017, p 1.

108 ibid.

4.10 The Royal Commission made a total of 409 recommendations in its 2017 final report, including two which are relevant to the Bill:

> **Recommendation 7.3**
>
> State and territory governments should amend laws concerning mandatory reporting to child protection authorities to achieve national consistency in reporter groups. At a minimum, state and territory governments should also include the following groups of individuals as mandatory reporters in every jurisdiction:
>
> a. out-of-home care workers (excluding foster and kinship/relative carers)
>
> b. youth justice workers
>
> c. early childhood workers
>
> d. registered psychologists and school counsellors
>
> e. people in religious ministry.
>
> **Recommendation 7.4**
>
> Laws concerning mandatory reporting to child protection authorities should not exempt persons in religious ministry from being required to report knowledge or suspicions formed, in whole or in part, on the basis of information disclosed in or in connection with a religious confession.[109]

Clauses 51 to 53

4.11 The Bill proposes to partially implement Royal Commission recommendation 7.3, and implement Royal Commission recommendation 7.4, through clauses 51–53.

Table 3. *Clauses 51 to 53 of the Children and Community Services*

Clause	Effect
Clause 51	Amends section 124A by: • inserting definition of 'ministers of religion' • inserting definition of 'commencement date' in relation to ministers of religion.
Clause 52	Amends section 124B by adding 'ministers of religion' to the list of mandatory reporters with a duty to report suspected child sexual abuse.
Clause 53	Inserts new section 124BA, provisions for ministers of religion: (1) In this section — religious confession means a confession made by a person to a minister of religion in the minister's capacity as a minister of religion in accordance with the tenets of the minister's faith or religion. (2) For the purposes of section 124B(1)(c)(i), a minister of religion who forms a belief on the basis of information disclosed to the minister in the minister's capacity as a minister of religion is taken to form the belief in the course of the minister's work. (3) A minister of religion is not excused from criminal responsibility for an offence under section 124B(1) on the grounds that —

[109] ibid.

Clause	Effect
	(a) the minister's belief is based on information disclosed to the minister during a religious confession; or (b) disclosure of the minister's belief or information on which the belief is based is otherwise contrary to the tenets of the minister's faith or religion.

Source: Children and Community Services Amendment Bill 2019, clauses 51-53.

Lack of consultation

4.12 The overwhelming message throughout the 606 submissions to this inquiry was that the WA Government had failed to consult stakeholders in the religious community about the Bill:

> Survivor groups, the Catholic Church and Orthodox Churches have not been contacted during the consultation process. The (grossly) inadequate / insufficient consultation with key stakeholders will have serious unintended consequences.[110]
>
> When these key people are not consulted, this can result in adverse consequences in the future which I would like to see rectified before any bill is passed by Parliament.[111]
>
> Mandatory reporting of Ministers of Religion impacts most on the very important Confessional Seal in Catholic and Orthodox Churches... I request that more consultation is made with the Catholic Church, Orthodox Church and the survivor groups before this Amendment is passed.[112]

4.13 Lack of consultation was particularly problematic for the Catholic and Orthodox Churches, who will be especially impacted by the Bill, due to its implications for the Sacrament of Confession. The Most Reverend Timothy Costelloe, Archbishop of Perth, told the Committee that the Catholic Archdiocese of Perth had not been consulted 'at all'.[113]

4.14 Reverend Father Abram Abdelmalek confirmed that the Oriental Orthodox Churches, comprising the Syrian, Coptic, Ethiopian, Eritrean, Indian and Armenian Apostolic Churches, were also not consulted.[114]

4.15 The Department advised that given the extensive evidence provided to the Royal Commission, no consultation was held on the merits of including ministers of religion as mandated reporters:[115]

> **Hon NICK GOIRAN**: So what was discussed during the consultation?
>
> **Ms WILLIAMSON**: It was about how "minister of religion" may be defined in the legislation.

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110 Submission 185 from Elsa Freitas, 22 July 2020, p 1.

111 Submission 267 from Imelda Brady, 23 July 2020, p 1.

112 Submission 280 from Private citizen, 23 July 2020, p 1.

113 Most Reverend Timothy Costelloe, Archbishop, Catholic Archdiocese of Perth, transcript of evidence, 6 August 2020, p 4.

114 Very Reverend Father Abram Abdelmalek, Senior Parish Priest, Oriental Orthodox Churches, transcript of evidence, 6 August 2020, p 4.

115 Department of Communities, Answer to question on notice 10 asked at hearing held 10 August 2020, dated 19 August 2020, p 5.

Hon NICK GOIRAN: So the definition of a minister of religion was the point of consultation, not whether ministers of religion should be mandatory reporters or whether it should include or exclude religious confession material.

Ms WILLIAMSON: That is correct.[116]

4.16 In June 2018, both the Federal Government and the WA Government announced their responses to the Royal Commission's 409 recommendations.[117] The WA Government accepted recommendation 7.4 (religious confession) in principle, and committed to considering recommendation 7.3 (mandatory reporter groups) further.[118]

4.17 Four religious organisations were consulted in September 2019 with respect to the scope and possible training requirements for the Bill.[119] The Bill was introduced in the Legislative Assembly on 28 November 2019. Subsequently, the Department has consulted a broader range of stakeholders in relation to developing training for ministers of religion, although in-person engagement has been limited due to COVID-19.[120] A list of organisations and consultation dates is included at Appendix 4.

4.18 Although the WA Government had not announced its intent to implement recommendation 7.3 prior to introducing the Bill in 2019, the Committee is aware that several other jurisdictions had introduced similar legislation by this time, and the issues around reporting information had been widely canvassed in the public domain.[121]

4.19 It is likely that people reasonably expected this legislation to be progressed at some point. However, the Committee has heard that impacted stakeholders expected to be consulted. The Committee is of the view that anticipation is not the same as consultation. It also notes that evidence to this inquiry was generally based on opposition to the proposed measures, particularly in relation to clause 53, rather than potential improvements to this section of the Bill.

FINDING 11

A majority of the Committee, consisting of Hons Nick Goiran, Jacqui Boydell and Hon Simon O'Brien MLCs, finds that consultation on clauses 51 to 53 of the Children and Community Services Amendment Bill 2019 was inadequate.

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116 Rosemary Williamson, Principal Legislation Officer, Department of Communities, transcript of evidence, 10 August 2020, p 29.

117 Hon Malcolm Turnbull, MP, Prime Minister, *Australian Government response to the Royal Commission into Institutional Responses to Child Sexual Abuse*, media statement, 13 June 2018 and Hon Mark McGowan MLA, Hon Simone McGurk MLA and Hon John Quigley MLA, *WA responds to Royal Commission and signs up to National Redress Scheme*, media statement, 27 June 2018.

118 Department of the Premier and Cabinet, *Western Australian Government six-month response to recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse*, June 2018, p 47. Also see: *Government of Western Australia, Royal Commission into Institutional Responses to Child Sexual Abuse – 2018 progress report*, 1 December 2018, p 22, initiative 9.

119 Department of Communities, Answer to question on notice 10 asked at hearing held 10 August 2020, dated 19 August 2020, p 5.

120 Department of Communities, Answer to question on notice 11 asked at hearing held 10 August 2020, dated 19 August 2020, pp 6-7.

121 Matthew Doran, *Catholics defend the secrecy of confession amid pressure over child abuse royal commission*, ABC News, 14 June 2018.

FINDING 12

A minority of the Committee, consisting of Hons Dr Sally Talbot and Pierre Yang MLCs, finds that it was clear from June 2018 onwards that the Western Australian Government intended to proceed with legislation implementing recommendations 7.3 and 7.4 of the Royal Commission into Institutional Responses to Child Sexual Abuse. It was equally clear from June 2018 that some religious practitioners would oppose the implementation of recommendations 7.3 and 7.4. The minority of the Committee further notes that recommendations 7.3 and 7.4 were formulated after extensive consultation with all stakeholders, including religious organisations and victims of child sexual abuse, as part of the Royal Commission into Institutional Responses to Child Sexual Abuse work. See, especially, Criminal Justice Report Parts 3 – 6, chapter 16.

4.20 The Public Sector Commission's Guidelines for the Review of Legislation provides that stakeholder consultation is a distinct stage of the legislative review process.[122] The Committee notes that even where a policy decision has already been made, it is best practice for the WA Government to develop legislation in consultation with stakeholders who are directly impacted.

RECOMMENDATION 12

That in developing legislation, the Government of Western Australia consult with stakeholders as per the Public Sector Commission's guidelines for the review of legislation.

Decision to include one out of five recommended groups (cl 51 and 52)

4.21 As noted at paragraph 4.10, the Royal Commission recommended that at a minimum, states and territories should amend legislation to include five groups of individuals as mandatory reporters:

- out-of-home care workers (excluding foster and kinship/relative carers)
- youth justice workers
- early childhood workers
- registered psychologists and school counsellors
- people in religious ministry.

4.22 The Bill only includes ministers of religion.

4.23 The Minister for Child Protection provided the following rationale in her second reading speech in the Legislative Assembly:

> Western Australia's expansion of the scheme to ministers of religion has been expedited over the other reporter groups that were recommended to become mandated reporters to achieve minimum national consistency.
>
> The royal commission noted that many religious institutions had institutional cultures that discouraged reporting of child sexual abuse and that mandatory reporting obligations may help persons in religious ministry to overcome cultural, scriptural, hierarchical and other barriers to reporting. Consultation regarding the additional groups will occur in 2020.[123]

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122 Public Sector Commission, *Guidelines for the review of legislation*, July 2013, p 2.

123 Hon Simone McGurk MLA, Minister for Child Protection, Western Australia, Legislative Assembly, *Parliamentary Debates (Hansard)*, 28 November 2019, p 9593.

What the Committee heard

4.24 The Committee heard considerable objection to the Bill applying only to ministers of religion. Some submitted that this was discriminatory:

> Are children in the care of the other groups not worthy of the same degree of protection as those interacting with 'people in religious ministry'? Why have 'People in Religious Ministry' been singled out for inclusion in the Amendment Bill? The omission of the other four groups, in my opinion, is prejudiced and discriminatory.[124]

> The Royal Commission recommended that five groups be considered for mandatory reporting of child sexual abuse. Why then, are only Ministers of Religion being singled out from the other four groups? This, in my opinion, shows bias and inequality. How can this possibly help implement an effective implantation of mandatory reporting in such a critical issue as child protection?[125]

> Our question is, "why has the Minister chosen to leave out the other four categories and singled out the 'ministers of religion' alone? Our understanding is that, 'at a minimum' would mean, to include ALL these categories.[126]

4.25 The concept of discrimination is considered later in this Chapter, as part of a discussion on religious freedoms.

4.26 Some suggested that other groups should be added first, due to having greater contact with vulnerable children:

> What about the other four groups, especially early childhood workers, who work daily with WA's most vulnerable children? The Royal Commission has stated that these are the most vulnerable group of all – and yet they are still not covered by mandatory reporting. This surely is the most urgent group to address.[127]

4.27 Others lamented the lack of opportunity for consultation, which the Minister for Child Protection has indicated will be extended to the other groups:

> The government has not made any effort to work in consultation with the Churches and ministers of religion, though they intend to do that with the other categories listed in Recommendation 7.3. This is discrimination against "religious institutions".[128]

4.28 Some submitters indicated that they support mandatory reporting for ministers of religion, but could not understand why the other four groups had not been included.[129]

4.29 The Committee heard support from non-religious stakeholders for extending mandatory reporting to the other groups recommended by the Royal Commission.
Dr Hannah McGlade told the Committee that it was 'very objectionable' that out-of-home care workers are not included in the Bill:

> I am deeply concerned, as someone who grew up in children's homes. I spent my time in Pallottine and Sister Kate's having full knowledge that there was child abuse perpetrated in those institutions against many Aboriginal children that must

124 Submission 77 from Alina De Souza, 19 July 2020, p 1.

125 Submission 62 from Mary Separovich, 18 July 2020, p 1.

126 Submission 171 from multiple submitters, 21 July 2020, pp 1-2.

127 Submission 162 from Joe and Grace-Maria de Araujo, 21 July 2020, p 1.

128 Submission 406 from Private citizen, 24 July 2020, p 1.

129 Submission 77 from Alina De Souza, 19 July 2020, p 1.

> have been seen and observed by other workers and that no reports were made. There was a culture of silence around what was being done to children. I think we have to absolutely implement the royal commission recommendations on mandatory reporting and I cannot see any good reason why there would be limitations being proposed.[130]

4.30 The WACOSS and the Youth Affairs Council of WA also expressed support for the remaining recommended groups being added as mandatory reporters:

> I am not clear on why they were not initially put in the amendments to this act.[131]

Other Australian jurisdictions

4.31 The broadest of all mandatory reporting provisions in Australia is section 26 of the *Care and Protection of Children Act 2007* (NT), which provides that any person is guilty of an offence if they fail to report their reasonable belief of child harm or exploitation.

4.32 Figure 2 displays which of the five recommended groups have been added as mandatory reporters in which jurisdictions. This table is for illustrative purposes only, due to variation between definitions.

4.33 The Committee notes that WA is the only Australian jurisdiction where none of the five recommended groups are currently mandatory reporters.

Figure 2. *Status of recommended groups in legislation across Australian jurisdictions*

Key	
Mandatory reporter	✓
Not mandatory reporter	✕
Partial/unconfirmed	○

	ACT	NSW	NT	QLD	SA	TAS	VIC	WA
Out-of-home care workers	○	✓	✓	○	✓	✓	✓	✕
Youth justice workers	✓	✓	✓	✕	✓	✓	✓	✕
Early childhood workers	✓	✓	✓	✓	✓	✓	✓	✕
Registered psychologists and school counsellors	✓	✓	✓	✕	✓	✓	✓	✕
Persons in religious ministry	✓	✓	✓	✕	✓	✓	✓	✕

Source: *Children and Young People Act 2008* (ACT) s 356, *Children and Young Persons (Care and Protection) Act 1998* (NSW), s 27, *Care and Protection of Children Act 2007* (NT), s 26, *Child Protection Act 1999* (QLD), s 13, *Children and Young People (Safety) Act 2017* (SA), s 30 and 31, *Children, Young Persons and Their Families Act 1997* (Tas), s 14, *Children, Youth and Families Act 2005* (Vic), s 182, *Children and Community Services Act 2004* (WA), s 124B.

Rationale for the decision to expedite ministers of religion

4.34 When explaining why ministers of religion had been expedited over the other recommended groups, the Minister for Child Protection noted that the institutional cultures

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130 Dr Hannah McGlade, Member, Noongar Family Safety and Wellbeing Council, transcript of evidence, 6 August 2020, p 2.

131 Ross Wortham, Chief Executive Officer, Youth Affairs Council of Western Australia, transcript of evidence, 6 August 2020, p 22.

of some religious organisation had, in the past, actively discouraged the reporting of child sexual abuse.[132] This is supported by the findings of the Royal Commission.[133]

4.35 The Department elaborated, advising that ministers of religion had been identified as the first priority based on presentations through the Royal Commission and assessment in broad terms around risk.[134]

4.36 The Committee notes the Royal Commissions comments about religious, and particularly Catholic, institutions in this regard:

> Of those survivors who told us about the types of institution where they were abused, 58.6 per cent said they were sexually abused in an institution managed by a religious organisation. Almost 2,500 survivors told us about sexual abuse in an institution managed by the Catholic Church. This was 61.8 per cent of all survivors who reported sexual abuse in a religious institution. It was 36.2 per cent of all survivors who came to a private session.[135]
>
> Based on the information before us, the greatest number of alleged perpetrators and abused children were in Catholic institutions. In many religious institutions, the power afforded to people in religious ministry and the misplaced trust of parents combined with aspects of the institutional culture, practices and attitudes to create risks for children. Alleged perpetrators often continued to have access to children even when religious leaders knew they posed a danger. We heard that alleged perpetrators were often transferred to other locations but they were rarely reported to police.[136]

4.37 The Committee also notes, however, that the highest proportion of abuse reported through the Royal Commission occurred in out-of-home care, and particularly historical residential institutions in the years between World War II and 1990.[137] Institutions such as the 'missions' or 'reserves' that accommodated ATSI people, were typically either government or church operated.[138] The Royal Commission notes that the number of children who are sexually abused in familial or other circumstances far exceeds those who are abused in an institution.[139] Figure 3 displays the number and proportion of survivors abused in particular institutions, of the 8000 survivors who gave evidence in private session.[140]

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132 Hon Simone McGurk MLA, Minister for Child Protection, Western Australia, Legislative Assembly, *Parliamentary Debates (Hansard)*, 28 November 2020, p 9593.

133 Royal Commission into Institutional Responses to Child Sexual Abuse, *Final report – religious institutions – volume 16, book* 1, Australian Government, Barton, ACT, 2017, p 11.

134 Michelle Andrews, Chief Executive Officer, Department of Communities, transcript of evidence, 10 August 2020, p 30.

135 Royal Commission into Institutional Responses to Child Sexual Abuse, *Final report - preface and executive summary*, Commonwealth of Australia, Barton, ACT, 2017, p 11.

136 ibid., p 6.

137 Royal Commission into Institutional Responses to Child Sexual Abuse, *Final report – historical residential institutions, volume 11,* Commonwealth of Australia, Barton, ACT, 2017, p 11.

138 ibid., p 22.

139 Royal Commission into Institutional Responses to Child Sexual Abuse, *Final report – preface and executive summary*, Commonwealth and Australia, Barton, ACT, 2017, p 4.

140 ibid., p 1.

Figure 3. *Number and proportion of survivors by institution type, from private sessions May 2013 – May 2017*[141]

All survivors	Number	Proportion (%)
Out-of-home care[a]	2,858	41.6
Out-of-home care: pre-1990	2,478	36.0
Out-of-home care: 1990 onwards	257	3.7
Out-of-home care: Unknown era	150	2.2
Schools	2,186	31.8
Religious activities	1,000	14.5
Youth detention	551	8.0
Recreation, sports and clubs	408	5.9
Health and allied	192	2.8
Armed forces	76	1.1
Supported accommodation	68	1.0
Family and youth support services	61	0.9
Childcare	32	0.5
Youth employment	17	0.2
Other	213	3.1
Unknown	63	0.9

Source: Royal Commission into Institutional Responses to Child Sexual Abuse, *Final report - preface and executive summary*, Commonwealth of Australia, Barton, ACT, 2017, p 11.

Policy outcomes

4.38 The Committee has already established that clause 51 and 52 fail to fully implement recommendation 7.3 of the Royal Commission. A second question is whether the clauses are likely to achieve the intended policy outcome, which the Department claims is to contribute to protecting children from harm.[142]

4.39 The Committee notes the wealth of domestic and international evidence about the effectiveness of mandatory reporting laws in protecting children.[143] This evidence is not being called into question, and the Committee assumes that good mandatory reporting laws can improve child safety.

4.40 In making recommendation 7.3, the Royal Commission was aiming to capture groups of individuals who work closely with children, in addition to the groups already mandated across the country (doctors, teachers, nurses and police):

> In our view, individuals who work closely with children should be obliged to report child sexual abuse to an external government authority.
>
> ...

141 Out of total 8000 survivors who gave evidence in private sessions. Survivors who were abused in more than one institution will be reflected more than once.

142 Submission 547 from Department of Communities, 24 July 2020, p 2.

143 Ben Mathews et al, *Child abuse and neglect: a socio-legal study of mandatory reporting in Australia – report for the Australian Government*, Queensland University of Technology, Brisbane, 2015.

> One of the benefits of this recommendation is that more individuals who work closely with children – and who therefore have a moral and professional imperative to report known or suspected child abuse and neglect to an external government authority – would be both obliged to report and protected in making a report to child protection.[144]

4.41 The Committee did not receive any evidence to suggest that ministers of religion work more closely or have more contact with children than the other four groups. The Department was unable to provide data to support which recommended reporter groups have the most contact with at-risk children.[145] Several stakeholders suggested that if one group was to be given 'first priority' for inclusion, it should be either out-of-home care workers or early childhood workers.[146]

Implementation concerns

4.42 The Committee acknowledges that the WA Government is planning for a staged implementation across the five recommended groups, and that training and implementation planning with religious stakeholders is currently underway.[147] It also notes the Department's evidence about the need to manage implementation from a resourcing and workload perspective:

> it is not simply a matter of adding another reporter group to a list. We need to consider the existing legislative context, definitions, policies and procedures.[148]

> Our intention was to stagger the introduction of the scheme. It was not to prioritise one group over the other. It was to stagger that introduction, because what we know, particularly from the experiences in Victoria and New South Wales, is if we have a large number of reports come in, we actually cannot identify those children most at risk.[149]

4.43 The Committee acknowledges these concerns, but does not consider them adequate justification for only including ministers of religion in this Bill. The Department could still achieve staged implementation if all five of the groups recommended by the Royal Commission were included in the Bill. For example, the provisions relating to each group could commence at six-monthly intervals, or some other period. The Committee considers that this approach would be preferable to making statutory provision for only one group.

4.44 Given that the Committee heard that some recommended reporter groups are already reporting child sexual abuse on a voluntary basis, the Committee does not anticipate that there would be community opposition to this proposal.[150]

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144 Royal Commission into Institutional Responses to Child Sexual Abuse, *Final report – improving institutional responding and reporting, volume 7,* Commonwealth of Australia, Barton, ACT, 2017, p 12.

145 Department of Communities, Answer to question on notice 12 asked at hearing held 10 August 2020, dated 19 August 2020, p 7.

146 See, for example, Submission 147 from Lydia Michaud, 21 July 2020 and Submission 219 from Edman Anthony and Jean Regnard, 22 July 2020.

147 Renee Gioffre, General Manager, Royal Commission, Department of Communities, transcript of evidence, 10 August 2020, p 27.

148 Michelle Andrews, Director General, Department of Communities, transcript of evidence, 10 August 2020, p 3.

149 Renee Gioffre, General Manager, Royal Commission, Department of Communities, transcript of evidence, 10 August 2020, p 30.

150 ibid., p 31.

4.45 On the balance of the evidence received, the Committee is not convinced that there is any adequate justification for ministers of religion to be the only reporter group included in this Bill.

4.46 The Committee acknowledges that clauses 51 and 52 are likely to contribute to child safety, in line with the stated policy objective. As noted at paragraph 4.33, WA is currently the only Australian jurisdiction where none of the five recommended groups are mandatory reporters. In particular, the Committee notes that all other jurisdictions have made early childhood workers and out-of-home-care workers mandatory reporters, and notes the amendment proposed by the Hon Nick Goiran MLC to this effect in the Supplementary Notice Paper.[151]

FINDING 13

While clauses 51 and 52 of the Children and Community Services Amendment Bill 2019 are likely to contribute to child safety, they fail to achieve the minimum national consistency of reporter groups recommended by the Royal Commission into Institutional Responses to Child Sexual Abuse.

4.47 The Committee is of the view that the other recommended groups should become mandatory reporters as soon as possible. Definitions are readily available for early childhood workers, out-of-home care workers and psychologists, removing one of the main objections to including these groups in the Bill. Consultation should commence as soon as possible on the relevant definitions for youth justice workers and school counsellors. The Committee makes recommendations 13 and 14 to this effect.

RECOMMENDATION 13

Clause 51 be amended as follows:

Page 34, after line 15 — To insert:
(1A) In section 124A insert in alphabetical order:
early childhood worker means —
(a) an adult who is any of the following under the *Education and Care Services National Law (Western Australia)* —
(i) an approved provider;
(ii) a nominated supervisor for an approved education and care service;
(iii) a staff member of an approved education and care service who is employed, appointed or engaged as an educator, a family day care co-ordinator or a family day care educator;
Or

(b) an adult who is any of the following —
(i) a licensee under the *Child Care Services Act 2007*;
(ii) a supervising officer under that Act;
(iii) a member of staff of a child care service (as defined in section 4 of that Act) whose duties include the provision of education and care to children;

Page 34, after line 28 — To insert:
(1B) In section 124A insert in alphabetical order:
out-of-home care service provider means a person who has entered into an agreement under section 15(1) for the provision of placement services;
out-of-home care worker means —
(a) an assessor; or

[151] Children and Community Services Amendment Bill 2019, Supplementary Notice Paper No 157, Legislative Council, 17 June 2020, pp 4-5.

(b) an authorised officer; or
(c) an officer who holds an office or position that is prescribed, or of a class prescribed, for the purposes of this paragraph;
or
(d) a person who holds an office or position at a residential facility or secure care facility the duties of which include the care of children living at the facility; or
(e) a person who holds an office or position, with an out-of-home care service provider, the duties of which include the provision of social services to —
(i) children who are under a placement arrangement; or
(ii) carers of those children;

Page 34, after line 28 — To insert:
(1C) In section 124A insert in alphabetical order:
psychologist means a person registered under the *Health Practitioner Regulation National Law (Western Australia)* in the psychology profession;

Page 35, line 10 — To delete "section 51" and insert:
section 51(1)

Page 35, after line 12 — To insert:
(3) In section 124A in the definition of ***commencement day***:
(a) in paragraph (c) delete "operation;" and insert:
operation; or
(b) insert in alphabetical order according to paragraph designation:
(d) in relation to an early childhood worker — the day on which the *Children and Community Services Amendment Act 2019* section 51(1A) came into operation;
(4) In section 124A in the definition of ***commencement day***:
(a) in paragraph (d) delete "operation;" and insert:
operation; or
(b) insert in alphabetical order according to paragraph designation:
(e) in relation to an out-of-home care worker — the day on which the *Children and Community Services Amendment Act 2019* section 51(1B) came into operation;
(5) In section 124A in the definition of ***commencement day***:
(a) in paragraph (e) delete "operation;" and insert: operation; or
(b) insert in alphabetical order according to paragraph designation:
(f) in relation to a psychologist — the day on which the *Children and Community Services Amendment Act 2019* section 51(1C) came into operation;

Clause 52 be amended as follows:
Page 35, after line 13 — To insert:
(1A) In section 124B(1)(a) and (c)(i) after "doctor," insert:
psychologist,
(1B) In section 124B(1)(a) and (c)(i) after "midwife," insert:
out-of-home care worker,
(1C) In section 124B(1)(a) and (c)(i) after "police officer," insert:
early childhood worker,

Page 35, after line 23 — To insert:
(aa) after "doctor," insert:
psychologist,
(ab) after "midwife," insert:
out-of-home care worker,

(ac) after "police officer," insert:
early childhood worker,

RECOMMENDATION 14

The Minister for Child Protection expedite consultation to include youth justice workers and school counsellors as mandatory reporters under the *Children and Community Services Act 2004*.

Information heard during religious confession (cl 53)

4.48 The Committee received strong opposition to clause 53 of the Bill, which provides, at proposed section 124BA(3)(a), that information heard during religious confession is not exempt from mandatory reporting requirements. This opposition came from members of churches which practice the Sacrament of Confession, namely the Catholic and Orthodox churches.

4.49 The Committee heard that members of other religious groups support mandatory reporting for ministers of religion. Baptist Churches WA supports the inclusion of ministers of religion as mandatory reporters under the Act.[152] The Committee asked Reverend Peter Abetz, Director of the WA Branch of the Australian Christian Lobby, about whether the non-Catholic and non-Orthodox religious communities support the provisions:

> Basically, there is no issue for any of the other churches that I have consulted with about mandatory reporting for child sexual abuse.[153]

FINDING 14

There is support from ministers of religion outside of the Catholic and Orthodox faiths for becoming mandatory reporters.

4.50 Knowmore, a community legal service for victims of child sexual abuse, strongly supports clause 53, which implements recommendation 7.4 of the Royal Commission:

> The accounts of the many victims who made a disclosure of abuse during a religious confession are disturbing, but particularly illustrative of the need for these reforms. In many of these cases, the victim's disclosure during confession was the first and only time as a child that they had told someone about the abuse they had suffered. The failure of the priests in question to act appropriately on the information they were given meant that children remained at risk, and in some cases suffered more because of their disclosures.[154]

4.51 The Committee notes that some Australian jurisdictions, including the Australian Capital Territory and Tasmania, have specifically provided in legislation that information heard during religious confession is subject to mandatory reporting provisions. Other jurisdictions, such as New South Wales, do not make specific reference to religious confession.

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152 Submission 23 from the Baptist Union of Western Australia, 14 July 2020, p 1.

153 Reverend Peter Abetz, Western Australian State Director, Australian Christian Lobby, transcript of evidence, 10 August 2020, p 3.

154 Submission 132 from knowmore, 21 July 2020, p 4.

4.52 Approximately 2 percent of submitters were Catholics who support clause 53:

> I believe that the Seal of the Confessional is NOT more important than the protection of children.[155]

4.53 Submitters presented several arguments against requiring ministers of religion to report certain information heard in religious confession, including that:

- the Australian Catholic Church has no authority to break the seal of confession, as this is inconsistent with the universal law of the Catholic Church
- compliance will put priests in an impossible position, forcing them to choose between breaking a criminal law and being excommunicated
- the Bill will be ineffective, as priests cannot comply with it and perpetrators will not confess
- it will potentially impact on victims, including adult survivors
- recommendation 16.26 of the Royal Commission, relating to the option of priests withholding absolution until a penitent has reported their offending to the authorities, has not been adequately explored
- the Bill breaches religious rights and freedoms.

Inconsistency with universal Church law

4.54 The Sacrament of Penance and Reconciliation, also known as the Sacrament of Confession, forms part of the universal law and tradition of the Roman Catholic Church. Orthodox Christian Churches also practice the Sacrament of Confession.[156]

4.55 Central to the Sacrament of Confession is its confidential seal. According to the Code of Canon Law:

> The sacramental seal is inviolable; therefore it is absolutely forbidden for a confessor to betray in any way a penitent in words or in any manner and for any reason.[157]

4.56 Archbishop Costelloe elaborated on how confession works in practice:

> The priest who hears a confession is present as a mediator for a conversation between the penitent and God. The purpose of a religious confession is not to collect information. Confession may be non-specific and is, more often than not, anonymous. No notes are taken. It relies entirely on the penitent voluntarily attending, and on what the penitent wishes to reveal to God through the priest.[158]

FINDING 15

According to evidence received, the passing of clause 53 of the Children and Community Services Amendment Bill 2019, which implements Recommendation 7.4 of the Royal Commission, would create a serious conflict for ministers of religion of the Catholic and Orthodox faiths.

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155 Submission 8 from Private citizen, 6 July 2020.

156 Submission 441 from Archdiocese of Perth, 24 July 2020, p 3.

157 Code of Canon Law, Can. 983 s 1.

158 Submission 441 from Archdiocese of Perth, 24 July 2020, p 4.

4.57 The Committee heard repeatedly that the Catholic Church in WA has no power to instruct priests to break the seal of confession, as this power rests with the Holy See.[159] According to Archbishop Costelloe:

> Put simply, if the Bill is passed into law it will become a criminal offence for Catholic priests in Western Australia to remain faithful to the teaching and tradition of the Catholic Church, which holds that any information gained by a priest in the course of celebrating the Sacrament of Confession is subject to the requirement of absolute and unbreakable confidentiality – what is generally known as the Seal of Confession
>
> The simple fact is that no priest, bishop, archbishop or cardinal has any authority whatsoever to change the universal teaching or laws of the Church. The Pope is the universal legislator in the Catholic Church and ultimately only the Pope can make changes to the Church's law. Pope Francis has indicated that he will not, and indeed cannot, make such changes.[160]

4.58 At a hearing, the Archbishop elaborated on this point:

> In the Catholic understanding, church law contains both what we might call human law and what would we would call divine law. Obviously, the Pope, as the universal legislator can make changes to what I am terming human law. A very clear example would be—not that he is likely to do it tomorrow—but the Pope could technically change the laws on the mandatory celibacy of clergy, for example, in the Catholic tradition. He could change that because it is not divine law. But the laws around the confidentiality of confession, because they touch the very nature of the sacrament as we understand it, come under of the category of divine law, and no-one, including the Pope, can change divine law. Now, it is a matter of faith, of course. It is not something that we have just created in the last five minutes. It has always been understood in our tradition that the sacraments fall under the category of divine law, so no-one in the church, including the Pope, is able to change law that we believe comes directly from the will of God. So that is the difference, and that is why said that he would not and could not change that. There are many things he can change, some things he cannot.[161]

4.59 Archbishop Costelloe acknowledged the terrible crimes of the past, and referred the Committee to his 2013 apology to all those inside and outside the Perth Catholic community who had suffered abuse. He also noted that the Catholic Archdiocese of Perth has worked to create a safer church, implementing many of the recommendations of the Royal Commission and establishing a Safeguarding Program:

> The Archdiocese of Perth in 2020, is very different from the Catholic Church thirty, forty or fifty years ago.[162]

4.60 Both Archbishop Costelloe and Father Abdelmalek confirmed in a hearing that they support the introduction of mandatory reporting for ministers of religion, with the exception of the confession.[163]

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159 See, for example, Submission 32 from Private citizen, 15 July 2020; Submission 74 from Patricia Suryawinata, 19 July 2020 and Submission 191 from Evelyn Feltoe, 22 July 2020.

160 Submission 441 from Archdiocese of Perth, 24 July 2020, p 1.

161 Most Reverend Timothy Costelloe, Archbishop, Catholic Archdiocese of Perth, transcript of evidence, 6 August 2020, p 7.

162 Submission 441 from Archdiocese of Perth, 24 July 2020, p 6.

163 Most Reverend Timothy Costelloe, Archbishop, Catholic Archdiocese of Perth and Very Reverend Father Abram Abdelmalek, Senior Parish Priest, Oriental Orthodox Churches, transcript of evidence, 6 August 2020, p 9.

FINDING 16

With the exception of information contained during religious confession, there is support from Catholic and Orthodox ministers of religion to become mandatory reporters.

The excommunication of priests

4.61 Submitters expressed their concern that should the Bill be passed, priests will be in an impossible situation, as the penalty for disclosing information heard in confession is excommunication from the Church:[164]

> If the legislation is passed requiring the Seal of Confessional to be broken, that puts the Catholic clergy in a very difficult position where they can be excommunicated from the church or imprisoned by the state depending on the choice they make.[165]

4.62 Father Abdelmalek confirmed that in the Orthodox faith, excommunication is 'a sentence of death':

> Because excommunication is not, you know, being deprived from the holy communion—you are deprived from being in eternity, in eternal life, so you will die in your sin.[166]

4.63 The Committee notes that the Act protects against the identity of reporters being revealed. Archbishop Costelloe explained to the Committee that excommunication is not contingent on other members of the Church finding out about the breach of the Sacrament of Confession:

> So by the very act of breaking the seal of confession, the bishop or priest would be excommunicated—that is, he would be cut off from the communion of the church. Whether anyone else knows that or not at that time, that is in fact the reality. This will then become a question of his own conscience, but it means that he cannot celebrate the sacraments, he cannot receive any of the sacraments, he cannot act in any way as a minister of the church.[167]

FINDING 17

Excommunication is one possible outcome for Catholic and Orthodox priests arising from the fact that there is a conflict between church law and clause 53 of the Bill, which implements recommendation 7.4 of the Royal Commission into Institutional Responses to Child Sexual Abuse.

Ineffective

4.64 Following from the argument above, submitters from the Catholic community told the Committee that the law will be ineffective. According to the Catholic Archdiocese of Perth, abusers do not regularly seek out confession, and would be even less likely to do so if they knew their offences would be reported.[168]

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164 For example, see Submission 105 from St Francis Xavier Hilbert Legion of Mary Group, 20 July 2020; Submission 179 from Bronwyn Muller, 21 July 2020 and Submission 13 from Private citizen, 12 July 2020.

165 Submission 58 from Keith Dissanaike, 17 July 2020.

166 Very Reverend Father Abdelmalek, Senior Parish Priest, Oriental Orthodox Churches, transcript of evidence, 6 August 2020, p 21.

167 Most Reverend Timothy Costelloe, Archbishop, Catholic Archdiocese of Perth, transcript of evidence, 6 August 2020, p 20.

168 Submission 441 from Archdiocese of Perth, 24 July 2020, p 2.

4.65 Confession in the Orthodox church is conducted face-to-face. However, anonymous confession remains a common practice within the Catholic Church, meaning priests cannot readily identify penitents:

> Normally that means that there would be some kind of screen, which means that the priest and the penitent do not actually see each other, so the only contact is a voice contact...[169]

4.66 Finally, submitters suggested that the Bill would be ineffective because priests will not comply. Some priests went as far as to tell the Committee that they would sooner commit a criminal offence under the Act than break the seal of confession:

> I would absolutely go to jail or face any other civil penalty before I broke the sacramental seal, and I suspect that all priests—regardless of their ideological persuasion—would say the same.[170]

Impact on victims

4.67 Approximately one quarter of submissions to the inquiry referred to how victims and survivors of child sexual abuse rely on the confidentiality of the confessional to seek healing for their own experiences of child sexual abuse. Submitters expressed concern that the Bill will take an important service away from this group:

> You are taking away the abused victims' protection rights when they go to a Confessional- they go because of the seal of privacy. There is a great chance that the Priest inspires them to go help. I know this because this was my experience.[171]

> For many people it has been the very first place, and I mean for very many—in fact, for the majority of people who have used it, it has been the first place that they have actually learnt to speak about their abuse.[172]

4.68 The Committee heard personally from a number of survivors of child sexual abuse about how confession helped them to begin healing. One submitter was deeply affected by being sexually abused at age 12. In her early twenties, she was finally able to share her suffering:

> It was within the Sacrament of Reconciliation that I began to understand the coping mechanisms I was exhibiting. Without the Seal of Confession I would not have shared the pain and wounds I was carrying.[173]

4.69 James Parker is a survivor of child sexual abuse who first disclosed his abuse during confession as a teenager. He spoke to the Committee on behalf of the Survivors Support Network in WA.

4.70 There are a variety of reasons why people may choose the confessional:

> I do know certainly of one person who has come to me and told me specifically that they have started making use of the confessional because of this reason—

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169 Most Reverend Timothy Costelloe, Archbishop, Catholic Archdiocese of Perth, transcript of evidence, 6 August 2020, p 13.

170 Submission 260 from Father Mark Baumgarten, 23 July 2020, p 1.

171 Submission 12 from Private citizen, 12 July 2020.

172 James Parker, Facilitator, Survivors Support Network in Western Australia, transcript of evidence, 6 August 2020, p 2.

173 Submission 38 from Private citizen, 16 July 2020, p 1.

> they had run out of money and they have had their 10 sessions of therapy and they are just desperate to keep speaking about it.[174]

4.71 Noting these reasons, the guarantee of confidentiality emerged as key. The Committee asked Mr Parker if a mandatory disclosure would have changed his experience in opening up about his abuse:

> **Hon SIMON O'BRIEN:** How would it have been if you had got to a point a couple of minutes later and the priest had said, "Let me just stop you there, my son; just before you go any further, I have to advise you that I think with what you are disclosing to me, I am going to have to report this to the authorities." What would have been your reaction then?
>
> **Mr PARKER**: I would have stood up and I would have run off as quickly as I could.[175]

FINDING 18

Submitters made the point that the absolute confidentiality of religious confession is an important benefit for victims who use the confessional.

Historical cases and adult survivors

4.72 As outlined at paragraph 4.68, the Committee heard from survivors who had first disclosed their abuse during confession in adulthood.[176] Some of these adult survivors are concerned that they will no longer be able to use the confessional to discuss their childhood abuse in a completely confidential way, without that abuse being reported under mandatory reporting provisions.

4.73 Reverend Peter Abetz, Director of the WA branch of the Australian Christian Lobby and former Member of the Legislative Assembly, told the Committee that the Australian Christian Lobby is concerned about the unintended consequences that mandatory reporting will have for adult survivors:[177]

> I have walked with victims through their dark valleys in their journey of recovery, taken their calls late at night when they felt suicide was the only way out, and been able to talk them through those dark valleys and bring them into renewed hope that the sun would shine again one day.
>
> Adult victims of childhood sexual abuse experience profound shame around their abuse. Many have never divulged to anyone that they have been abused.[178]

4.74 The Australian Christian Lobby submit that the 'has' in section 124B(1)(b)(i) can be read as past tense:

> (b) believes on reasonable grounds that a child —

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174 James Parker, Facilitator, Survivors Support Network in Western Australia, transcript of evidence, 6 August 2020, p 5.

175 ibid., p 4.

176 See, for example, Submission 38 from Private citizen, 16 July 2020 and Submission 471 from Survivors Support Network in Western Australia, 24 July 2020.

177 Reverend Peter Abetz, Western Australian State Director, Australian Christian Lobby, transcript of evidence, 10 August 2020, p 2.

178 Submission 430 from Australian Christian Lobby, 24 July 2020, p 4.

(i) has been the subject of sexual abuse that occurred on or after commencement day;

and that:

Section 124B(1) (b)(i) makes no distinction between whether the abused person at the time of disclosure is still a child, or an adult.

4.75 To ensure that adult survivors are excluded, the Australian Christian Lobby proposed an amendment to the draft provision:

One possible way of addressing this would be to insert the words 'person who is still a' between the words 'a' and child, so as to read:

(b) believes on reasonable grounds that a person who is still a child —

(i) has been the subject of sexual abuse that occurred on or after commencement day; or

(ii) is the subject of ongoing sexual abuse;[179]

4.76 The Committee notes that many submitters to the inquiry appear to have read the provision in this way. The Committee asked the Department about the operation of section 124B of the Act, and whether a mandatory reporter has an obligation to report child sexual abuse where the victim concerned is no longer a child, but was a child at the time of the abuse:

There is no duty to make a mandatory report in respect of a person who is an adult but was sexually abused as a child.

Section 124B(1) of the *Children and Community Services Act 2004* requires a report to be made if a person (who is a mandatory reporter) forms a belief on reasonable grounds in the course of the person's paid or unpaid work that a child -

i. has been the subject of sexual abuse that occurred on or after commencement day; or

ii. is the subject of ongoing sexual abuse.

Section 124A defines commencement day as the day on which the person became a mandatory reporter; that is, the day on which the relevant paragraph in the definition of commencement day came into operation.[180]

4.77 The Department advised that the primary intent of the mandatory reporting provisions is to protect children from being sexually abused, rather than respond to historical sexual abuse.[181] To confirm, the Committee posed a hypothetical scenario:

The CHAIR: We will just run this specific scenario before you, so can you confirm what would be required in the following scenario. Assume the provisions commence at the end of 2020. In 2025, an 18-year-old discloses abuse that happened in 2022 when they were 15. In this case, is a minister of religion required to report the abuse?

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179 ibid., p 6.

180 Mathew Mailer, Ministerial and Executive Services Manager, Department of Communities, email, 29 July 2020.

181 Renee Gioffre, General Manager, Royal Commission, Department of Communities, transcript of evidence, 10 August 2020, p 24.

Ms GIOFFRE: No, there would be no duty to make a mandatory report with respect to the person who is an adult who was sexually abused as a child.[182]

4.78 To summarise, the Department's understanding is that a mandatory reporter is not required to make a report under section 124B of the Act in respect of an adult who was sexually abused as a child.

4.79 The Committee notes the Department's assessment, but also notes the valid concerns of stakeholders who have interpreted the section otherwise. This gives rise to FLP 11, whether the Bill is unambiguous and drafted in a sufficiently clear and precise way.

4.80 The Department consulted with Parliamentary Counsel's Office as to whether section 124B could be amended to clarify that the duty to report under section 124b(1) does not apply in relation to child sexual abuse that the reporter believes happened to an adult when the adult was a child:

> "Child" is defined in section 3 of the Act to mean a person who is under 18 years of age.
>
> The reference to "a child" in section 124B(1)(b) refers to a person who is a child at the time the relevant belief is formed. Parliamentary Counsel has advised that if there was a different intention it would have been necessary to structure the provisions in the section differently.
>
> Further, subsection (4) of section 124B provides that a person's duty to make a report under section 124B(1) "is in addition to, and does not affect, any other function that the person has in respect of *the child*…".
>
> In addition, where the Act intends to refer to a person who was a child at a particular point in time, it does so. For example, section 237(2) of the Act regarding restrictions on the publication of certain information or material refers to "…a person who is or was a child…".
>
> The Department for Communities preference is to avoid amendments to section 124B because of the potential implications for other references to "a child" in the Act.[183]

4.81 The Committee notes that the phrase 'a person who is a child' is already present in the Act (see section 237) and therefore makes the following recommendation.

RECOMMENDATION 15

That the Minister representing the Minister for Child Protection advise the Legislative Council if there would be any detriment to replacing 'a child' with 'a person who is a child' at section 124B(1)(b) of the *Children and Community Services Act 2004*.

RECOMMENDATION 16

That the Department of Communities issue public guidelines as part of its training for ministers of religion, and all other mandatory reporters, to confirm that the duty to report under section 124B(1) applies only in relation to a person who is currently a child.

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182 ibid.

183 Department of Communities, Answer to question on notice 9 asked at hearing held 10 August 2020, dated 19 August 2020, p 5.

Child victims

4.82 The Committee explored the concerns about the impact on child victims who specifically seek out the confession as a space of confidentiality, and do not wish for their abuse to be reported. The Department acknowledged that these situations already arise under current mandatory reporting provisions:

> It is the nature of this type of abuse. It is very much that secretism, that shame, that blame.[184]

4.83 The Department advised that once the report is made, the best interests of the child are at the forefront of deciding how to proceed, which includes considering the wishes of the child and any immediate risk to safety:

> **The CHAIR:**...there is a view that the risk is that a child discloses to a mandatory reporter and then sometime later that night, two police officers knock on the door and say, "We know what's going on here." Does that ever happen?
>
> **Ms GIOFFRE:** I think each individual case is unique in its circumstances. It would depend on the type of information that we were provided with. It would be about the immediate safety risk to that child. It is difficult to categorise that. That can happen in extreme circumstances, where that child is at immediate risk. But in other circumstances, that information would need to be taken. We would be speaking further to the child. We would speak to other people who are relevant to gather further information.
>
> **The CHAIR:** So there is no automatic chain of circumstances that is activated once that button is pushed.
>
> **Ms GIOFFRE:** No.
>
> **The CHAIR:** It is always the best interests of the child that is paramount.
>
> **Ms GIOFFRE:** Yes.[185]

4.84 Stakeholders including James Parker and Reverend Peter Abetz told the Committee about the concept of 'enabled reporting'. Enabled reporting refers to the process by which a person may assist a victim to develop the strength and will to come forward on their own. James Parker told the Committee that this is key to moving from report to conviction:

> The challenge becomes this—this is our difficulty, really, with mandatory reporting—in essence it sounds like a very, very good idea, but in practice, if you literally cripple the very witnesses or you shut down the evidence that you need, nobody wins. You just do not get a guilty verdict in the end.[186]
>
> So what happened was I became enabled to the point where I had learnt to have a voice, and where I am today is very much enabled to stand and speak on behalf of others, I hope. So what happens is if the survivor or the victim is being given the opportunity to be able to grow in their inner person, which, again, is what the seal of the confessional offers them, then what happens is we are much, much more

184 Renee Gioffre, General Manager, Royal Commission, Department of Communities, transcript of evidence, 10 August 2020, p 25.

185 ibid., p 26.

186 James Parker, Facilitator, Survivors Support Network in Western Australia, transcript of evidence, 6 August 2020, p 7.

likely to have people coming forward and going to statutory authorities and saying, "This is a situation."[187]

4.85 For Reverend Peter Abetz, this would mean providing enough time flexibility in the Act for the minister to help empower the victim to tell their own story, particularly for older children:

> That aspect of "as soon as practical", how do you define that in a pastoral context? One would hope that the authorities would give some flexibility in terms of how that is dealt with, obviously not a year, but sometimes several weeks may need to run their course of helping an older child—say, a 14, 15 or 16-year-old—to actually be in control and be able to tell their story, rather than the minister immediately having to ring the police or the child protection people and then potentially the police officer turning up on their doorstep before they are ready to deal with it. There are some really practical issues there.[188]

4.86 The Committee notes that 'enabled reporting' may be a way of helping victims to take control of their stories. However, where the safety of a child is at risk, it is important that the timelines associated with mandatory reporting be adhered to. The Committee finds that the context of the best interests of the child is the appropriate measure of assessing the timing and nature of actions taken after a mandatory report has been made.

Recommendation 16.26 of the Royal Commission

4.87 As part of its volume on religious institutions, the Royal Commission made the following recommendation:

> **Recommendation 16.26**
>
> The Australian Catholic Bishops Conference should consult with the Holy See, and make public any advice received, in order to clarify whether:
>
> a. information received from a child during the sacrament of reconciliation that they have been sexually abused is covered by the seal of confession
>
> b. if a person confesses during the sacrament of reconciliation to perpetrating child sexual abuse, absolution can and should be withheld until they report themselves to civil authorities.[189]

4.88 Many submitters told the Committee that this recommendation has not been adequately explored.[190] The Committee heard that for some in the Catholic faith, the option of withholding absolution, or conditional absolution, is preferable to requiring priests to break the seal of confession:

> This would be a far more tolerant option, if the Catholic Church law permits. This possibility should be pursued with the Catholic Church.[191]
>
> This is a positive recommendation in the spirit of collaboration. When clarified by the Holy See, Recommendation 16.26 could afford the Australian Church a level of

187 ibid., p 8.

188 Reverend Peter Abetz, Western Australian State Director, Australian Christian Lobby, transcript of evidence, 10 August 2020, p 8.

189 Royal Commission into Institutional Child Sexual Abuse, *Final report recommendations*, Commonwealth of Australia, Barton, ACT, 2017, p 55.

190 See, for example, Submission 249 from Maureen Byrne, 22 July 2020; Submission 283 from Maria Gorman, 23 July 2020 and Submission 457 from Lydia Travicich, 24 July 2020.

191 Submission 60 from Private citizen, 18 July 2020, p 1.

> flexibility and the priest a level of discretion when confronted with the revelation of child sexual abuse during confession.[192]

4.89 Catholics for Renewal Inc. drew the Committee's attention to the Note of the Apostolic Penitentiary on the Importance of the Internal Forum and the Inviolability of the Sacramental Seal. The Note, published by the Holy See in June 2019, appears to confirm that absolution cannot be made conditional:

> In the presence of sins that involve criminal offenses, it is never permissible, as a condition for absolution, to place on the penitent the obligation to turn himself in to civil justice, by virtue of the natural principle, incorporated in every system, according to which "*nemo tenetur se detegere*".[193]

4.90 The Committee asked Archbishop Costelloe if the Australian Catholic Bishops Conference had sought, received or published any advice from the Holy See:

> We have received the advice, but we have made a formal approach to the federal government in order to formally communicate the advice, because it is partly advice from one sovereign state to another sovereign state. It is the belief of the bishops that until the federal government has been formally advised of the Holy See's response, it should not be made public anywhere else. As soon as it is communicated to the federal government, which I believe is happening at a meeting between the president and vice president of the Bishops Conference and the Attorney General in early September, once that has happened and those protocols have been honoured, then it will be made public.[194]

4.91 The Committee is unable to wait for the public release of this advice, as the reporting date for this inquiry is 15 September. The Committee notes that it has been three years since the Royal Commission issued its recommendations, and waiting any longer to implement its recommendations is not likely to be in the best interests of children, particularly, given the conclusion of the Royal Commission that:

> In relation to the Sacrament of Confession, we heard evidence that perpetrators who confessed to sexually abusing children went on to re-abuse and seek forgiveness again.
>
> In this context, we have concluded that the importance of protecting children from child sexual abuse means that there should be no exemption or privilege from the failure to report offence for clergy who receive information during religious confession that an adult associated with the institution is sexually abusing or has sexually abused a child.[195]

Process of the Catholic Archdiocese of Perth

4.92 The Committee heard that the Catholic Archdiocese of Perth has implemented a range of measures in recent years to improve the safety of children, including:

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192 Submission 139 from Howard Ong, 21 July 2020, p 3.

193 Vatican, *Note of the Apostolic Penitentiary on the importance of the internal forum and the inviolability of the sacramental seal*. See: http://www.vatican.va/roman_curia/tribunals/apost_penit/documents/rc_trib_appen_pro_20190629_forointerno_en.html. Viewed 3 September 2020.

194 Most Reverend Timothy Costelloe, Archbishop, Catholic Archdiocese of Perth, transcript of evidence, 6 August 2020, p 5.

195 Royal Commission into Institutional Responses to Child Sexual Abuse, *Final report – criminal justice report parts 3- 4*, Australian Government, Barton, ACT, 2017, p 216.

- establishing a Safeguarding Office, which promotes the safety and wellbeing of children, young people and vulnerable adults
- establishing a Safeguarding Program, which is responsible for educational resources and training
- working in accordance with national professional standards.[196]

4.93 Archbishop Costelloe tabled a number of Safeguarding Program resources at a hearing with the Committee, including 'Protecting God's Children', a handbook designed to help children to develop a language of safety, develop emotional intelligence and identify, respond appropriately and seek help in unsafe situations.[197]

4.94 The Safeguarding Program has also been adopted by the Broome, Bunbury and Geraldton Dioceses.[198]

4.95 The Catholic Archdiocese of Perth has a process for managing confessions of child sexual abuse, although this is said to be a rare occurrence.[199] Archbishop Costelloe told the Committee that in such cases, the priest has a fundamental responsibility to do everything he can, without breaking the seal of confession, to ensure that the abuse stops:

> One of the things that the priest would do—we are not a police force; we cannot enforce things—he would insist with the person, or say to the person, "You need to wait for me outside so that we can discuss this outside the context of this particular thing that we are doing here now and deal with it." Of course, as soon as that happens, the confession is over and there is no question of breaking the seal or not.
>
> What I am trying to say is that it would be the responsibility of the priest to do his level best to convince the perpetrator that this has to stop, that possibly the only way this is going to stop is for the perpetrator to give himself in to the authorities, and to assure the person that he will accompany them to help them do so—all of that. He cannot force the person, but he can put a lot of moral pressure on the person. A priest would be failing in his responsibilities if he did not do that.[200]

Freedom of religion

What the Committee heard

4.96 The Committee heard clearly about how important the seal of confession is to practising Catholics:

> I would not be able to disclose all of my troubles, pains and worries if I didn't feel safe and secure. Without the Seal of Confession, I doubt I will have a safe place where I can get the help that I need to continue with my healing journey.[201]

4.97 The Committee considers that these concerns reflect a broader fear about state interference in matters of religion:

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196 Submission 441 from Archdiocese of Perth, 24 July 2020, p 3.

197 Tabled Paper 6, *Protecting God's children: A Catholic Parent's guide to keeping their kids safe,* Andrea Musulin, Catholic Archdiocese of Perth, tabled by Most Reverend Timothy Costelloe, Catholic Archdiocese of Perth during hearing held 6 August 2020, p 5.

198 Submission 441 from Archdiocese of Perth, 24 July 2020, p 8.

199 Very Reverend Timothy Costelloe, Archbishop, Catholic Archdiocese of Perth, transcript of evidence, 6 August 2020, p 12.

200 ibid., p 13.

201 Submission 35 from Marian dela Fuente, 15 July 2020, p 1.

> Other acts of abuse or harm such as murder, rape and assault are equally abhorrent, would the churches be forced to report on those acts in the future? So, where do you draw the line?[202]

4.98 According to Reverend Barry Hickey, Archbishop Emeritus of Perth:

> To claim power over the content of any faith, can lead easily to abuse of that power. History, and even recent history, shows how easy it is for civil authorities to move from control to persecution, even to violent persecution if the claims of religious freedom and the limits of civil authority are not clear. To my mind, elements of religious practice like confession should not appear in parliamentary bills. It sets a dangerous precedent.[203]

4.99 The Committee will briefly consider arguments raised in this context about freedom of religion, discrimination and religious confession privilege. The Committee also refers readers to the discussion and findings of the Royal Commission in this regard.[204]

International law

4.100 Numerous submissions suggested that clause 53 would contravene the Australian Constitution and the International Covenant on Civil and Political Rights (ICCPR).[205] The Australian Christian Lobby submitted that under the terms of Article 18(1), the only basis on which a priest could be required to break the seal of confession is if it can be demonstrated that it would enhance public safety, which they argue it will not.[206]

4.101 Article 18 of the ICCPR provides:

> (1) Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
>
> (2) No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
>
> (3) Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.[207]

4.102 The Royal Commission considered Article 18, and noted its qualification at subsection (3):

> Although it is important that civil society recognise the right of a person to practise a religion in accordance with their own beliefs, that right cannot prevail over the safety of children.[208]

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202 Submission 444 from the Oriental Orthodox Churches of Western Australia, 24 July 2020, p 2.

203 Submission 443 from Most Reverend Barry James Hickey, Emeritus Archbishop of Perth, 23 July 2020, p 1.

204 Royal Commission into Institutional Responses to Child Sexual Abuse, *Final report – religious institutions – volume 16, book* 1, Australian Government, Barton, ACT, 2017.

205 See, for example, Submission 26 from Tim and Madeline Clear, 14 July 2020; Submission 125 from Richard and Kaye Lynam, 20 July 2020 and Submission 118, Private citizen, 21 July 2020.

206 Submission 430 from Australian Christian Lobby, 24 July 2020, p 8.

207 International Covenant on Civil and Political Rights, article 18.

208 Royal Commission into Institutional Responses to Child Sexual Abuse, *Final report – criminal justice report parts 3- 4*, Australian Government, Barton, ACT, 2017, p 291.

4.103 The Royal Commission expanded on its reasons for concluding that public safety is at stake:

> The Royal Commission has learned that people who commit sexual offences against children are often repeat offenders. We heard of many instances where, if adults who learned of sexual offences being perpetrated against children in an institution had informed police, further children within the institution may have been protected from sexual abuse.
>
> If clergy are exempt from reporting information they learn in religious confession that an adult associated with their religious institution is committing child sexual offences, civil authorities may not receive information enabling them to intervene and remove an abuser's opportunity to abuse in an institution that provides them with access to children. We are satisfied that carries a risk to the safety of children.[209]

4.104 The Committee also notes that while Australia has ratified the ICCPR, it has not been formally adopted into domestic law (though some rights, such as non-discrimination, do have legislative protection in Australia).[210]

The Australian Constitution

4.105 The Committee heard that clause 53 would contravene section 116 of the Australian Constitution,[211] which provides:

> The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

4.106 The Committee notes that while the Australian Capital Territory and Victoria have bills of rights, and Tasmania provides for freedom of religion in its constitution, WA does not have legislation protecting freedom of religion and the Bill is a piece of State legislation. [212]

Religious confession privilege

4.107 There is no legislative provision in WA to attribute privilege to religious confessions and the privilege does not exist at common law.[213] As outlined by Garth Blake AM SC:

> The position in each of South Australia, Queensland and Western Australia is governed by the common law. While there is a paucity of clear authority on the matter, the almost unanimous opinion of text writers is against the existence of any religious confession privilege at common law. Accordingly, this exception will not have any impact in these jurisdictions.[214]

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209 ibid.

210 Commonwealth of Australia, House of Representatives, Joint Standing Committee on Foreign Affairs, Defence and Trade, report, *Second interim report: freedom of religion and belief, the Australian experience*, April 2019, p 7.

211 Submission 125 from Richard and Kaye Lynam, 20 July 2020.

212 Denise Meyerson, 'The protection of religious rights under Australian law', *Brigham Young University Law Review*, 2009.

213 Garth Blake, *the Confidentiality of confessions in the Anglican Church of Australia*, Ecclesiastical Law Journal (2015).

214 ibid.

Committee's comment on freedom of religion

4.108 The Committee acknowledges stakeholder concerns that requiring ministers of religion to report information heard during religious confession is perceived as an infringement of religious freedom or discrimination on religious grounds.

4.109 However, the Committee also notes that freedom of religion at international law is qualified by limitations at law to protect public safety. In any event, the Committee acknowledges that most legislation dealing with criminal justice involves a weighing of significant rights and interests.

4.110 In the case of the Bill, the Committee is aware of two arguments. First, based on the evidence received, the risk to children will be ineffectively countered by the inclusion of religious confession in the Bill. Second, with reference to the evidence heard by the Royal Commission, there is a risk to children which is legitimately countered by the inclusion of religious confession in the Bill.

Committee reflections on clause 53, proposed section 124BA(3)(a)

4.111 In considering clause 53, the Committee found that according to evidence received, requiring priests to break the seal of confession to report child sexual abuse creates a conflict for ministers of religion from the Catholic and Orthodox faiths with their universal church law, and may result in their excommunication.

4.112 The Committee heard that some priests would break the law over breaking the seal of confession. Nonetheless, there is support from Catholic and Orthodox churches for their ministers of religion to become mandatory reporters, outside of the confessional.

4.113 A particularly strong aspect of the evidence presented in relation to clause 53 is the value that victims of child sexual abuse who access the confessional assign to its absolute confidentiality. The fear is that victims of child sexual abuse would not disclose that abuse in the confessional, if the priest was obliged to make a mandatory report.

4.114 Some adult survivors are concerned that they will no longer be able to use the confessional to discuss their abuse in a completely confidential way, without that abuse being reported under mandatory reporting provisions. The Committee has established that this fear is without grounds, but has nevertheless recommended clarification.

4.115 Despite these observations, the Committee also acknowledges the evidence to the Royal Commission about how the failure to report information about child sexual abuse disclosed in the confessional has allowed abuse to continue in the past (see paragraph 4.91).

Conclusion

4.116 Limited consultation, a sense of being singled out and concerns about the impact of a legislative requirement to break the seal of confession have contributed to opposition to clauses 51 to 53, particularly from Catholic and Orthodox stakeholders. This is evidenced by the fact that over 90 percent of submissions to this inquiry were opposed to breaking the seal of confession.

4.117 The Committee finds that clauses 51 and 52 are likely to contribute to child safety. To achieve the policy objective of protecting children from harm, the remaining four categories of individuals recommended by the Royal Commission—out-of-home care workers, youth justice officers, early childhood workers and psychologists/school counsellors—should, after adequate consultation, also become mandatory reporters. The Committee recommends this at recommendations 13 and 14.

4.118 A central point in dispute in relation to the matters discussed in this Chapter is the 'breaking the seal of the confessional' issue. Members of the Committee hold divergent views on this matter, and as such, the Committee was unable to reach a unanimous recommendation in relation to proposed section 124BA(3)(a).

4.119 A majority of the Committee, consisting of Hons Simon O'Brien, Jacqui Boydell and Nick Goiran MLCs, finds that the case for clause 53 has not been fully established. While noting the Royal Commission's reasons for recommending that no exemption apply, the majority also notes evidence suggesting that clause 53, proposed section 124BA(3)(a), will not be effective.

4.120 The Committee, being a majority consisting of Hons Simon O'Brien, Jacqui Boydell and Nick Goiran MLCs, makes the following recommendation:

RECOMMENDATION 17

c) Ministers of religion be excused from criminal responsibility only when the grounds of their belief is based solely on information disclosed during religious confession; and

d) the Government of Western Australia consult with ministers of religion on non-statutory provisions that would facilitate the effective use of information received during religious confession.

4.121 A minority of the Committee, consisting of the Hons Dr Sally Talbot and Pierre Yang MLCs, have concluded that while clause 53 is contentious for Catholic and Orthodox stakeholders, exempting information gained under the confessional seal has, in the past, led to child sexual abuse not being stopped.

4.122 The minority of the Committee consisting of Hons Dr Sally Talbot and Pierre Yang MLCs, recommend that clause 53 be enacted in full.

CHAPTER 5
Enforcement provisions and review

Powers of workplace inspectors and authorised officers (cl 71)

Introduction

5.1 Clause 71 of the Bill inserts new Part 10A, relating to enforcement. The clause expands the powers of authorised officers.

5.2 A table providing a comparison between the enforcement powers of authorised officers under section 195 of the Act and new Part 10A, including identification of equivalent provisions in the *Child Care Services Act 2007* is contained in Appendix 5.

Employment of children

5.3 Part 7 of the Act relates to the employment of children. Offences under this section include, for example, employing a child under 15 years of age in a business, trade or occupation, or employing a child to perform in an indecent manner.[215]

Current enforcement provision

5.4 Section 195 currently provides authorised officers powers in relation to Part 7, including:

- to enter a place
- require a person to answer a question
- use reasonable force and assistance.

5.5 For the purposes of section 195, an authorised officer is an officer authorised by the CEO under section 25, or an industrial inspector. In the case of an industrial inspector, the powers conferred by section 195 are in addition to, and do not limit, the powers conferred by the *Industrial Relations Act 1979*.

5.6 Section 195 does not refer to a warrant or consent to enter.

5.7 Clause 69 will delete section 195, and transfers the substance of these powers into new Part 10A.

New Part 10A

5.8 Clause 71 provides authorised officers will have powers to:

- enter a place where given consent or authorised by a warrant
- enter a place without informed consent or an entry warrant (in relation to a suspected offence under Part 7)
- inspect or search that place
- take or seize a thing from that place
- direct a person to provide information or documents
- use force that is reasonably necessary.

[215] *Children and Community Services Act* ss 190 and 192.

5.9 In her second reading speech in the Legislative Council, Hon Sue Ellery MLC said:

> The bill increases the powers of authorised officers of the department and industrial inspectors to investigate offences related to the employment of children in part 7 of the act.
>
> In addition, authorised officers of the department will be able to exercise those powers in relation to all the offences in the act. The additional powers are consistent with those provided to licensing officers under the *Child Care Services Act 2007*, and do not derogate from the powers provided to industrial inspectors under the *Industrial Relations Act 1979*.[216]

5.10 The enhanced powers proposed for authorised officers apply beyond offences relating to employment of children to all offences under the Act including, for example:

- failing to protect child from harm[217]
- leaving a child unsupervised in a vehicle[218]
- tattooing or branding a child under the age of 16.[219]

5.11 In considering clause 71, FLP 5 is relevant –

> whether the Bill confers powers to enter premises and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer. The Committee notes that clause 71, proposed section 241C(3) allows authorised officers to gain entry to a place without consent or a warrant, and search for and seize things at that place, in order to investigate a suspected offence under Part 7.

FINDING 19

Clause 71, proposed section 241C(3) allows authorised officers to enter premises and search for, or seize documents or other property, without consent or warrant in order to investigate a suspected offence under Part 7.

5.12 In relation to the expanded powers, the Department explained:

> Currently, investigations and prosecutions are largely undertaken by WA Police who have their own powers to investigate but who make independent decisions on whether or not [sic] investigate based on police priorities and other related matters.
>
> The Department of Communities has no powers of its own to investigate offences under the Act other than in respect of the employment of children provisions in Part 7.[220]

5.13 In addition, the Department advised:

> New Part 10A in clause 71 of the Bill addresses shortfalls in the Act regarding the Department's powers to investigate non-compliance with the obligations imposed

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216 Hon Sue Ellery MLC, Leader of the House, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 21 May 2020, p 3055.

217 *Children and Community Services Act* s 101.

218 ibid., s 102.

219 ibid., s 103.

220 Michelle Andrews, Director General, Department of Communities, email – attachment, responses to outstanding questions for the Department of Communities, 19 August 2020, p 3.

> by the Act. The new powers will enable the Department to investigate possible breaches of the Act in circumstances where the Police are not involved. They are consistent with those provided to licensing officers under the Child Care Services Act 2007 and do not derogate from the powers already available to industrial inspectors under the Industrial Relations Act 1979.[221]

5.14 The Committee's comparison in Appendix 5 confirms the enforcement powers in new Part 10A are consistent with existing powers contained in the *Child Care Services Act 2007*.

FINDING 20

The enforcement powers contained in new Part 10A of the Children and Community Services Bill 2019 are consistent with those provided to licensing officers under the *Child Care Services Act 2007*.

5.15 The Committee is satisfied that the broader powers of entry into any place contained in new Part 10A facilitates the purposes of the Act by better enabling authorised officers and industrial inspectors to obtain the information they require to carry out their functions under the Act.

5.16 The Committee notes that proposed section 241C(3) empowers an authorised officer to enter a place without consent or obtaining a warrant to investigate a suspected offence against Part 7 of the Act. A list of offences under the Act can be found at Appendix 6.

5.17 With reference to FLP 5, the Committee considers that further justification for this is required for the Legislative Council to make an informed decision on whether to support this measure.

RECOMMENDATION 18

The Minister representing the Minister for Child Protection explain, in relation to clause 71, proposed section 214C(4), the justification for providing an authorised officer with the power to enter a place in the absence of the occupier's informed consent or an entry warrant.

Clause 71 Proposed section 241E(4) – (5) of the Bill

5.18 Clause 71, proposed sections 241E(4) and (5) raise FLP 6:

> Does the Bill provide appropriate protection against self-incrimination?

5.19 The common law privilege against self-incrimination entitles a person to refuse to answer any question, or produce any document, if the answer or the production of the document would tend to incriminate that person.[222]

5.20 The privilege against self-incrimination protects not only from direct incrimination, but also from making a disclosure that may lead indirectly to incrimination or to the discovery of other evidence of an incriminating nature.[223]

5.21 The privilege is not absolute, and the Committee notes the observation of the Queensland Law Reform Commission:

> abrogation might also be justified where there is an immediate need for information to avoid risks such as danger to human life, serious personal injury or

221 Submission 547 from Department of Communities, 24 July 2020, p 11.

222 Pyneboard Pty Ltd v Trade Practices Commission (1983) 152 CLR 328, 335.

223 Queensland Law Reform Commission, report 59, *The abrogation of the privilege against self-incrimination,* December 2004, at paras 1.3-1.4.

damage to human health, serious damage to property or the environment, or significant economic detriment, or where there is a compelling argument that the information is necessary to prevent further harm from occurring.[224]

5.22 In some circumstances, it has been acknowledged that the authorities may need information to enable them to carry out their duties to the community. Thus the privilege against self-incrimination may not be absolute and can be modified or excluded by legislation to facilitate investigative activities. Also, it has been recognised that the public benefit from a negation of the privilege needs to outweigh the resultant harm from its removal.[225]

Current enforcement provision

5.23 Currently section 195(5) abrogates the privilege of self-incrimination in relation to questions asked by an authorised officer in relation to investigations relating to the employment of children. It also stipulates:

> (5) A person must not—
>
> (a) refuse or fail to answer a question when required to do so under subsection (3); or
>
> (b) in purporting to comply with a requirement under subsection(3), give an answer that the person knows is false or misleading.
>
> Penalty: a fine of $6000
>
> (6) A person is not excused from answering a question, when required to do so under subsection (3), on the ground that the answer might incriminate the person or render the person liable to a penalty, but that answer is not admissible in evidence against the person in any civil or criminal proceedings other than proceedings for an offence under subsection(5)(b)

5.24 Clause 71 proposed section 241E(4) and (5) is essentially the same as the existing provision, however it expands the abrogation to the investigation of all suspected offences under the Act:

> (4) A person is not excused from complying with a direction under this section to give information, answer a question or produce a record or document on the ground that complying with the direction might tend to incriminate the person or render the person liable to a penalty.
>
> (5) However, any information or answer given by an individual in compliance with such a direction is not admissible in evidence against the individual in criminal or civil proceedings other than proceedings for perjury or for an offence under section 244.

5.25 The Committee notes that clause 71 proposed section 241E (5) provides a common statutory protection of restricting how the information, record or answer can be used against the person.

5.26 The question that arises is whether the lack of compliance may be admissible evidence in proceedings for the offence of failing to comply with a direction.

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224 Queensland Law Reform Commission, report 59, *The abrogation of the privilege against self- incrimination*, December 2004.

225 Western Australia, Legislative Council, Standing Committee on Legislation, report 25, *Custodial Legislation (Officers Discipline) Amendment Bill 2013*, 11 November 2014, p 41.

5.27 The proposed section also fails to protect the individual giving the information against 'derivative use' or 'indirect use' of the information. In common law, derivative use immunity prevents the use of information gained under compulsion to 'uncover other evidence against the individual who provided the information'.[226]

5.28 The most comprehensive of these protections were located in Acts regulating the mining and petroleum sectors. For example, section 30 of the *Mining Rehabilitation Fund Act 2012* provides as follows:

> **30. Incriminating information**
>
> (1) An individual is not excused from giving information, answering a question or producing a record when directed to do so under section 29(1) on the ground that the information, answer to the question, or production of the record, might tend to incriminate the individual or make the individual liable to a penalty.
>
> (2) However —
>
> (a) the information or answer given or record produced; or
>
> (b) giving the information, answering the question or producing the record; or
>
> (c) any information, document or thing obtained as a direct or indirect consequence of giving the information, answering the question or producing the record,
>
> is not admissible in evidence against the individual —
>
> (d) in any civil proceedings; or
>
> (e) in any criminal proceedings other than proceedings for perjury or an offence against section 31 ['False or misleading information'].

5.29 The Committee is satisfied that the protection of children is exactly the kind of public interest that warrants an abrogation of the privilege against self-incrimination. It notes also the safeguards included in clause 71. The Committee is concerned however with the blanket application of the abrogation to all offences in the Act. It does not have before it evidence about the nature and seriousness of each offence under the Act, and as such, would have some misgivings if the privilege against self-incrimination were to be abrogated in circumstances where the nature of the offence does not warrant it.

RECOMMENDATION 19

That the Minister representing the Minister for Child Protection provide to the Legislative Council:

a) an explanation of whether the lack of compliance may be admissible evidence in proceedings for the offence of failing to comply with a direction

b) justification for the abrogation of the privilege against self-incrimination in relation to all offences under the *Children and Community Services Act 2004*.

[226] Queensland Law Reform Commission, report 59, *The abrogation of the privilege against self-incrimination,* December 2004, p 19.

RECOMMENDATION 20

The next statutory review of the *Children and Community Services Act 2004* expressly consider whether there is a need for the privilege against self-incrimination to be abrogated by sections 241E(4) and (5).

5.30 Recommendation 20 can be implemented by recommendation 22, which proposes to amend clause 47 to require that specific matters be considered during the next statutory review of the Act.

RECOMMENDATION 21

The Department of Communities include in its annual report, in relation to proposed Part 10A, a report on the number of:

- times those powers were used
- complaints received about the use of those powers
- complaints investigated, sustained, and those that remain under investigation.

CHAPTER 6
Review

Review (cl 74)

6.1 Clause 74 of the Bill replaces current section 249, Review of the Act. In this report, the Committee has made three recommendations that specific matters be considered during the next statutory review of the Act (see paragraph 2.57, paragraph 3.61 and paragraph 5.30). The following recommendation will give effect to these recommendations by amending clause 74.

RECOMMENDATION 22

Clause 74 be amended as follows:

Page 54, after line 19 — To insert:
(1A) Without limiting subsection (1), the first review under that subsection must address —
(a) recommendations 4 and 11 set out in Report 44 (*Children and Community Services Amendment Bill 2019*) of the Standing Committee on Legislation of the Legislative Council; and

(b) the need for the continuation of section 241E(4) and (5).

Hon Dr Sally Talbot MLC
Chair

APPENDIX 1

STAKEHOLDERS, SUBMISSIONS AND PUBLIC HEARINGS

Stakeholders contacted

Number	From
1.	Aboriginal Health Council of Western Australia
2.	Aboriginal Legal Service of Western Australia
3.	Aboriginal Catholic Ministry
4.	Aboriginal Family Law Services Western Australia
5.	ACT Government, Child and Youth Protection Services
6.	Anglicare Western Australia
7.	Anti-Slavery Australia
8.	Australian Association of Social Workers
9.	Australian Baha'i Community
10.	Australian Christian Lobby
11.	Australian Council of Hindu Clergy
12.	Australian National Imams Council
13.	Baptist Churches Western Australia
14.	Buddhist Society of Western Australia
15.	Centrecare Incorporated
16.	Child and Adolescent Mental Health Service (Department of Health)
17.	Child and Family Welfare Association of Australia
18.	Office of the Commissioner for Children and Young People
19.	Communicare
20.	Community and Public Sector Union / Civil Service Association
21.	Community Legal Western Australia
22.	CREATE Foundation
23.	Department of Justice
24.	Djinda Service
25.	Family Court of Western Australia

Number	From
26.	Family Inclusion Network of Western Australia
27.	Family Matters WA
28.	Department for Child Protection South Australia
29.	Department of Communities Tasmania
30.	Department of Health and Human Services Victoria
31.	Greek Orthodox Archdiocese of Australia
32.	Archbishop of Perth
33.	Key Assets Western Australia
34.	Law Reform Commission of Western Australia
35.	Legal Aid Western Australia
36.	Lutheran Church of Australia
37.	MacKillop Family Services
38.	Mental Health Commission
39.	Mission Australia
40.	Noongar Family Safety and Wellbeing Council
41.	Northern Territory Government – Territory Families
42.	Parkerville
43.	Perth Children's Court
44.	Law Society of Western Australia
45.	Perth Hebrew Congregation
46.	Office of the Archbishop
47.	RUAH Community Services
48.	Sikh Association of Western Australia
49.	Serbian Orthodox Church Australia and New Zealand
50.	Secretariat of National Aboriginal and Islander Child Care – National Voice for our Children (SNAICC)
51.	Social Policy Practice and Research Consortium, University of Western Australia
52.	Society of Professional Social Workers
53.	The Islamic Council of Perth, Western Australia
54.	Uniting Church in Australia (WA)

Number	From
55.	Valuing Children Initiative
56.	Wanslea Family Services Inc.
57.	Western Australian Council of Social Service
58.	Western Australia Police Force
59.	Women's Council for Domestic and Family Violence Services (WA)
60.	Women's Legal Service WA
61.	Youth Affairs Council of Western Australia
62.	YMCA Western Australia
63.	Department of Communities and Justice New South Wales
64.	Department of Child Safety, Youth and Women Queensland
65.	Foster Care Association of Western Australia
66.	Foundations Care
67.	Lifestyle Solutions
68.	Yorgum Aboriginal Corporation
69.	Life Without Barriers
70.	Escare Youth Service
71.	Save the Children
72.	Salvation Army
73.	Albany Youth Support Association - Young House
74.	Yaandina Community Services
75.	Garnduwa
76.	Centacare Kimberley
77.	Kimberley Community Legal Services
78.	Albany Community Legal Centre
79.	Goldfields Community Legal Centre
80.	Pilbara Community Legal Services
81.	Regional Alliance West
82.	South West Community Legal Centre
83.	Wheatbelt Community Legal Centre

Number	From
84.	Shire of Halls Creek – Youth Service
85.	Shire of Wyndham – East Kimberley Youth Services
86.	Shire of Dundas – Youth Services
87.	Shire of Laverton – Youth Support Service
88.	Shire of Leonora – Youth Service
89.	Shire of Denmark – Youth Support Service
90.	Shire of Carnarvon – Youth Services
91.	Shire of Meekatharra – Youth Service
92.	City of Greater Geraldton – Mullewa Youth Service
93.	Shire of Derby – Derby Youth Service
94.	Spinifex Health Service
95.	Bega Garnbirringu Health Service
96.	Ngangganawili Aboriginal Health Service
97.	South West Aboriginal Medical Service
98.	Moorditj Koort Aboriginal Corporation
99.	Derbarl Yerrigan Health Service Aboriginal Corporation
100.	Geraldton Regional Aboriginal Medical Service
101.	Carnarvon Medical Service Aboriginal Corporation
102.	Puntukurnu Aboriginal Medical Service
103.	Mawarnkarra Health Service Aboriginal Corporation
104.	Wirraka Maya Aboriginal Health Service
105.	Bidyadanga Aboriginal Community Health Service
106.	Broome Regional Aboriginal Medical Service
107.	Milliya Rumurra Aboriginal Corporation
108.	Kimberley Aboriginal Medical Services Council
109.	Nirrumbuk Aboriginal Corporation
110.	Beagle Bay Community Health Service
111.	Derby Aboriginal Health Service
112.	Nindillingarri Cultural Health Service

Number	From
113.	Yura Yungi Aboriginal Medical Service
114.	Ngnowar Aerwah Aboriginal Corporation
115.	Ord Valley Aboriginal Health Service
116.	Great Southern Aboriginal Health Service
117.	Ngaanyatjarra Health Service

Submissions received

Number	From
1.	Rev Christian Irdi
2.	Vicki Carter
3.	Amanda Varley
4.	Fr John Flynn
5.	Philip Fingleton
6.	Private citizen
7.	Private citizen
8.	Private citizen
9.	Anne Pike
10.	Mark Kelly
11.	Tom Gourlay
12.	Private citizen
13.	Private citizen
14.	Dr Philippa Martyr
15.	Private submission
16.	Murray Dickson
17.	Julie Ann Kerr
18.	Fr John Flynn
19.	Maurice Castelli
20.	Callan Leach
21.	Shadi Salama
22.	Paul Clune

Number	From
23.	The Baptist Union of Western Australia
24.	Adeline Bock
25.	Christina Jack
26.	Tim and Madeleine Clear
27.	Patrick and Armelle Pilot
28.	Ann Stedul
29.	Alex Benziger
30.	Beverley Stott
31.	Monica Holmes
32.	Private citizen
33.	Margot Mackay
34.	Department of Child Safety, Youth and Women (Qld)
35.	Marian dela Fuente
36.	Maria Blundell
37.	Catalina Nolasco
38.	Private citizen
39.	Private citizen
40.	Kathleen Ryan
41.	Nessya Santoso
42.	Helena Hungerford-Morgan
43.	Deryck and Norma Simons
44.	Fr Patrick Toohey
45.	Private citizen
46.	Private citizen
47.	Private citizen
48.	Pioneers Aboriginal Corporation
49.	Thomas Loreck
50.	Michael Davila
51.	Submission not accepted

Number	From
52.	Kiffin Miller
53.	Davide Marchetti
54.	Private citizen
55.	Barbara Brunelli
56.	Indigo Hurleigh-Craig
57.	Private submission
58.	Keith Dissanaike
59.	Private citizen
60.	Private citizen
61.	Private citizen
62.	Mary Separovich
63.	Gillian Gonzalez
64.	Private citizen
65.	Multiple submitters
66.	John Hibble
67.	Tula Delic
68.	Vivian Ng
69.	Raffaele Pala
70.	John Kiely
71.	Boon Ann Christopher Tan
72.	Private submission
73.	Richard Norris
74.	Patricia Suryawinata
75.	Nicholas Diedler
76.	Private citizen
77.	Alina De Souza
78.	Colleen Digby
79.	Edgar Escobar
80.	Lena Bitar Arrieta

Number	From
81.	Bernadette D'Souza
82.	Paul Pillai
83.	Private citizen
84.	Private citizen
85.	Paola Demberger
86.	Basil and Christina Fernandez
87.	Terence Flanagan
88.	Brenda Auret
89.	Margaret & Dunstan Hartley
90.	Brian Digby
91.	R Kersh de Courtenay
92.	Judith Skeet
93.	Fr Grant Gorddard
94.	Kathleen Fernandez
95.	Peter and Margaret Thomas
96.	Ivan Colgan
97.	Anna Kazimierczuk
98.	Pauline Matthys
99.	Private submission
100.	Marguerite Ward
101.	Nicole Benn
102.	Colino Gomes
103.	Carol Norris
104.	Private citizen
105.	St Francis Xavier Hilbert Legion of Mary Group
106.	Helen Rankine
107.	George and Josephine Schaefer
108.	Mildred Gabriel
109.	Adeola Ayeni

Number	From
110.	Private citizen
111.	Anne de Ridder
112.	Private citizen
113.	Multiple submitters
114.	Su Goh
115.	Private citizen
116.	Zilma Rangel
117.	Wendy Leach
118.	Private citizen
119.	Dr Wayne Keady
120.	John Pratt
121.	Private citizen
122.	Lalith Weerasuriya
123.	Judy Flanagan
124.	Lynne and David Buzzard
125.	Richard and Kaye Lynam
126.	Gilda De Oliveira
127.	Angela Tuhakaraina
128.	Western Australian Council of Social Services (WACOSS)
129.	John Loreck
130.	Hilda Keogh
131.	Luanna Bong and Freddie Low
132.	knowmore
133.	Anne De Sousa
134.	Steven Lukito
135.	Lucy Tang
136.	Yolander Mitchell
137.	Eileen Beard
138.	Mary Duckett

Number	From
139.	Howard Ong
140.	Teresa Millar
141.	Marie Rowles
142.	Mandy Rojnic
143.	Sr Terri Emslie
144.	Lynley Barnett
145.	Marguerite Ward
146.	Bette Lyra
147.	Lydia Michaud
148.	Derbarl Yerrigan Health Service
149.	Joseph Chia
150.	Private citizen
151.	Josephine Geoghegan
152.	Jenny Mann
153.	Margaret Kane
154.	Miranda Mary
155.	Marie Mclachlan
156.	Private citizen
157.	Ann Taylor
158.	Private submission
159.	Vivienne Chapman
160.	Margaret Boulger
161.	Private citizen
162.	Joe and Grace-Maria de Araujo
163.	Private citizen
164.	Dr Rini Margawani
165.	Tobiloba Ayeni
166.	Frank Giuffre
167.	Jose de Sousa

Number	From
168.	William Schaefer
169.	Kaye Ruttledge
170.	David and Brenda Low
171.	Private citizen
172.	Private citizen
173.	Rhonda Haynes
174.	Beth Hawke
175.	Mary Cooper
176.	Helen Crosby
177.	Lorraine Brookes
178.	Geraldine Jaffar
179.	Bronwyn Muller
180.	Chris Muller
181.	Chris Leonard
182.	Denis Colley
183.	Commissioner for Children and Young People Western Australia
184.	Private citizen
185.	Elsa Freitas
186.	Alberto Dei Giudici
187.	Paul Star and Elizabeth Baggio
188.	Monica Mui Tian Chan
189.	Lexye La-Spada
190.	Tonina Di Bucci
191.	Evelyn Feltoe
192.	Private citizen
193.	Janice Mulry
194.	Mission Australia
195.	Terry Hamilton
196.	Mgr Kevin Long

Number	From
197.	Private citizen
198.	Mike Miller
199.	Private citizen
200.	Private citizen
201.	Agnes Noronha
202.	John Furlong
203.	William Ritchie
204.	Ngaire Kiernan
205.	Private submission
206.	Patrick Malry
207.	Multiple submitters
208.	Shera Lobo
209.	Arthur Lobo
210.	Laura Munut
211.	Selwyn Poi
212.	Private citizen
213.	Holy Family Catholic Church Maddington
214.	Secretariat of National Aboriginal and Islander Child Care – National Voice for our Children (SNAICC) and the Noongar Family Safety and Wellbeing Council
215.	Multiple submitters
216.	Private citizen
217.	Private citizen
218.	Private citizen
219.	Edman Anthony and Jean Regnard
220.	Judy Payton
221.	Maureen Nold
222.	Private citizen
223.	Private citizen
224.	Syona Fernandez
225.	Nicole Sintrikos

Number	From
226.	Brendan Cullen
227.	Renata Mattia
228.	Connor Maynard
229.	Carol Phillips
230.	Monica Hunter
231.	Private citizen
232.	Marie Srdarev
233.	Len Rego
234.	Perry Mitchell
235.	Andrea Anthony
236.	Rev Fr Philip Perreau
237.	Submission not accepted
238.	Don Huggins
239.	Private citizen
240.	Private citizen
241.	Stephen Wong
242.	Saji Varghese Valiaparampil
243.	Stephen Courtauld
244.	Peter Gray
245.	Moses Goodrick
246.	Kendall Diaz
247.	St Bernadette's Church
248.	Private submission
249.	Maureen Byrne
250.	Private citizen
251.	Dr Helen Watt
252.	Kaye & Richard Lynam
253.	Private submission
254.	Private citizen

Number	From
255.	Caroline Miller
256.	Private citizen
257.	Private citizen
258.	Beverley Bucat
259.	Beatrice Goh
260.	Fr Mark Baumgarten
261.	Tracey Twyford
262.	Private submission
263.	Private citizen
264.	Children's Court of Western Australia
265.	Hiep Nguyen
266.	Jenny Troy
267.	Imelda Brady
268.	Child and Family Alliance WA
269.	Zofia Wienczugow
270.	Jane Borg
271.	Margherita Amato
272.	Private citizen
273.	Private citizen
274.	Private citizen
275.	Rosemary Lorrimar
276.	Rita Morgan
277.	Private submission
278.	Janet Wallace
279.	Mai Pham
280.	Private citizen
281.	Private citizen
282.	Pierangelo Borali
283.	Maria Gorman

Number	From
284.	Private citizen
285.	Community and Public Sector Union and Civil Service Union
286.	Holy Family Catholic Parish
287.	Private citizen
288.	Serina Wong
289.	Dr Patrick Colgan
290.	Michael Banaszczyk
291.	Marjo Hannele
292.	Dr Michael Leahy
293.	Christopher de freitas
294.	Kenneth Anthony Phua
295.	Conchita Lewis
296.	Liam Ryan
297.	Private submission
298.	Anthony Quinlan
299.	Peter Neesham
300.	Anna Cook
301.	Private citizen
302.	Keith McEncroe
303.	Karriholm Christian Centre
304.	Marco Mottolini
305.	Private submission
306.	Sea Ng
307.	Private submission
308.	Dr Anthony Poli
309.	Fr Matthew Hodgson
310.	Laurine Hines
311.	Christine Dominic
312.	Woodlands Catholic Prayer Group

Number	From
313.	Matthew Bognoni
314.	Fr Ken D'Souza
315.	Hilda Joseph
316.	Catholic Women's League Australia
317.	Ruth Cooke
318.	Timothy Kennedy
319.	Irene Edwards
320.	Our Lady of Lourdes Nollamarra – Parish Pastoral Council
321.	Private citizen
322.	Vinitha Cyriac
323.	Rebecca Cummins
324.	Joseph Almeida
325.	Daniel Chan
326.	Frank Purcell
327.	Private citizen
328.	Brian Liu
329.	Richard Cooke
330.	Rowena Almeida
331.	Linson Sunny
332.	Anton and Joan Louie
333.	Private citizen
334.	Denis Cyriac
335.	Private citizen
336.	Private citizen
337.	Paul Sheridan
338.	Submission not accepted
339.	Joshua Low
340.	Private submission
341.	Private citizen

Number	From
342.	Anish James
343.	Samuel Chan
344.	Joel Chan
345.	Private submission
346.	Babychen Varghese
347.	Giustina Massolino
348.	Andre Sequeira
349.	Jessy Babychen
350.	Kevin Baby Philip
351.	Private citizen
352.	Private citizen
353.	Emma Walczak
354.	Van Hung Vu
355.	Maria Oliveiro
356.	Tessy Michael
357.	Matthew Oliveiro
358.	Submission not accepted
359.	Michelle Castieau
360.	Susan Tan
361.	Australian Association of Religious Educators
362.	Holy Rosary Catholic Church Nedlands
363.	Edmund May
364.	Manfred Hotger
365.	Mariza D'Souza
366.	Catherine Fraser
367.	Submission not accepted
368.	Mary Sherborne
369.	Private citizen
370.	Fr Paul Fox

Number	From
371.	Private citizen
372.	Phillip Moran
373.	Dr Michael Chong
374.	Mark Watts
375.	Alexander and Elizabeth Phua
376.	Joshua Stock
377.	Lilia Fernandez
378.	Lindsay Gregory
379.	Private citizens
380.	Daphne Sook Ferhn Siow
381.	Boon Liang Quah
382.	Hilda Ousephachan
383.	Private citizen
384.	Private citizen
385.	Teresa De Sousa
386.	Michael De Sosua
387.	Peter Feltoe
388.	Private citizen
389.	Submission not accepted
390.	Catholics for Renewal Inc.
391.	Richard Murray
392.	Anju Joseph
393.	Adele Coyne
394.	Eugene Lim
395.	Denzil D'Souza
396.	Justin Geldart
397.	David Morrissey
398.	Private citizen
399.	Sandra Robinson

Number	From
400.	Sherylee Tutt
401.	Maria Petrecca
402.	Kevin Susai
403.	Ederlyn Patterson
404.	Bp Antoine-Charbel Tarabay
405.	Wanslea Limited
406.	Private citizen
407.	Society of Professional Social Workers
408.	Jason Yeap
409.	Private citizen
410.	Private citizen
411.	Private citizen
412.	Alicia Benn
413.	Anna van Eck
414.	Submission not accepted
415.	Glenn Ebsary
416.	Adele Parsons
417.	Graham Geoghegan
418.	Multiple submitters
419.	Anthony Martyr
420.	John Winship
421.	Robert Fitzgerald
422.	Victoria Panopio
423.	Dr Rocco Loiacono
424.	Knights of the Southern Cross (WA) Inc.
425.	Private submission
426.	Robyne de Garis
427.	Eric Miller
428.	Darlene Elliott

Number	From
429.	Private citizen
430.	Australian Christian Lobby
431.	Fr Mark Payton
432.	Faith Enrichment Committee Queen of Apostles Catholic Parish
433.	Sr Mary of the Holy Spirit
434.	Yorganop
435.	Thai Hong Truong Vu
436.	Private citizen
437.	Private submission
438.	Private submission
439.	Private submission
440.	Private citizen
441.	The Catholic Archdiocese of Perth
442.	Rosa Pasquale
443.	Most Rev Barry Hickey
444.	Oriental Orthodox Churches of WA
445.	Private citizen
446.	Mary Della Maddalena
447.	Private citizen
448.	Private submission
449.	Deidre Lyra
450.	Dn Trevor Lyra
451.	Vivienne Watts
452.	Nellie Chew
453.	Shivaun Hughes
454.	Fr Brennan Kee-Ong Sia
455.	The Youth Affairs Council of Western Australia
456.	Private citizen
457.	Lydia Travicich

Number	From
458.	Brendan McManus
459.	Submission not accepted
460.	Private citizen
461.	Private citizen
462.	Private citizen
463.	Bianca Cobby
464.	Submission not accepted
465.	Sophia Abraham
466.	Submission not accepted
467.	Matthew Yum
468.	Anthonius Lukito
469.	Multiple submitters
470.	John Daly
471.	Survivors' Support Network in WA
472.	Dolly Saji
473.	Doniya Saji
474.	Dawn Saji
475.	Saji Manuel
476.	Lisa Hogg
477.	Sally Bishop
478.	Private citizen
479.	Joseph Pauley
480.	Private citizen
481.	Private citizen
482.	Irene De Mel
483.	Giang Vu
484.	Dimitri De Mel
485.	Duc Hieu Dong
486.	Private citizen

Number	From
487.	Private citizens
488.	Fr Michael Rowe
489.	Private citizen
490.	Brian Castieau
491.	Submission not accepted
492.	Private citizen
493.	Private submission
494.	Private citizen
495.	Ronan Mulligan
496.	Private citizen
497.	Private citizen
498.	Veronica McShane
499.	Rev Fr Steven Casey
500.	Steven Lukito
501.	Stefani Dewi
502.	Iryna Kvach-Mancini
503.	Marco Mancini
504.	William Pauley
505.	Brendon Burke
506.	Eliza Matthys
507.	Private citizen
508.	Submission not accepted
509.	Submission not accepted
510.	Vernon Bastian
511.	Private citizen
512.	Alain Marion
513.	Private citizen
514.	Private citizen
515.	Private citizen

Number	From
516.	Private citizen
517.	Private citizen
518.	Private submission
519.	Private citizen
520.	Private citizen
521.	Gaetan Raspanti
522.	Submission not accepted
523.	John McShane
524.	Geraldine Sim
525.	Daniel Benn
526.	Private citizen
527.	Private submission
528.	Private citizen
529.	The Coptic Orthodox Church of WA
530.	Private citizen
531.	Private citizen
532.	Private citizen
533.	Private citizen
534.	Private citizen
535.	Private citizen
536.	Kelvin Lobo
537.	James Parker
538.	Submission not accepted
539.	Nathaneale Subianto
540.	Private citizen
541.	John Fernandez
542.	Trevor De Silva
543.	Private submission
544.	Soly Fernandez

Number	From
545.	Felicia Novana
546.	Aboriginal Family Law Services
547.	Department of Communities
548.	Peter and Margaret de San Miguel
549.	Aboriginal Health Council of Western Australia
550.	John Rullo
551.	Sr Lynn Chua
552.	Justin Airey
553.	Kevin Collins
554.	Michael Harrington
555.	Anne Irvine
556.	Steve Casey
557.	Private citizen
558.	Ian Miller
559.	Joanna Stokes
560.	Private citizen
561.	Private citizens
562.	Seaman Family
563.	Grace Feltoe
564.	John Hicks
565.	Mark and Michelle Firth
566.	Cecilia Sequerah
567.	Joseph Wisolith
568.	Private submission
569.	David Fleming
570.	Philomena Vaz
571.	Correia Family
572.	Joe and Beatriz Neves
573.	Larry Hibble

Number	From
574.	Eva Lenz
575.	Eva Lenz
576.	Imelda Aslett
577.	Albert and Aileen Atkinson
578.	Rev Mgr Brian O'Loughlin
579.	Private citizen
580.	Katie Hughes
581.	Margaret Foss
582.	Peter Dunbar
583.	Peter Sellars
584.	Robert and Josephine Thompson
585.	Multiple submitters
586.	Private citizen
587.	Aboriginal Legal Service of Western Australia Ltd
588.	Women's Legal Service WA
589.	Legal Aid Western Australia
590.	Community Legal Western Australia
591.	Peta Freedman
592.	Rev Fr Edward Miller
593.	Anglicare WA
594.	Family Inclusion Network of Western Australia Inc.
595.	School of Population and Global Health – University of Western Australia
596.	Law Society of Western Australia
597.	Australian Association of Social Workers
598.	Teresa Spinelli
599.	Private citizen
600.	Multiple submitters
601.	Multiple submitters
602.	Multiple submitters

Number	From
603.	Multiple submitters
604.	Multiple submitters
605.	Multiple submitters
606.	Margaret and Keith Brady

Public hearings

Date	Participants

6 August 2020	• Secretariat of National Aboriginal and Islander Child Care
	  ○ Richard Weston, Chief Executive Officer
	• Noongar Family Safety and Wellbeing Council
	  ○ Joanne Melva Della Bona, Co-Chairperson
	  ○ Dr Hannah McGlade, Member
	  ○ Glenda Kickett, Member
	• Child and Family Alliance WA
	  ○ Brenda Yelland, State Director
	• Aboriginal Legal Service of Western Australia
	  ○ Kathryn Russell, Managing Lawyer, Family Law Unit
	  ○ Jonathon Reid, Senior Solicitor

	• Catholic Archdiocese of Perth
	  ○ The Most Reverend Timothy Costelloe SDB, Archbishop of Perth
	  ○ Father Vincent Glynn, Episcopal Vicar for Education and Faith Formation
	  ○ Daniel Lynch, Director, Office of the Archbishop
	• Oriental Orthodox Churches of WA
	  ○ The Very Reverend Father Abram Abdelmalek, Senior Parish Priest

	• Western Australian Council of Social Services
	  ○ Chris Twomey, Leader, Policy and Research
	• Wanslea
	  ○ Tricia Murray, Chief Executive Officer
	  ○ Robyn Collard, Practice Leader, Aboriginal Programs
	• Youth Affairs Council of WA
	  ○ Ross Wortham, Chief Executive Officer
	  ○ Stefaan Bruce-Truglio, Policy and Advocacy Officer

Date	Participants
	• Survivors' Support Network in WA o James Parker, Facilitator
10 August 2020	• Australian Christian Lobby o Reverend Peter Abetz, Western Australian State Director

	• Department of Communities
	  o Michelle Andrews, Director General
	  o Jacqueline Littlejohn, Acting Assistant Director General, Aboriginal Outcomes
	  o Audrey Lee, General Manager, Children and Families
	  o Renee Gioffre, General Manager, Royal Commission
	  o Melanie Samuels, Acting Executive Director, Statewide Services, Regional and Remote
	  o Rosemary Williamson, Principal Legislation Officer
	  o Nayantara Gupta, General Counsel, Advisory Services and Legislation

	• Catholic Archdiocese of Perth
	  o Most Reverend Barry Hickey, Emeritus Archbishop of Perth
	  o Sister Kerry Willison, Director of Liturgy, Archdiocese of Perth

APPENDIX 2

FUNDAMENTAL LEGISLATIVE PRINCIPLES

Does the Bill have sufficient regard to the rights and liberties of individuals?

1. Are rights, freedoms or obligations, dependent on administrative power only if sufficiently defined and subject to appropriate review?
2. Is the Bill consistent with principles of natural justice?
3. Does the Bill allow the delegation of administrative power only in appropriate cases and to appropriate persons?
4. Does the Bill reverse the onus of proof in criminal proceedings without adequate justification?
5. Does the Bill confer power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer?
6. Does the Bill provide appropriate protection against self–incrimination?
7. Does the Bill adversely affect rights and liberties, or impose obligations, retrospectively?
8. Does the Bill confer immunity from proceeding or prosecution without adequate justification?
9. Does the Bill provide for the compulsory acquisition of property only with fair compensation?
10. Does the Bill have sufficient regard to Aboriginal tradition and Island custom?
11. Is the Bill unambiguous and drafted in a sufficiently clear and precise way?

Does the Bill have sufficient regard to the institution of Parliament?

12. Does the Bill allow the delegation of legislative power only in appropriate cases and to appropriate persons?
13. Does the Bill sufficiently subject the exercise of a proposed delegated legislative power (instrument) to the scrutiny of the Legislative Council?
14. Does the Bill allow or authorise the amendment of an Act only by another Act?
15. Does the Bill affect parliamentary privilege in any manner?
16. In relation to uniform legislation where the interaction between state and federal powers is concerned: Does the scheme provide for the conduct of Commonwealth and State reviews and, if so, are they tabled in State Parliament?

APPENDIX 3

MANDATORY REPORTS BY CATEGORY OF REPORTER 2015-16 TO 2019-20

Table 4. *Mandatory reports by profession of reporter*

Financial Year	Boarding Supervisor	Doctor	Midwife	Nurse	Police Officer	School Teacher	Total
2019-20	13	521	16	351	1 187	1 589	**3 677**
2018-19	12	518	14	331	1 028	1 296	**3 199**
2017-18	6	452	16	310	1 020	1 301	**3 105**
2016-17	4	434	14	266	947	1 024	**2 689**
2015-16	3	410	14	233	943	829	**2 432**

Source: Department of Communities, answer to question on notice 8, asked at hearing held on 10 August 2020, dated 19 August 2020, p 4 and attachment 4.

APPENDIX 4

STAKEHOLDER CONSULTATION ON MANDATORY REPORTING FOR MINISTERS OF RELIGION

Table 5. *Consultation on scope of the Children and Community Services Bill 2019 and training requirements*

Organisation	Date of consultation
Uniting Church Western Australia	12 September 2019
Anglican Church Diocese of Perth	13 September 2019
Catholic Archdiocese of Perth	13 September 2019
Islamic Council of Western Australia	16 September 2019

Source: Department of Communities, answer to question on notice 10, asked at hearing held on 10 August 2020, dated 19 August 2020, p 5.

Table 6. *Consultation on development of training for ministers of religion*

Organisation	Date of contact	Type of contact
Anglican Dioceses of Perth Bunbury and North West Australia	18 May 2020 28 July 2020 13 August 2020 13 August 2020 13 August 2020	Phone Call Email Meeting Phone Call (Bunbury Diocese) Email
Australian and New Zealand Diocese of the Russian Orthodox Church Outside of Russia	19 February 2020 20 February 2020	Email Email
Australian Christian Churches WA	28 July 2020 29 July 2020	Email Telephone call
Buddhist Council of WA	28 July 2020 3 August 2020	Email Meeting
Catholic Archdiocese of Perth	8 May 2020 18 May 2020 25 May 2020 28 May 2020 4 June 2020 18 June 2020	Email Telephone Call Email Email Email Meeting
Islamic Council of WA	28 July 2020 6 August 2020	Email Email
Presbyterian Church of WA	28 July 2020	Email

Organisation	Date of contact	Type of contact
The Church of Jesus Christ of Latter-day Saints	19 May 2020 19 May 2020 25 May 2020 28 July 2020	Telephone Call Email Email Email
Uniting Church Western Australia	8 May 2020 11 May 2020 18 May 2020 25 May 2020 28 May 2020 28 July 2020 30 July 2020	Email Email Telephone Call Email Email Email Meeting

Source: Department of Communities, answer to question on notice 11, asked at hearing held on 10 August 2020, dated 19 August 2020, p 6-7.

APPENDIX 5

COMPARISON OF ENFORCEMENT PROVISIONS

Table 7. *Comparison of section 195 of the Children and Community Services Act 2004, new Part 10A of the Children and Community Services Bill 2019 and the Child Care Services Act 2007*

Provision in section 195 of the Act (powers of authorised officers)	**Provision in new Part 10A of the Bill (Enforcement)**	**Equivalent provision in *Child Care Services Act 2007***
Section 195(1) – definition of *authorised officer*	No definition – relies on general definition in section 3 (officer designated under section 25)	
Section 195(2) – authorised officer at any reasonable time entering a place where a child is employed or believes on reasonable grounds they may be employed to inspect the place and make inquiries on employment or prospective employment as they consider appropriate	Section 241A – C The powers of entry are exercised by: • an authorised officer for any authorised purpose (investigating any suspected offence under the Act) • an authorised officer or industrial inspector for any authorised purpose (investigating a suspected offence under Part 7 of the Act – Employment of children or monitoring compliance with that Part) The powers of entry are: • to enter a place with consent of the occupier or authorised by entry warrant • to enter a place where a child is employed or the officer believes on reasonable grounds a child is or may be in the future employed, without requiring consent or an entry warrant Section 241D – provides more specific powers after entering a place, including to photograph or film; take any thing for analysis or testing and operating equipment or facilities	Yes – section 43A
Section 195(3) – authorised officer may require any person to answer a question put by an authorised officer regarding the employment or prospective employment of a child	Section 241E – F - increases powers to the giving of information; answering a question or producing a document or record as well as including operating a computer and seizing a record or document for any authorised purpose	Yes – section 43B and C

Provision in section 195 of the Act (powers of authorised officers)	**Provision in new Part 10A of the Bill (Enforcement)**	**Equivalent provision in *Child Care Services Act 2007***
Section 195(4) – if an authorised officer requires a person to answer a question they must inform them they are required to do so	Section 241E(6) – authorised officer must explain it is an offence to contravene a direction to give information, answer a question or produce a record	Yes – section 43B(4) and (5)
Section 195(5) – penalty for (a) refusing to answer a question or (b) knowingly giving a false or misleading answer is a fine of $6 000	Section 241G – penalty for contravening a direction is a fine of $12 000	Yes – section 43N
Section 195(6) – a person is not excused from answering a question on the ground it might incriminate them or render them liable to a penalty but the answer is not admissible in evidence in any civil or criminal proceedings other than proceedings for an offence under section 195(5)(b)	Section 241E(4) – (5) – equivalent provision, except replaces section 195(5)(b) with proceedings for perjury and adds an offence under section 244 (false information in relation to applications, reports or other documents prepared for the purposes of the Act)	Yes – section 43(2)
Section 195(7) – authorised officer may use reasonable force when exercising a power	Section 241I(2) – equivalent provision, except expanded to enable those assisting to use reasonable force	Yes – section 43F(3)
Section 195(8) – authorised officer may be accompanied by a police officer or other person requested by them to provide assistance	Section 241I(1) – equivalent provision (states 'as many people to assist in exercising the power as are reasonably necessary in the circumstances')	Yes – section 43F(2)
Section 195(9) – powers for industrial inspectors are in addition to those under the *Industrial Relations Act 1979*, section 98(3)	Section 241B – equivalent provision	
Not prescribed	Section 241H – authorised officer or industrial inspector may record the exercise of a power including an audiovisual recording	Yes – section 43E
Not prescribed	Section 241J – procedures on seizing things, including the giving of receipts to those in possession and giving them reasonable access	Yes – section 43G
Not prescribed	Section 241K – applies the *Criminal and Found Property Disposal Act 2006* to any thing seized	Yes – section 43H

Provision in section 195 of the Act (powers of authorised officers)	**Provision in new Part 10A of the Bill (Enforcement)**	**Equivalent provision in *Child Care Services Act 2007***
Not prescribed	Sections 241L – M – application for and issue and content of, an entry warrant	Yes – sections 43J and 43K
Not prescribed	Section 241N – refusal of entry warrant – magistrate to record the fact, date and time of and reasons for the refusal	Yes – section 43K(4)
Not prescribed	Section 241O – effect of entry warrant – comes into force when issued by a magistrate	Yes – section 43L

Source – *Children and Community Services Act 2004*, Children and Community Services Amendment Bill 2019 and *Child Care Services Act 2007*.

APPENDIX 6

OFFENCES IN THE CHILDREN AND COMMUNITY SERVICES ACT 2004

Table 8. *Offences in the Children and Community Services Act 2004*

Provision	Offence	Penalty
Section 40(8): Power to keep child under 6 years of age in hospital	A person must not take a child who is being kept in a hospital under subsection (2) from the hospital except with the consent of the CEO or the officer in charge.	A fine of $12 000 and imprisonment for one year.
Section 84(3): Authorised officer may require person to hand over child	A person who is required to hand over a child under subsection (2) must comply with the requirement.	A fine of $12 000 and imprisonment for one year.
Section 102: Leaving child unsupervised in vehicle	A person who has the care or control of a child and who leaves the child in a motor vehicle (as defined in the *Road Traffic (Administration) Act 2008* section 4) without proper supervision for such period or in such circumstances that: (a) the child becomes or is likely to become emotionally distressed; or (b) the child's health becomes or is likely to become permanently or temporarily impaired, is guilty of a crime.	Imprisonment for 5 years. Summary conviction penalty: a fine of $36 000 and imprisonment for 3 years.

Provision	Offence	Penalty
Section 103: Tattooing or branding	(1) A person must not in any manner tattoo or brand any part of the body of a child who has not reached 16 years of age.	A fine of $12 000 and imprisonment for one year.
	(2) A person must not in any manner tattoo or brand any part of the body of a child who has reached 16 years of age unless the person has first obtained the written consent of a parent of the child to tattoo or brand the child in that manner and on that part of the child's body.	A fine of $12 000 and imprisonment for one year.
Section 104A: Body piercing	(2) A person must not carry out body piercing on any of the following parts of the body of a child — (a) the genitals; (b) the anal area; (c) the perineum; (d) the nipples.	A fine of $18 000 and imprisonment for 18 months.
	(4) A person must not carry out body piercing on any other part of the body of a child unless the person has first obtained the written consent of a parent of the child to carry out body piercing on that part of the child's body.	A fine of $12 000 and imprisonment for one year.
Section 104(2): Providing long-term care for young children	A person must not provide care for a young child for longer than the prescribed period unless the person is —(various classes such as the parent; adult relative, etc)[227]	A fine of $12 000 and imprisonment for one year
Section 106: Removing child from State	A person must not, without lawful authority, remove a child, or cause or permit a child to be removed, from the State.	A fine of $24 000 and imprisonment for 2 years.

[227] For full text see *Children and Community Services Act 2004*, s 104(2).

Provision	Offence	Penalty
Section 107: Removing child from place of residence	(2) A person must not, without lawful authority, remove a child from the child's place of residence. (3) A person must not, without lawful authority, counsel, induce or assist a child to leave the child's place of residence.	A fine of $12 000 and imprisonment for one year. A fine of $12 000 and imprisonment for one year.
Section 108: Harbouring child absent from place of residence	A person must not harbour a child if the person knows that the child has left, or has been removed from, the child's place of residence without lawful authority.	A fine of $12 000 and imprisonment for one year.
Section 109: Preventing child's return to place of residence	A person must not prevent the return of a child to the child's place of residence if the person knows that the child has left, or has been removed from, the child's place of residence without lawful authority.	A fine of $12 000 and imprisonment for one year.
Section 110: CEO may prohibit communication with child	(1) The CEO may, by written notice, direct a person not to communicate, or attempt to communicate, in any way with a child specified in the notice. (2) A person who fails to comply with a direction under subsection (1) commits an offence.	A fine of $6 000.

Provision	Offence	Penalty
Section 124B: Duty of certain people to report sexual abuse of children	(1) A person who — (a) is a doctor, nurse, midwife, police officer, teacher or boarding supervisor; and (b) believes on reasonable grounds that a child — (i) has been the subject of sexual abuse that occurred on or after commencement day; or (ii) is the subject of ongoing sexual abuse; and (c) forms the belief — (i) in the course of the person's work (whether paid or unpaid) as a doctor, nurse, midwife, police officer, teacher or boarding supervisor; and (ii) on or after commencement day, must report the belief as soon as practicable after forming the belief.	A fine of $6 000.
Section 124C: Reports under s. 124B, form and content of	(1) A report may be written or oral but if oral the reporter must make a written report as soon as practicable after the oral report is made. (4) A person mentioned in section 124B(2)(b) or (c) (a person approved by the CEO or member of a class of persons approved by the CEO)[228] who receives - (a) a written report must give the report to the CEO as soon as practicable after receiving it; or (b) an oral report must inform the CEO of the contents of the report as soon as practicable after receiving it.	A fine of $3 000. A fine of $6 000.

[228] For full text see *Children and Community Services Act 2004*, s 124B.

Provision	Offence	Penalty
Section 124F(2): Confidentiality of reporter's identity	A person who, in the course of duty, becomes aware of the identity of a reporter, must not disclose identifying information to another person unless — (various reasons, such as disclosure for performing function under the Act)[229]	A fine of $24 000 and imprisonment for 2 years.
Section 137(3): Confidentiality of pre-hearing conference	A person who attends a pre-hearing conference must not disclose any statement made by another person at, or information furnished by another person to, the conference without the leave of the Court or the consent of that other person.	A fine of $12 000 and imprisonment of one year.
Section 141(1): Confidentiality of report	A person who prepares or is given a report must not, without the leave of the Court, disclose information contained in it to another person.	A fine of $6 000.
Section 187(1): Offence to remove certain children from where they live	A person must not, by any conduct carried out within the State, without lawful authority, remove a child from the place where the child lives under — (a) a child protection order, other than a protection order under Part 4; or (b) an interim order.	A fine of $24 000 and imprisonment for 2 years.
190. Child under 15 not to be employed in business etc	(1) A person must not employ a child under 15 years of age in a business, trade or occupation carried on for profit. (3) A parent of a child under 15 years of age must not permit the child to be employed in a business, trade or occupation carried on for profit.	A fine of $24 000. A fine of $24 000.
Section 193: CEO may prohibit or limit employment of child	(5) A person must not employ a child in contravention of a notice. (6) A parent of a child must not permit the child to be employed in contravention of a notice.	A fine of $36 000 and imprisonment for 3 years. A fine of $36 000 and imprisonment for 3 years.

[229] For full text see *Children and Community Services Act 2004*, s 124F.

Provision	Offence	Penalty
Section 194A: CEO may prohibit or limit employment of children in particular business or place	(3) If a notice is given to an employer, the employer must give a copy of the notice to each child who, at the time the notice is given, is employed in the business or place to which the notice relates.	A fine of $6 000.
	(4) A person must not employ a child in contravention of a notice.	A fine of $36 000 and imprisonment for 3 years.
Section 194: False information to employers etc	A child or a parent of a child must not give false or misleading information to an employer or prospective employer of the child about — (a) the age of the child; (b) the matter of whether or not there is a notice in respect of the child under section 193(2); (c) the matter of whether or not there is an exemption in respect of the child under the *School Education Act 1999* section 11(1).	A fine of $6 000.
Section 195(5): Powers of authorised officers	A person must not — (a) refuse or fail to answer a question when required to do so under subsection (3); or (b) in purporting to comply with a requirement under subsection (3), give an answer that the person knows is false or misleading.	A fine of $6 000.
Section 237(2): Restriction on publication of certain information or material	A person must not, except in accordance with a written authorisation given under this section, publish information or material that identifies, or is likely to lead to the identification of, another person (the identified person) as — (various persons, such as a person who is or was a child the subject of an investigation referred to in section 32(1)(d))[230]	A fine of $12 000 and imprisonment for one year

[230] For full text see *Children and Community Services Act 2004*, s 32(1)(d).

Provision	Offence	Penalty
Section 238: Production of departmental records in legal proceedings	(5) A person must not, directly or indirectly, record, disclose or make use of information in a departmental record produced in response to a requirement referred to in subsection (2) other than for a purpose connected with the proceedings. (7) A person referred to in subsection (6) who has been given access to a departmental record by a court or tribunal must not, without the approval of the court or tribunal, make a copy of, or otherwise reproduce, the record.	A fine of $12 000. A fine of $6 000.
Section 240(2): Restrictions on disclosing notifier's identity	A person who, in the course of duty, becomes aware of the identity of a notifier, must not disclose identifying information to another person unless —(various exceptions, such as when the disclosure is made in connection with performing functions under the Act or *Child Care Services Act 2007)*[231]	A fine of $24 000 and imprisonment for 2 years
Section 241(2): Restrictions on disclosing information obtained under this Act	A person to whom this section applies must not, directly or indirectly, record, disclose or make use of information obtained in the course of duty, except — (various exceptions, such as for the purpose of performing functions under the Act)	A fine of $12 000 and imprisonment for one year.
Section 242: Obstruction	A person must not obstruct or hinder a person who is performing or attempting to perform a function under this Act.	A fine of $12 000 and imprisonment for one year.
Section 243: Impersonating assessor or authorised officer	A person must not falsely represent, by words or conduct, that the person or another person is an assessor or an authorised officer.	A fine of $12 000 and imprisonment for one year.

[231] For full text see *Children and Community Services Act 2004*, s 240.

Provision	Offence	Penalty
Section 244: False information in applications etc	A person must not give information orally or in writing in, or in relation to, an application, report or other document prepared for the purposes of this Act that the person knows to be false or misleading in a material respect.	A fine of $6 000.

Source: *Children and Community Services Act 2004*.

GLOSSARY

Term	Definition
ACCO	Aboriginal Community Controlled Organisation
Act	*Children and Community Services Act 2004*
AFLDM	Aboriginal Family-Led Decision-Making
ARO	Aboriginal Representative Organisation
ATSI	Aboriginal and Torres Strait Islander
Bill	Children and Community Services Amendment Bill 2019
CEO	Chief Executive Officer
Committee	Standing Committee on Legislation
Department	Western Australian Department of Communities
FLPs	Fundamental legislative principles
ICCPR	International Covenant on Civil and Political Rights
NFSWC	Noongar Family Safety and Wellbeing Council
Review	2017 statutory review of the *Children and Community Services Act 2004*
Royal Commission	Royal Commission into Institutional Responses to Child Sexual Abuse
SNAICC	Secretariat of National Aboriginal and Islander Child Care
WA	Western Australia
WACOSS	Western Australian Council of Social Services

Standing Committee on Legislation

Date first appointed:

17 August 2005

Terms of Reference:

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

'4. Legislation Committee

4.1 A *Legislation Committee* is established.

4.2 The Committee consists of 5 Members.

4.3 The functions of the Committee are to consider and report on any Bill referred by the Council.

4.4 Unless otherwise ordered, any amendment recommended by the Committee must be consistent with the policy of the Bill.'

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