FIRST SESSION OF THE THIRTY-SIXTH PARLIAMENT

REPORT OF THE
STANDING COMMITTEE ON LEGISLATION

IN RELATION TO THE

CHILD WELFARE AMENDMENT BILL 2001

Presented by Hon Jon Ford MLC (Chairman)

Report 10
March 2002

STANDING COMMITTEE ON LEGISLATION

Date first appointed:

May 24 2001

Terms of Reference:

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

"**1. Legislation Committee**

1.1 A *Legislation Committee* is established.

1.2 The Committee consists of 7 members.

1.3 The functions of the Committee are -

(a) to consider and report on any bill referred by the House;

(b) to review the form and content of the statute book;

(c) to inquire into and report on any proposal to reform an existing law;

(d) to consider and report on a bill referred under SO 230 (c).

1.4 Unless otherwise ordered, the policy of a bill referred under subclause 1.3(a) at the second reading or any subsequent stage is excluded from the Committee's consideration.

1.5 The Committee of its own motion, or on a reference from a Minister, may inquire into and report to the House on any or all aspects, including policy, of a proposal for an agreement or arrangement that, to have effect, would necessitate the enactment of legislation of a type described in SO 230 (c)."

Members as at the time of this inquiry:

Hon Jon Ford MLC (Chairman)
Hon Giz Watson MLC (Deputy Chair)
Hon Kate Doust MLC
Hon Paddy Embry MLC
Hon Adele Farina MLC
Hon Peter Foss MLC
Hon Bill Stretch MLC

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Government Response

This Report is subject to Standing Order 337:

> *After tabling, the Clerk shall send a copy of a report recommending action by, or seeking a response from, the Government to the responsible Minister. The Leader of the Government or the Minister (if a Member of the Council) shall report the Government's response within 4 months.*

The four-month period commences on the date of tabling.

LIST OF ABBREVIATIONS

AASW	Australian Association of Social Workers.
administrative transfer	A transfer of a child protection order by the Director-General under the provisions of the Bill.
Bill	Child Welfare Amendment Bill 2001.
Committee	Standing Committee on Legislation.
CROC	United Nations Convention on the Rights of the Child.
Department	Department for Community Development.
IPP	The 11 Information Privacy Principles contained in the *Privacy Act 1988* (Cth).
NPP	The 10 National Privacy Principles contained in the *Privacy Act 1988* (Cth).
LASECA	Lobby Against Sexual Exploitation of Children in Australia.
Model Bill	Model legislation drafted by the Victorian parliamentary counsel in consultation with a national working party established by the Australian and New Zealand Community Services Ministers' Council and endorsed by that Council in 1999.
NAPCAN	National Association for Prevention of Child Abuse and Neglect (WA).
Position Paper	1996 Position Paper on the Scrutiny of National Schemes of Legislation by the Working Party of Representatives of Scrutiny Committees throughout Australia.
Principal Act	*Child Welfare Act 1947* (WA).
New Legislation	Proposed new modern child welfare legislation to replace the Principal Act which the Minister for Community Development has advised will be introduced in early 2002.
subcommittee	Subcommittee comprising Hon Giz Watson MLC (Convenor) and Hon Kate Doust MLC appointed by the Committee to progress the inquiry into the Bill.
1998 Bill	Child Welfare Amendment Bill 1998.

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EXECUTIVE SUMMARY AND RECOMMENDATIONS

EXECUTIVE SUMMARY

1 The Child Welfare Amendment Bill 2001 (**Bill**) was referred to the Standing Committee on Legislation (**Committee**) on November 6 2001, under Standing Order 230(d) (now Standing order 230A) of the Legislative Council.

2 The Government has plans to implement comprehensive legislation in early 2002 following a complete review of the *Child Welfare Act 1947* (**Principal Act**). Delay in finalising that legislation (**New Legislation**) has resulted in the need, as an interim measure, to make a number of urgent amendments to the Principal Act.

3 The Bill amends the Principal Act in addressing five main issues:

a) inserting the 'best interest of the child' principle (clause 5);

b) redefining the term 'parent' (clause 6);

c) facilitating the exchange of information between agencies (clause 7);

d) inserting warrant provisions (clause 9); and

e) inserting interstate transfer provisions (clause 10), which aspect involves implementation of reciprocal legislation to facilitate a uniform national scheme.

4 The major part of the Bill (clause 10 inserting Part VIII into the Principal Act) implements a national agreement between the governments of Western Australia, other Australian states and territories and New Zealand, for the efficient transfer of child protection orders and proceedings for children who move between jurisdictions.

5 Many matters raised during the Committee's inquiry are currently dealt with by administrative instruction or guidelines or will be addressed in that manner when the Bill is proclaimed. The Committee notes that some of the procedures and practices discussed by the subcommittee and Committee are to be enshrined in the New Legislation.

RECOMMENDATIONS

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

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Recommendation 1: The Committee recommends that the Government give consideration to including in the New Legislation principles indicating factors to be considered when determining the 'best interests of the child'.

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Recommendation 2: The Committee recommends that, in respect of the privacy and security of information obtained by the Department of Community Development and 'public authorities' (as that term is defined in the Bill) pursuant to the provisions of the Bill, the Government give consideration to those matters addressed in the former Legislation Committee's report No 54, in particular Chapter 7 of that report at pages 31 – 36 which are attached as Appendix 7 to this report.

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Recommendation 3: The Committee recommends that the Government give consideration to developing legislation regulating the execution of warrants in relation to children and young persons and in so doing to have regard to the provisions of the *Search Warrants Act 1985* (NSW).

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Recommendation 4: The Committee recommends that the Child Welfare Amendment Bill 2001 be passed without amendment.

CHAPTER 1
INTRODUCTION

REFERENCE

1.1 The Child Welfare Amendment Bill 2001 (**Bill**) was referred to the Standing Committee on Legislation (**Committee**) on November 6 2001, under Standing Order 230(d) (now Standing order 230A) of the Legislative Council.

1.2 The Standing Orders require that the Committee report to the Legislative Council within 30 days of the date that the Bill was read a first time. On November 8 2001 the Legislative Council ordered that the time within which the Committee is to report the Bill to the Legislative Council be extended to not later than March 21 2002.

PROCEDURE

1.3 The Committee appointed a subcommittee comprising Hon Giz Watson MLC (Convenor) and Hon Kate Doust MLC to progress the inquiry into the Bill.

1.4 The subcommittee approached seven stakeholders[1] and placed an advertisement in *The West Australian* on November 10 2001 calling for public submissions on the Bill. The subcommittee also liaised extensively with the Department for Community Development (**Department**).

1.5 The subcommittee reported to the Committee in February 2002.

1.6 The Committee thanks the individuals and organisations that provided evidence and information to the subcommittee and the Committee.

OVERVIEW OF SUBMISSIONS

1.7 The subcommittee received seven responses to the call for pubic submissions. A list of these is attached as Appendix 1. Of the five substantive submissions received:

- One submission was opposed to the Bill: Lobby Against Sexual Exploitation of Children in Australia (**LASECA**).

[1] Stakeholders were identified by the Department for Community Development and included: Aboriginal Legal Service of Western Australia (Inc), Children's Court, Department for Community Development (formerly Department of Family and Children's Services), Department of Justice, Legal Aid WA, Western Australian Council of Social Service and Western Australian Police Service.

- Three submissions were in support of the Bill: The Department of Justice (formerly the Ministry of Justice), Australian Association of Social Workers (**AASW**) and the Department for Community Development.

- One submission was in support of the Bill but raised concerns: The National Association for Prevention of Child Abuse and Neglect (WA) (**NAPCAN**).

1.8 Of the two remaining submissions, the Children's Court of Western Australia advised the subcommittee that the provisions of the Bill were unlikely to have a significant impact on the work of the Children's Court. The Western Australian Police Service did not have any comment on the Bill and advised that administrative matters would be addressed with the Department once the Bill came into operation.

1.9 Matters raised by the submissions involved consideration of :

- Clause 5 (proposed section 3A) – 'best interests of the child' principle;

- Clause 6 (section 4 amended) – 'near relative' and 'parent' definitions;

- Clause 7 (proposed section 10C) - disclosure of relevant information to certain authorities;

- Clause 9 (proposed section 67) - warrants to apprehend certain children; and

- Clause 10 (proposed Part VIIIA) – transfer of child protection orders and proceedings.

1.10 These matters are discussed in chapter 3.

CHAPTER 2
THE BILL AND ITS BACKGROUND

OVERVIEW

2.1 The Bill amends the *Child Welfare Act 1947* (**Principal Act**) in addressing five main issues:

a) inserting the 'best interest of the child' principle (clause 5);

b) redefining the term 'parent' (clause 6);

c) facilitating the exchange of information between agencies (clause 7);

d) inserting warrant provisions (clause 9); and

e) inserting interstate transfer provisions (clause 10), which aspect involves implementation of reciprocal legislation to facilitate a uniform national scheme.

UNIFORM LEGISLATION - INTERSTATE TRANSFER PROVISIONS

Background

2.2 Child protection is the responsibility of the states and territories and jurisdictional problems arise when children who have a child protection order made in one jurisdiction move to another jurisdiction.

2.3 These jurisdictional problems include:[2]

a) The difference in child protection legislation between the various jurisdictions does not provide for consistent case support for the children who move between them.

b) A child protection order made in one jurisdiction is not enforceable in another jurisdiction to which the child has moved.

c) There is also no capacity for child protection proceedings to be transferred between jurisdictions. The need for transfer arises in circumstances where a child relocates interstate after the proceedings commenced. The current process involves the withdrawal of child protection proceedings in the original

[2] Queensland Parliament, Scrutiny of Bills Committee, *Alert Digest Issue No 2 of 2000*, March 14 2000, p. 2.

jurisdiction and the re-commencement of the proceeding in the new jurisdiction – this is costly and time consuming.

2.4 The major part of the Bill (clause 10 inserting Part VIII into the Principal Act) implements a national agreement between the governments of Western Australia, other Australian states and territories and New Zealand, for the efficient transfer of child protection orders and proceedings for children who move between jurisdictions. [3]

2.5 As defined in proposed section 120B in clause 10 of the Bill, a 'child protection order', in relation to a child, means a final order made under a child welfare law in respect of the child that gives specified persons responsibility in relation to the guardianship, custody or supervision of the child.

The legislation

2.6 The reciprocal legislation is designed to allow the efficient transfer of children under the legal protection of one state to the legal protection of another state. It recognises that a child's welfare and protection is best managed by the jurisdiction in which the child is living. Most states and New Zealand have already implemented, or are close to implementing, the reciprocal legislation. [4]

2.7 National legislative schemes have been addressed in a 1996 Position Paper on the Scrutiny of National Schemes of Legislation by the Working Party of Representatives of Scrutiny Committees throughout Australia (**Position Paper**). The Position Paper emphasises that it does not oppose the concept of legislation with uniform application in all jurisdictions across Australia. It does, however, question the mechanisms by which those uniform legislative schemes are made into law and advocates the recognition of the importance of the institution of Parliament.

2.8 National legislative schemes can take a number of forms. Nine different categories of legislative structures promoting uniformity in legislation, each with varying degrees of emphasis on national consistency or uniformity of laws and adaptability have been identified. The legislative structures are summarised at Appendix 2 to this report. [5]

2.9 The scheme to which clause 10 (inserting proposed Part VIII) gives effect, involves enactment by participating jurisdictions of legislation based on model legislation drafted by Victorian parliamentary counsel (**Model Bill**). A feature of this structure of model, or 'template', legislation is the enactment of nearly identical legislation in all

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3 Western Australia, *Parliamentary Debates (Hansard),* Legislative Council, November 6 2001 (Second Reading Speech), p. 5010.

4 *Explanatory Notes to the Child Welfare Amendment Bill 2001*, p. 1.

5 Refer to reports of the former Legislative Assembly Standing Committee on Uniform Legislation and Intergovernmental Agreements (Assembly Committee) See also: *Position Paper on the Scrutiny of National Schemes of Legislation by the Working Party of Representatives of Scrutiny Committees throughout Australia.*

participating jurisdictions. This structure emphasises consistency, assuming the bills pass through each Parliament as originally drafted.

2.10 The origins of the interstate transfer provisions go back over a number of years and involved the previous Government. The decision to develop reciprocal legislation and accompanying protocols was made by the Australian and New Zealand Community Services Ministers' Council in October 1996. At that time Victoria agreed to prepare the Model Bill in consultation with a national working party established by the Council. Western Australia was represented on that working party. [6]

2.11 The Australian and New Zealand Community Services Ministers' Council endorsed the Model Bill in 1999 and agreed that each state, territory and New Zealand would amend their respective child welfare legislation to implement the reciprocal legislation.[7]

2.12 The precise degree of legislative uniformity envisaged by the intergovernmental agreement made by the Australian and New Zealand Community Services Ministers' Council in 1996 is not clear. However, it is to be noted that the proposed Part VIII (inserted by clause 10 of the Bill) is not identical to the Model Bill and appears to have been tailored to the Western Australian context. This may go at least some way towards ameliorating a concern in relation to national schemes of legislation, namely, that its form is predetermined by an agreement amongst the various Executive Governments and is presented to Parliament as a 'given'.

Other legislative responses

2.13 The Committee notes that, at the date of this report, legislation addressing interstate transfer provisions has been enacted in:

- Australian Capital Territory (Chapter 8, ss. 298 – 323 of the *Children and Young People Act 1999* (ACT)).
- Queensland (amendments made to the *Child Protection Act 1999* (Qld)).
- Victoria (amendments made to the *Children and Young Persons Act 1989* (Vic)).
- New Zealand (*Children, Young Persons, and Their Families (Trans-Tasman Transfer of Protection Orders and Proceedings) Amendment Act 1999*, part of the *Children, Young Persons, and Their Families Act 1989* (NZ)).

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6 Western Australia, *Parliamentary Debates (Hansard),* Legislative Council, November 6 2001 (Second Reading Speech), p. 5010.

7 Ibid.

2.14 The Committee's inquiry concentrated on the differences between the Bill and the Model Bill, with some comparative reference to legislation in other states.

Previous bills

Overview of child welfare legislation

2.15 The development of new modern child welfare legislation to replace the Principal Act was commenced but not completed under the previous Government. During the second reading speech, Hon Ljiljanna Ravlich MLC, the Parliamentary Secretary representing the responsible Minister, stated that the delay in finalising that legislation has resulted in the need, as an interim measure, to make a number of urgent amendments to the Principal Act.[8] The Parliamentary Secretary also advised that the Minister for Community Development intends to introduce comprehensive legislation in early 2002 (**New Legislation**).[9]

2.16 During the inquiry, many of the issues raised by the subcommittee with the Department were stated as being addressed in the New Legislation.[10]

1998 Bill

2.17 The Legislation Committee of the 35th Parliament inquired into and reported to the House on the Child Welfare Amendment Bill 1998 (**1998 Bill**) recommending a number of amendments.[11] The 1998 Bill did not proceed through Parliament before prorogation, the general election and change of Government.

2.18 The 1998 Bill provided for the regulation of the operation of a Child Protection Services Register. The register was to be the formal mechanism to improve co-ordination and co-operation across Government agencies in the area of child welfare and focused on information relating to children at risk and persons convicted of an offence involving maltreatment of a child. The 1998 Bill addressed the collection, collation, storage and destruction of and access to information. It also created an offence in respect of unauthorised use and access to information stored on the register and exempted information obtained for use on the register from the access provisions of the *Freedom of Information Act 1992.*

2.19 Proposed Part VIII in clause 10 of the Bill originates from more general matters and uniform principles in relation to interstate transfer issues.

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8 Ibid.

9 Ibid.

10 Letters from the Department to the subcommittee dated January 29 2002 and February 11 2002 (Appendices 3 and 4).

11 Parliament of Western Australia, Legislative Council, Standing Committee on Legislation, *Child Welfare Amendment Bill 1998,* Report No 54 (2000).

2.20 Although the 1998 Bill and this Bill deal with different areas, they both contain provisions addressing problems encountered by some government agencies in exchanging information. This matter is discussed at paragraphs 3.27 to 3.38.

The Protocols

2.21 The implementation and operation of the proposed legislation is assisted by protocols developed between the participating jurisdictions; and between the Department and state, territory and Commonwealth police officers.

Transfer of Child Protection Orders and Proceedings Protocol

2.22 A uniform protocol to provide practical guidelines for the transfer of child protection orders and proceedings between jurisdictions has been implemented. The protocol outlines a process for states that wish to transfer or accept the transfer of a child protection order or proceeding. The protocol emphasises the need for the careful planning of transfers and co-operation between the states.[12]

2.23 The protocol was finalised on October 20 1999 and commenced on November 1 1999. It addresses various issues, including:

- general principles for the transfer of child protection orders and proceedings;
- the transfer of children between New Zealand and Australia;
- the interstate placement of indigenous children;
- the obtaining of consent to a transfer from an interstate department;
- the transfer of a child who is not on a child protection order;
- the confidentiality of information received; and
- the review of the protocol.[13]

2.24 The protocol also provides for consultation prior to amending child protection legislation: "*If a state intends to make significant amendments to its child protection legislation, it should, prior to making those amendments, consult with other states. The consultation may involve distributing a discussion paper, preliminary drafting*

12 *Explanatory Notes:* Child Welfare Amendment Bill 2001, p.1.

13 *Protocol for the Transfer of Orders and Proceedings and Interstate Assistance* October 20 1999, attached to Submission No 1: Department for Community Development.

instructions or an early draft of the bill".[14] A state must also provide information regarding when legislative amendments occur.[15]

Interstate Child Protection Warrants Protocol

2.25 A uniform protocol to provide practical guidelines to departmental and police officers and improve the co-ordination of departmental and police operations with regard to the application for, and execution and implementation of orders resulting from, child protection warrants is being drafted.

2.26 Generally police are responsible for finding a child who is referred to in a child protection warrant, executing that warrant, taking the child into safe custody and seeking various orders from the court. Departmental staff are generally responsible for seeking child protection warrants and providing care to the children who are apprehended consequent to those warrants in accordance with the directions of a magistrate or Justice of the Peace who is able to issue warrants.[16]

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14 Ibid.

15 Ibid.

16 The *Service and Execution of Process Act 1992* (Cth) (**SEPA**) applies to such warrants and enables valid child protection warrants to be executed interstate. If a warrant is executed interstate, it must be in accordance with SEPA. SEPA addresses such issues as who can execute the warrant, taking the apprehended person before the court and the orders that the court can then make: *Draft Interstate Child Protection Warrants Protocol,* November 19 2001, attached to Submission No 1: Department for Community Development.

CHAPTER 3

SPECIFIC CLAUSES OF THE BILL

INTRODUCTION

3.1 The subcommittee liaised extensively with the Department to investigate various provisions of the Bill and where it differed from the Model Bill. Copies of the subcommittee's letters to the Department and the Department's responses are attached as Appendices 3 and 4.

3.2 It is evident from the Department's responses that many matters raised during the inquiry are currently dealt with by administrative instructions or guidelines or will be addressed in that manner when the Bill is proclaimed, for example:

a) How information obtained under proposed section 10C is to be stored and used: clause 7.

b) Procedures for applying for warrants of apprehension: clause 9, proposed section 67.

c) Issues of involvement by the child, the parents, and family when considering an administrative transfer: clause 10 (proposed Part VIIIA), proposed section 120C.

d) Explanation of proposed transfer of child protection order or proceeding to the child, child's parents and persons with a 'direct interest' under the Bill: clause 10, proposed sections 120E and 120I.

e) Confidentiality provisions with regard to information provided under the enabling provisions of the Bill: clause 10, proposed section 120Z.

f) Indigenous child placement principles.

3.3 The Committee notes that the amendments to the Principal Act that are proposed by the Bill are viewed as an "*interim minimal measure*" until the New Legislation is finalised.[17] The Committee notes that some of the procedures and practices discussed by the subcommittee and Committee are to be enshrined in the New Legislation, for example:

a) Issues of involvement by the child, the parents, and family when considering an administrative transfer: clause 10, proposed section 120C.

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[17] Letter from the Department to the subcommittee dated February 11 2002, p.2 (Appendix 4).

b) Matters to have regard to when considering an administrative or a judicial transfer of a child protection order: clause 10, proposed sections 120D and 120I.

c) Matters to have regard to when considering a judicial transfer of a child protection proceeding: clause 10, proposed section 120O.

d) Confidentiality provisions with regard to information provided under the enabling provisions of the Bill: clause 10, proposed section 120Z.

e) Indigenous child placement principles.

3.4 In this Chapter the Committee does not repeat all of the matters discussed with the Department, rather it highlights those matters which the Committee believes need to be addressed in legislation as opposed to administrative guidelines or instructions, or simply wishes to bring to the House's attention. Readers are referred to Appendices 3 and 4 for more detailed discussion of other matters raised by the Bill.

CLAUSE 5 (PROPOSED SECTION 3A) – 'BEST INTERESTS OF THE CHILD' PRINCIPLE

Overview

3.5 The term 'best interests of the child' is used in the United Nations Convention on the Rights of the Child (**CROC**). CROC was adopted in 1989 and ratified by Australia in December 1990. An international treaty does not have the force of law at a state level unless a state Parliament passes it into legislation. However an international treaty has certain legal force in that the courts can take a treaty into account where there are uncertainties or ambiguities with a particular piece of legislation.[18]

3.6 CROC does not explicitly define 'best interests of the child'. The term is "*imprecise, but no more so than the 'welfare of the child' and many other concepts with which the courts must grapple*", said the High Court majority in *Marion's Case*.[19]

3.7 At present Western Australia is the only State in Australia that does not reflect this principle in child welfare legislation.[20] Clause 5 of the Bill rectifies this gap by inserting into the Principal Act proposed section 3A which states:

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18 P. Hanks, P Keyzer and D Creamean, 'Constitutional Law' *Halsbury's Laws of Australia*, para. 90-1660, <www.butterworthsonline.com.au> (site accessed February 19 2002). R Watt and G Dal Pont, 'Statutes' *Halsbury's Laws of Australia*, para. 385-330 <www.butterworthsonline.com.au> (site accessed February 19 2002).

19 *Secretary, Department of Health and Community Services v JWB and SMC* (*Marion's Case*) (1992) 175 CLR 218 at paragraph 75.

20 Western Australia, *Parliamentary Debates (Hansard),* Legislative Council, November 6 2001 (Second Reading Speech), p. 5011.

> ***"3A. Principle – interests of child paramount***
>
> *In performing a function or exercising a power under this Act in relation to a child, a person or the court shall regard the best interests of the child as the paramount consideration."*

3.8 During the second reading speech, Hon Ljiljanna Ravlich MLC, the Parliamentary Secretary representing the responsible Minister, stated that:

> *"The clause will ensure consistency throughout Australian jurisdictions. It will provide legal guidance to the court and practitioners when deciding child protection matters, including those relating to interstate transfer of orders and proceedings."*[21]

Submissions

3.9 The Department of Justice in their submission stated that the changes proposed by the Bill will not cause any difficulties for them. The Department of Justice further stated that the provisions of the Bill relating to the 'best interests of the child' principle have been developed in consultation with the Department of Justice and the Children's Court judiciary, and are considered to be reasonable and proper.[22]

3.10 The AASW in their submission stated that the introduction of the principle 'best interests of the child' is of paramount importance, as it will bring Western Australia in line with other jurisdictions and will provide links in parallel with the Family Court.[23]

3.11 NAPCAN in their submission raise the question of "*on what information will the judgement of the best interest of the child be made?*' and 'strongly suggest' that there should be some guidelines or checklists to ensure that:

- a number of opinions are taken into account; and
- there is a mechanism for accountability, as the standards of what is in the 'best interest of the child' is open to subjective views and application of personal beliefs, which may or may not be guided by up to date education on child development.[24]

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21 Ibid.

22 Submission No 5 dated November 30 2001 from the Department of Justice, p. 1.

23 Submission No 3 undated but received November 29 2001 from AASW, p. 1.

24 Submission No 4 dated November 28 2001 from NAPCAN, p. 1.

3.12 NAPCAN suggest that the opinions to be sought as a matter of course, would be those of the child, possibly via report from a separate representative such as a psychologist/counsellor.[25]

3.13 In their submission the AASW stated that they believe that any representation of children's interests needs to encompass appropriate cultural, educational, psychological, emotional and physical needs. The AASW stated that where children are of sufficient maturity, their wishes should also be respected.[26]

Discussion

3.14 The legislation of other jurisdictions in Australia, differ as to whether they address what a court or other authorised person must have regard to in determining what is 'in the best interests of the child'.[27] For example:

- Relevant legislation in Queensland, NSW and Victoria include the general principle but do not define 'best interests of the child'.

- In South Australia, the legislation does not specifically state how to determine the 'best interests of the child'. However, it does provide that serious consideration must be given to the desirability of a number of factors such as keeping the child within his or her family, and not interrupting unnecessarily the child's education or employment: s. 4 *Children's Protection Act 1993* (SA).

- The *Children and Young People Act 1999* (ACT) includes a section on how to apply the 'best interests' principle.[28] It contains ten matters for consideration and enables other matters to be taken into account. An extract of the Act is at Appendix 5.

- The Commonwealth *Family Law Act 1975* stipulates 12 matters which the court must consider in determining what is in the 'best interests of the child'. These are mandatory considerations and there is flexibility with the inclusion of "*any other fact or circumstances that the court thinks is relevant*": s. 68F *Family Law Act 1975* (Cth) (see Appendix 6).

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25 Ibid.

26 Submission No 3 undated but received November 29 2001 from AASW, p. 1.

27 *Children and Young Persons Act 1989* (Vic), *Children and Young People Act 1999* (ACT), *Community Welfare Act 1983* (NT), *Child Protection Act 1999* (QLD), *Children's Protection Act 1993* (SA), *Children and Young Persons (Care and Protection) Act 1998* (NSW), *Family Law Act 1975* (Cth)

28 Section 13.

3.15 As the Bill does not include any parameters to determine the concept of 'best interests of the child', this matter was explored with the Department who advised the subcommittee:

> *"In Western Australia, 'best interests of the child' are determined according to the individual circumstances and relevant factors of each case, together with the use of common law indications. The Department is of the view that this system works well and provides decision makers with the greatest degree of flexibility to determine the child's best interests.*
>
> *…*
>
> *There is debate as to whether or not provisions detailing what constitutes 'best interests of the child' should be defined in legislation. While the Family Law Act 1975 (Cth), and Children and Young People Act 1999 (ACT) insert such guidelines, there is other successfully operating legislation, (for example, Adoption Act 1994 (WA), Children and Young Persons Act 1989 (Vic)), which does not define 'bests interests of a child' in a prescriptive sense. The Adoption Act 1994 (WA) is administered by the Department for Community Development.*
>
> *The Department's preferred position is that the legislation should not be overly prescriptive. Maximum flexibility needs to be available to decision makers when determining the best interests of a child. Otherwise it may be too restrictive for some cases, as it may not allow consideration of certain factors in a case, which obviously contribute to determining the best interests of the child, but which are not prescribed in the legislation."*[29] [emphasis added]

3.16 The Department does not have a specific checklist or instruction concerning the 'best interests of the child'. The subcommittee was advised that departmental officers have access to professional training, numerous casework guidelines, a detailed Case Practice Manual, Director General Instructions (which detail departmental policy and procedures) and the Administrative Procedures and Approvals in Casework Manual.[30]

3.17 Senior Casework Supervisors are located in each of the Department's geographical zones throughout the State with the responsibility for overseeing quality assurance in

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[29] Letter from the Department to the subcommittee dated January 29 2002, p. 1 (Appendix 3).

[30] Letter from the Department to the subcommittee dated February 11 2002, p. 1 (Appendix 4).

case practice matters and decision making with respect to the best interests of the child.[31]

3.18 The Department has advised the subcommittee that the New Legislation will contain a set of guiding principles that will apply to all care and protection processes including an administrative transfer of a child protection order. [32]

3.19 In the Committee's view the advantages of flexibility must be balanced with measures for openness and accountability. The Committee believes that in the sometimes difficult area of child welfare, where many interests vie to be considered, it is highly desirable that:

- principles indicating factors to be considered when determining the 'best interests of the child' are established; and
- such factors be legislatively enshrined.

3.20 The Committee notes the Department's reticence that prescriptive factors may prevent consideration of other relevant factors. In the Committee's view this concern can be addressed by including a provision similar to that found in the relevant federal and ACT legislation, that is, "*any other fact or circumstances that the* [decision maker] *thinks is relevant*".

3.21 As the precise nature of the principles to be included may require some liaison between government departments and the community, the Committee does not wish to impede progress of this Bill until that occurs.

Recommendation

Recommendation 1:

The Committee recommends that the Government give consideration to including in the New Legislation principles indicating factors to be considered when determining the 'best interests of the child'.

CLAUSE 6 (SECTION 4 AMENDED) - "NEAR RELATIVE" AND "PARENT" DEFINITIONS

Overview

3.22 Clause 6 amends s. 4 of the Principal Act by deleting the definitions of 'near relative' and 'parent' and inserting new definitions. The current definition of 'parent' does not

31 Ibid, p. 1.

32 Ibid, p. 4.

include a father who has never been married to the child's mother. This means that the unmarried father of a child who is the subject of child protection court proceedings is not recognised as a party in the proceedings and cannot give evidence unless called as a witness. The new definition of 'parent' removes the current discrimination against unmarried fathers.

Submissions

3.23 The Department of Justice in their submission agree with the changes proposed by the Bill. The Department advised the subcommittee that the provisions of the Bill relating to redefining the term 'parent', have been developed in consultation with the Department of Justice and the Children's Court judiciary, and are considered to be reasonable and proper.[33]

3.24 AASW in their submission stated that the change in the definition of the term 'parent' is significant. They recognise that family compositions are widely varied and that legislation must reflect the community whilst also promoting equality of opportunity. AASW also stated that they hope that necessary services for fathers will be increased with the redefined roles.[34]

Discussion

3.25 The subcommittee also explored whether the definition of 'parent' in the Bill could extend to same-sex couples, and de facto heterosexual couples. It appears that the definition of 'parent' in the Bill cannot extend to same-sex couples as the Bill stands.

Observation

3.26 The Committee notes the Department's response in relation to the advice that the New Legislation will be consistent with recent law reform amendments to ensure that there are no discriminatory laws with regard to de facto couples and same-sex relationships.[35]

CLAUSE 7 (PROPOSED SECTION 10C) - DISCLOSURE OF RELEVANT INFORMATION TO CERTAIN AUTHORITIES

Overview

3.27 Proposed Section 10C in clause 10 of the Bill provides for the exchange of information between the Director-General of the Department and a 'corresponding authority' or a 'public authority'. The information must be relevant to the health,

33 Submission No 5 dated November 30 2001 from the Department of Justice, p. 1.

34 Submission No 3 undated but received November 29 2001 from AASW, p. 1.

35 Letter from the Department to the subcommittee dated February 11 2002, p. 3 (Appendix 4).

safety or welfare of the child, or the performance of functions under the Principal Act, defined as 'relevant information' by the Bill. The clause will enable increased flexibility for departmental officers when requesting information from other government agencies relating to the protection and welfare of children.

3.28 A 'corresponding authority' and 'public authority' are defined in proposed section 10C(1).

3.29 There is no mandatory requirement to provide the information requested, however, the requested agency may comply with the information request despite any other written law to the contrary: proposed section 10C(3)-(5).

3.30 If the Director-General, a public authority or a corresponding authority discloses information in accordance with proposed section 10C in clause 7 of the Bill then that act is expressly protected by proposed section 10C(5).

3.31 It is proposed that implementation issues for the exchange of information relevant to the protection of children be addressed through the development of protocols between the Department and other government agencies.

3.32 The subcommittee was advised that, from time to time, at a practice level, some Government departments and agencies have been reluctant to release information that would assist the Department in its efforts to protect children, particularly in relation to investigations of child maltreatment allegations.[36] For example, a protection application may need to be made in the Children's Court and there may be some information that the Department would like to place before the court. However the Department may not be able to do so because of a legislative restriction applying to the WA Police Service that prevents information sharing. Proposed section 10C in clause 7 of the Bill is specifically aimed at addressing these kinds of problems.

Submissions

3.33 AASW, in their submission, stated that the increased ability to exchange information between corresponding or public authorities will promote a more holistic approach to successful planning for a child's wellbeing. It will enable officers to make more informed decisions with the increased availability of information.[37]

3.34 NAPCAN raised the question of the interaction of the Bill with the new privacy legislation.[38]

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36 Letter from the Department to the subcommittee dated January 29 2002, p. 2 (Appendix 3).

37 Submission No 3 undated but received November 29 2001 from AASW, p. 1.

38 Submission No 4 dated November 28 2001 from NAPCAN, p. 2.

Discussion

3.35 Proposed section 10C(5)(b) and (c) enables disclosure of 'relevant information' without imposing a requirement to obtain consent to use or disclose that information. It is Commonwealth (not State) legislation – the *Privacy Act 1988* (Cth) - which imposes a requirement on agencies of the Commonwealth and the Australian Capital Territory to comply with 11 Information Privacy Principles (**IPP**). From December 2001 the Commonwealth extended the *Privacy Act 1988* to require *private organisations* to comply with 10 National Privacy Principles (**NPP**). The IPP and NPP do not bind state or territory authorities: s. 6C *Privacy Act 1988* (Cth).

3.36 Western Australia does not currently have a privacy regime. Various confidentiality provisions cover government agencies and some of the privacy principles are provided for in the Freedom of Information legislation.

3.37 The Committee observes that the range of information which may be exchanged under proposed section 10C and thus stored, collated and accessed in some form (for example, a register/registers), is very wide and that the Bill does not address matters covered by the 1998 Bill. The 1998 Bill expressly addressed the collection, collation, storage and destruction of and access to information on the register created and identified by that bill. It also created an offence in respect of unauthorised use and access to information stored on the register and exempted information obtained for use on the register from the access provisions of the *Freedom of Information Act 1992*.

3.38 As the Bill does not include any parameters as to how information obtained under proposed section 10C would be stored and used, this matter was explored with the Department who advised the subcommittee:

> *"It is not intended to replicate the objectives or purpose of the 1998 Amendment Bill. Its aim is to remove barriers to communication and information exchange between public authorities when general concerns exist for a child's safety and health. It is emphasised that proposed clause 10C does not authorise release of information to non-government organisations or third party individuals. Further, it is only an enabling provision for government agencies to exchange information. Government agencies do not have to provide the information requested and have the opportunity to discuss any concerns with the Department prior to making a decision whether or not to release the actual information.*
>
> *It is planned to implement proposed section 10C administratively through expansion of existing reciprocal guidelines with relevant public authorities.*

> *Information obtained under proposed section 10C will be recorded and stored in Department for Community Development files, in accordance with the Department's administrative instructions. In addition, Public Sector Administrative Instruction 711 (covering all of government) prevents a public officer from disclosing information except in the course of his or her official duty and with the express permission of the chief executive officer."*[39]

Observations

3.39 The Committee believes that inter-agency co-operation and information sharing should be encouraged so long as appropriate safeguards are in place for the secure passage of confidential information between agencies and individuals within those agencies.

3.40 The Committee notes that the Department proposes to develop protocols for the exchange of information with other government agencies. However, the Committee is of the view that there is a potential for information to be collated into a number of forms including registers of the type addressed in the 1998 Bill. In such circumstances the Committee recommends that the Government give consideration to those matters addressed in the former Legislation Committee's report No 54, in particular Chapter 7 of that report at pages 31 – 36 which are attached as Appendix 7 to this report. However the Committee does not recommend that the consideration of such matters impede the progress of this Bill.

3.41 This issue has raised and continues to raise significant questions concerning privacy and security of information. The Committee notes that the Department has indicated that the New Legislation will contain confidentiality provisions and that the Department will rely on administrative instructions and provisions until such time as the New Legislation is introduced.[40]

Recommendation

Recommendation 2:

The Committee recommends that, in respect of the privacy and security of information obtained by the Department of Community Development and 'public authorities' (as that term is defined in the Bill) pursuant to the provisions of the Bill, the Government give consideration to those matters addressed in the former Legislation Committee's report No 54, in particular Chapter 7 of that report at pages 31 – 36 which are attached as Appendix 7 to this report.

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39 Letter from the Department to the subcommittee dated January 29 2002, p. 3 (Appendix 3).

40 Ibid, p. 10.

CLAUSE 9 (PROPOSED SECTION 67) - WARRANT TO APPREHEND CERTAIN CHILDREN

Overview

3.42 Clause 9 inserts new ss. 67 and 68 which provide for a departmental officer or a police officer to apply to a magistrate of the Children's Court for a warrant to apprehend a child who is under the guardianship of the Director-General of the Department and who has been unlawfully taken. The provisions also cover children who have been apprehended by the Department as being in need of care and protection, where the court proceedings have not yet been finalised. This will enable the return of a child, under the guardianship of the Director-General, who has run away or been unlawfully taken. The warrant may be obtained remotely, including by telephone, fax, email or radio.

3.43 The Explanatory Notes state that:

> *"Warrant provisions are important to assist officers in apprehending children who may have run away or been unlawfully taken. Such provisions are currently not available in the Child Welfare Act 1947."*[41]

3.44 The provision will operate within Western Australia and outside of Western Australia when used in association with the *Service and Execution of Process Act 1992* (Cth).

Submissions

3.45 The Department of Justice in their submission stated that whilst the provisions of the Bill concerning applications for warrants of apprehension have implications for the Children's Court in terms of workload, it is anticipated that the number of such applications will be minimal. Procedures will be developed for dealing with such applications with the Department.[42]

3.46 The Children's Court of Western Australia advised the subcommittee that the provisions of the Bill were unlikely to have a significant impact on the work of the Children's Court.[43]

3.47 General concerns about the warrant provisions were also raised by LASECA.

3.48 In relation to the warrant provisions, NAPCAN in their submission raised two issues:

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41 *Explanatory Notes:* Child Welfare Amendment Bill 2001, p. 3.

42 Submission No 5 dated November 30 2001 from the Department of Justice, p. 1.

43 Submission No 6 dated November 29 2001 from the Children's Court of Western Australia, p. 1.

a) When a warrant to apprehend a child is granted and the child is hidden or removed so that the apprehension order cannot be implemented, that a penalty should be imposed, for example, a warrant for the arrest of the offender and/or a substantial fine (refer to paragraphs 3.89 - 3.92); and

b) the need for an advocate (independent from the Department and other parties such as Legal Aid) to assist in the process of appealing against a court decision.[44]

An independent advocate for the child

Discussion

3.49 This issue raised by NAPCAN is outside the scope of the Committee's inquiry into the Bill.

3.50 The Committee notes that there is currently a pilot project -"The Columbus Project" - being conducted in Western Australian courts. The Department has advised that the issue of legal representation for children in care and protection proceedings will be addressed in the New Legislation.[45]

Execution of warrant

Discussion

3.51 The Committee notes that it is common for legislation to place the onus on the person exercising a warrant to produce the warrant *prior* to executing its powers. In contrast, the Bill states that the warrant shall be produced upon request: proposed section 67(6)(b).

3.52 Under the Bill, once entry has been gained to premises with a warrant, an officer has significant powers of search and apprehension.[46]

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44 Submission No 4 dated November 28 2001 from NAPCAN, p. 2.

45 Letter from the Department to the subcommittee dated February 11 2002, p. 4 (Appendix 4).

46 For example a warrant authorises an officer (s. 67(5)):

- to enter, at any time, any place where the officer reasonably suspects the ward or child to be;
- to search the place for the purposes of finding the ward or child;
- to remain at the place for as long as the officer considers reasonably necessary to find the ward or child; and
- if the ward or child is found, to apprehend the ward or child and take the ward or child to such place as the Director-General directs.

Pursuant to (s. 67(6), (7)), when exercising the warrant the officer may use reasonable force and assistance; shall produce the warrant if asked to do so by a person at the place where the warrant is, or is to be, executed; and may be accompanied by a police officer.

3.53 The subcommittee was advised that the Department's policy is to have the greatest amount of flexibility so that warrants can be validly executed whether or not anyone other than the child is at home and whether or not the warrant was shown (unless the occupier asked to see the warrant).[47]

3.54 The Department also cited several Acts that contain examples where authorities or warrants need only be produced upon request.[48]

3.55 The Committee notes, with the exception of s. 232 of the Criminal Code (general duty of person executing any process or warrant to have it with him, and to produce it if required), that most of the Acts cited by the Department deal with the inspection of books, records or equipment.

3.56 The subcommittee examined other states' legislation and noted that most child protection legislation contains provisions for the removal of children without a warrant where a certain threshold test is satisfied, for example, "*in immediate risk of serious harm*".[49] Certain legislative requirements must then be met, for example, notification to the parents of the apprehension of the child and the requirement to bring the child before the court within a certain period of time.

3.57 The Committee notes that the Principal Act also contains provisions enabling the apprehension of children without a warrant in certain circumstances: s. 29 (power to apprehend child in need of care and protection without warrant); s. 46 (power to apprehend absconders without warrant); and s. 138B (apprehending a child without warrant).

3.58 The Committee also notes that under the relevant NSW legislation, when warrants are issued for the apprehension of children subject to the care of the Minister, the provisions of Part 3 of the *Search Warrants Act 1985* (NSW) must be complied with.[50] The NSW legislation enables warrants to be obtained by remote communication

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47 Letter from the Department to the subcommittee dated January 29 2002, pp. 2 and 3 (Appendix 3).

48 For examples refer to ibid, p. 3, Appendix 3.

49 *Children and Young Persons (Care and Protection) Act 1998* (NSW), ss. 43 and 233.

50 Section 94 *Children (Care and Protection) Act 1987* (NSW); ss. 233 and 234 *Children and Young Persons (Care and Protection) Act 1998* (NSW).

devices and imposes certain requirements which must be met when executing a warrant.[51]

3.59 The Committee considers that examples of the existence of provisions in legislation of a requirement to produce a warrant only upon request does not necessarily mean that it is an appropriate practice in every circumstance.

3.60 The Committee is of the view that, in the sometimes difficult area of child welfare, where many interests vie to be considered, it is highly desirable that guidelines are developed in relation to the execution of such warrants.

3.61 The Committee notes the Department's position that it desires the greatest amount of flexibility when executing such warrants. In the Committee's view the department's concerns might be addressed in any legislative standard by including provisions similar to those found in the *Search Warrants Act 1985* (NSW).

3.62 However the Committee recognises that matters relating to the execution of warrants may require some liaison between relevant government departments and the community and are outside the scope of the Committee's immediate inquiry. Furthermore, the Committee does not wish to impede the progress of this Bill while such discussions occur.

Recommendation

Recommendation 3:
The Committee recommends that the Government give consideration to developing legislation regulating the execution of warrants in relation to children and young persons and in so doing to have regard to the provisions of the *Search Warrants Act 1985* (NSW).

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[51] For example, a person executing a search warrant shall:

- before entry onto the premises, announce that the persons is authorised by the search warrant to enter and give the occupier the opportunity to allow entry. Compliance with this requirement is not required if, on reasonable grounds, immediate entry is required to ensure that the effective execution of the warrant is not frustrated: s. 15A *Search Warrants Act* (NSW);
- upon entry into or onto the premises, as soon as practicable thereafter serve a prescribed notice on a person over the age of 18 , or if not present, on the occupier of the premises. Service of such notice may be postponed by the justice if satisfied that there are reasonable grounds for so doing: s. 15 *Search Warrants Act 1985* (NSW); and
- produce the warrant for inspection if requested to do so: s. 16 *Search Warrants Act 1985* (NSW).

The NSW legislation also sanctions the use of 'reasonable force' in execution of the warrant and contains restrictions on the execution of warrants at night: ss. 17 - 19 *Search Warrants Act 1985* (NSW).

CLAUSE 10 (PROPOSED PART VIIIA) – TRANSFER OF CHILD PROTECTION ORDERS AND PROCEEDINGS

Overview

3.63 Clause 10 of the Bill inserts proposed Part VIII into the Principal Act and provides for the transfer of child protection orders and proceedings between Western Australia and another state or a territory of Australia or between Western Australia and New Zealand so that children who are in need of protection may be protected despite moving from one jurisdiction to another; and so as to facilitate the determination of court proceedings relating to the protection of a child.

3.64 The inability to effectively transfer child protection *orders* means that children may be subject to Western Australian child protection orders but are permanently placed interstate, for example where the best placement for a child under guardianship may be with extended family members who live in another state. Such orders are difficult to administer or supervise. In such situations it may be difficult for the Department to provide the child with an appropriate level of support and assistance.

3.65 Similarly, the inability to effectively transfer child protection *proceedings* means that the Children's Court often cannot appropriately address matters where the child is only temporarily located in Western Australia and a child protection proceeding is before the Children's Court in Western Australia.

3.66 The Bill provides for two types of transfers of child protection *orders*:

- administrative transfers by the Director-General of the Department (proposed sections 120C – 120F); and
- judicial transfers by the Children's Court (proposed sections 120G – 120L).

3.67 Child protection *proceedings* may only be transferred by the Children's Court upon application by the Director-General of the Department and if the relevant interstate officer has consented in writing to the transfer (proposed ss 120M – 120Q).

Submissions

3.68 The Department of Justice in their submission stated that the changes proposed by the Bill will not cause any difficulties for them and further that the provisions of the Bill in relation to interstate transfer have been developed in consultation with the Department of Justice and the Children's Court judiciary, and are considered to be reasonable and proper.[52]

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[52] Submission No 5 dated November 30 2001 from the Department of Justice, p. 1.

3.69 AASW in their submission acknowledged that, currently, interstate transfers are problematic for relevant staff of the Department and that it is anticipated that the proposed changes will promote more streamlined strategies for transfers and jurisdictional communication.[53]

CLAUSE 10 (PROPOSED PART VIIIA) – PROPOSED SECTIONS 120C – 120F: ADMINISTRATIVE TRANSFERS OF CHILD PROTECTION ORDERS

Proposed section 120C – When Director-General may transfer order: consent

Discussion

3.70 Proposed section 120C(1) lists three factors which must be met when the Director-General may make a transfer of a child protection order ("**administrative transfer**"), including the consent of the relevant interstate officer. The Model Bill lists a further factor which is missing from the Bill – that is, depending on the type of order, the consent of the child's parents and that of any other person who is granted access to the child under the order (clauses 3(1)(d) and 4 of the Model Bill).

3.71 The subcommittee considered four other states' provisions with regard to whether consent is required for administrative transfers:

- In New South Wales and South Australia the relevant legislation does not require consent of the child or the child's parents to an administrative transfer.[54]

- In Queensland and Victoria the relevant legislation provides that the child protection order may not be transferred unless the child's parents consent.[55]

3.72 In considering these matters the principles of 'natural justice' were regarded.[56] It is conceivable that, depending on the type of order, a child's parent would have a right and interest in the transfer of an order to do with their child. In this respect it is noted that the Bill provides for an ability to appeal a decision once it has been made.

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53 Submission No 3 undated but received November 29 2001 from AASW, p. 2.

54 *Children's Protection Act 1993* (SA) s54(4): the Minister must give the guardians of the child written notice of any transfer of guardianship or custody.

55 *Child Protection Act 1999* (Qld) s209; *Children and Young Persons Act 1989* (Vic). The Victorian legislation goes further and provides that a child may oppose such order and is entitled to legal representation in relation to the application: Schedule 2 clause 3, *Children and Young Persons Act 1989* (Vic).

56 Natural justice equates to fairness between parties – what is required to achieve fairness depends on the circumstances of each case. Generally when a decision is to be made which will affect the rights, interests or legitimate expectations of a person, that person is to be accorded the procedural fairness of knowing about the pending decision and having an opportunity to make a submission. The rules of natural justice are variable according to the context in which the decision-maker is acting.

3.73 The subcommittee explored these issues with the Department who advised that:

> *"Child welfare legislation in other states has a range of child protection orders that can be imposed by the court. For example, some orders enable the parents to retain parental responsibility and others enable access rights by law. The Child Welfare Act 1947 does not have such flexible options. A child protection order granted by the Children's Court of Western Australia effectively transfers guardianship of the child from the parents to the Director-General for the duration of the order. Parents are not afforded legal access rights under such orders.*
>
> *Issues of involvement by the child, the parents, and family when considering an administrative transfer will be addressed administratively through case practice procedures.*
>
> *The Department is currently developing replacement legislation that will address the obvious inadequacies of the Child Welfare Act 1947. The administrative transfer provisions in the Amendment Bill will subsequently be modified for inclusion in the new replacement legislation.*
>
> *Natural justice issues are addressed administratively as part of the case planning process."*[57]

3.74 The Department has advised the subcommittee that the New Legislation will:[58]

a) provide for a wider range of child protection orders;

b) contain a set of guiding principles which will apply to all care and protection processes including an administrative transfer of a child protection order;

c) will emphasise the importance of a child's involvement in decisions concerning him or her; and

d) will specifically provide for parental consent to the transfer of supervision orders.

Observation

3.75 The Committee notes that parental consent will be addressed when the New Legislation expands the types of orders which can be made in Western Australia.

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[57] Letter from the Department to the subcommittee dated January 29 2002, p. 4 (Appendix 3).

[58] Letter from the Department to the subcommittee dated February 11 2002, p. 4 (Appendix 4).

CLAUSE 10 (PROPOSED PART VIIIA) – PROPOSED SECTIONS 120G – 120L: JUDICIAL TRANSFERS OF CHILD PROTECTION ORDERS

Overview

3.76 Subdivision 2 of Division 2 of proposed Part VIIIA contains provisions giving jurisdiction to the Children's Court to order the transfer of a child protection order to a participating state on the application of the Director-General.

3.77 The court may make an order that is different to the order that exists at the time of transfer. It is, however, important to note that before the Children's Court is able to transfer a child protection order, the Court needs to determine that the "*relevant interstate officer has consented in writing to the transfer and to the proposed terms of the order to be transferred*" (s. 120G(c)). If the interstate officer does not provide the consent, the Court would not have the power to review the decision of the interstate officer to refrain from granting such consent.

3.78 The Director-General might choose to apply for judicial transfer as opposed to ordering an administrative transfer:

a) if the order could not be transferred administratively because a person who was required to consent (for example, parents) did not do so (this is not presently relevant to Western Australia);

b) even if consent was not required, in complex cases where there is dispute with the child's parents; [59]

c) if it was necessary to obtain an order in the receiving state which was *not similar* to the order currently existing (a prerequisite to an administrative transfer under s. 120C(1)(a));[60] or

d) if it was otherwise appropriate to take the matter to court (for example, the decision may be subject to review).

Proposed section 120I – Court to have regard to certain matters

Discussion

3.79 Proposed section 120I sets out matters that the Children's Court must have regard to when determining whether to transfer a child protection order to another state.

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59 Letter from the Department to the subcommittee dated January 29 2002, p.6 (Appendix 3).

60 Ibid.

3.80 The Model Bill legislatively sets out further matters that the [Director-General] must have regard to when determining whether to transfer a child protection order by reference to:

a) matters in s. 87 (1) of the *Children and Young Person's Act 1989* (Vic);[61] and

b) any information given to the court by the [secretary] under that person's obligation to inform the court of certain matters in relation to sentencing orders in force in respect of a child, or criminal proceeding pending against a child.

3.81 Similar guidelines are absent from the Bill. The subcommittee canvassed these matters with the Department who advised:

a) When making a decision for a transfer of a child protection order the Court would have regard to the 'best interests of the child' principle. Further assistance is provided to the Children's Court by proposed sections 120I(a) and (b).[62]

b) The Principal Act does not have an equivalent provision to the sections of the *Children and Young Person's Act 1989* (Vic) which can be cross referenced in the Bill. The New Legislation being developed by the Department will address this issue and the transfer provisions will be modified accordingly. [63]

c) Guidelines will be developed to provide for the explanation of the purpose, nature and implications of the proposed transfer of a child protection order to the child and the child's parents.[64]

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61 For example: the need to protect children from harm and to protect their rights and to promote their welfare; and the need to give the widest possible protection and assistance to the family as the fundamental group unit of society and, accordingly, ensure that intervention into family life should be to the minimum extent that is necessary to secure the protection of the child; the need to strengthen and preserve the relationship between the child and the child's family; the effect of the finding or order on the stability of family relationships and the welfare and interests of the child; the need, when the child is removed from his or her family, to ensure that, if there is a conflict between the interests of the child and some other person, the welfare and interests of the child are the paramount considerations; the need to consider any wishes expressed by the child and give those wishes such weight as the Court considers appropriate in the circumstances; and the need to ensure that a child is only removed from his or her family if there is an unacceptable risk of harm to the child and so on.

62 Letter from the Department to the subcommittee dated January 29 2002, pp. 4 and 5 (Appendix 3).

63 Ibid, p.5.

64 Ibid.

Observation

3.82 The Committee notes that the New Legislation is to address the criteria to be considered by the Court when making a decision to order a judicial transfer of a child protection order.

CLAUSE 10 (PROPOSED PART VIIIA) – PROPOSED SECTIONS 120M – 120Q: JUDICIAL TRANSFERS OF CHILD PROTECTION PROCEEDINGS

Overview

3.83 Division 3 of proposed Part VIIIA contains provisions giving jurisdiction to the Children's Court to order the transfer of a child protection proceeding pending in the Children's Court to a participating state on the application of the Director-General, provided that the relevant interstate officer has consented to the transfer in writing.

3.84 Before the Children's Court is able to transfer a child protection order, the Court needs to determine that the relevant interstate officer has consented in writing to the transfer and to the proposed terms of the order to be transferred (proposed section 120M(b)). If the interstate officer does not provide the consent, the Court would not have the power to review the decision of the interstate officer to refrain from granting such consent.

Proposed section 120O – Court to have regard to certain matters

Discussion

3.85 Proposed section 120O sets out matters that the Children's Court must have regard to when determining whether to transfer a child protection proceeding to another state.

3.86 The court is required by the Bill to have regard to information given to the Court by the Director-General under that person's obligation to inform the court of certain matters in relation to sentencing orders in force in respect of a child, or criminal proceedings pending against a child: proposed section 120O(2). This is absent from the similar provision relating to judicial transfer of child protection *orders*.

3.87 The subcommittee canvassed these matters with the Department who advised:

a) When making a decision for a transfer of a child protection proceeding, the Court would have regard to the 'best interests of the child' principle. Further assistance is provided by proposed section 120O and by the *Protocol for the Transfer of Child Protection Orders and Proceedings and Interstate Assistance*.[65]

[65] Ibid, p.6.

b) The Principal Act does not have an equivalent provision to those contained within sections of the *Children and Young Person's Act 1989* (Vic) which can be cross referenced in the Bill. The New Legislation being developed by the Department will address this issue and the transfer provisions will be modified accordingly. [66]

c) Guidelines will be developed to provide for the explanation of the purpose, nature and implications of the proposed transfer of a child protection order to the child and the child's parents.[67]

Observation

3.88 The Committee notes that the New Legislation is to address the criteria to be considered by the Court when making a judicial transfer of a child protection proceeding.

CREATION OF AN OFFENCE AND PROTECTION AGAINST DOUBLE JEOPARDY

Discussion

3.89 The Model Bill contains provisions, absent from the Bill, relating to:

- creation of an offence if a person without lawful authority withdraws a child from the place in which the child had been placed under a child protection order. Commentary in the Model Bill on the provisions notes that it would be desirable for each jurisdiction to adopt the offence provision, but that adoption is not mandatory; and

- protection against double jeopardy. Protection against double jeopardy may take the form that if conduct constitutes an offence under two or more laws, a person who is convicted, found guilty or acquitted of the offence under one law is not liable to be prosecuted for the offence under another law.

3.90 In relation to whether or not to impose a penalty the Department advised the subcommittee that:

> *"The intent of the provision is the location and return of the child rather than the imposition of criminal sanctions against a person who has unlawfully taken the child. In the vast majority of cases, such a person is an aggrieved parent or relative of the child. Wherever possible, the Department endeavours to work co-operatively with the child's family with the ultimate objective of returning the child to the*

66 Ibid.

67 Ibid, p.7.

> *family. The imposition of criminal sanctions can be counter productive to achieving this objective.*
>
> *Existing sections 125 (Offence of interfering with wards or children placed under control of the Department) and 142 (General Penalty) of the Child Welfare Act 1947 gives the Department some flexibility to seek criminal sanctions when considered appropriate in specific cases."*[68]

3.91 The Committee notes that Western Australia has a provision (s. 125 of the Principal Act) that prohibits the removal of a child from the custody or care of a person who has that custody or care pursuant to the child protection legislation.

3.92 The subcommittee was advised by the Department that a number of other states have not included these provisions and that:

> *"These provisions* [contained in the Model Bill regarding the creation of an offence and protection against double jeopardy] *do not refer to the interstate transfer of child protection orders and proceedings per se but to interstate applicability of offences in relation to non-transferred orders. Due to the legal complexity (including matters of extra-territorial application) of these provisions and their potential interaction with current provisions in Part IX of the Child Welfare Act 1947, it was decided that these provisions would be included in the new replacement legislation being drafted by the Department."*[69]

Observation

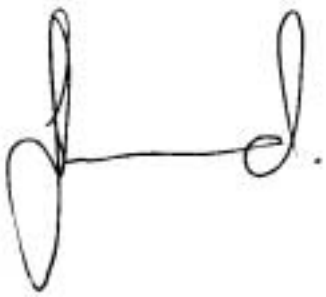
3.93 The Committee notes that the New Legislation will address issues raised by the Model Bill relating to the creation of certain offences and protection against double jeopardy.

Recommendation

Recommendation 4: The Committee recommends that the Child Welfare Amendment Bill 2001 be passed without amendment.

68 Ibid, p.3.

69 Ibid.



Hon Jon Ford MLC
Chairman

Date: March 12 2002

APPENDIX 1

LIST OF SUBMISSIONS

No	Author	Date
1	The Department for Community Development	November 13 2001
2	Lobby Against Sexual Exploitation of Children in Australia	November 28 2001
3	Australian Association of Social Workers	undated but received November 29 2001
4	National Association for Prevention of Child Abuse and Neglect (WA)	November 28 2001
5	Department of Justice (formerly Ministry of Justice)	November 30 2001
6	Children's Court of Western Australia.	November 29 2001
7	Western Australian Police Service	December 5 2001

APPENDIX 2

IDENTIFIED STRUCTURES FOR UNIFORM LEGISLATION

The former Legislative Assembly Standing Committee on Uniform Legislation and Intergovernmental Agreements identified and classified nine legislative structures relevant to the issue of uniformity in legislation. A brief description of each is provided below.

Structure 1: *Complementary Commonwealth-State or Co-operative Legislation*. The Commonwealth passes legislation, and each State or Territory passes legislation which interlocks with it and which is restricted in its operation to matters not falling within the Commonwealth's Constitutional powers.

Structure 2: *Complementary* or *Mirror Legislation*. For matters that involve dual, overlapping, or uncertain division of constitutional powers, essentially identical legislation is passed in each jurisdiction.

Structure 3: *Template, Co-operative, Applied* or *Adopted Complementary Legislation*. Here a jurisdiction enacts the main piece of legislation, with the other jurisdictions passing Acts which do not replicate, but merely adopt that Act and subsequent amendments as their own.

Structure 4: *Referral of Power*. The Commonwealth enacts national legislation following a referral of relevant State power to it under s 51 (xxxvii) of the Australian Constitution.

Structure 5: *Alternative Consistent Legislation*. Host legislation in one jurisdiction is utilised by other jurisdictions which pass legislation stating that certain matters will be lawful in their own jurisdictions if they would be lawful in the host jurisdiction. The non-host jurisdictions cleanse their own statute books of provisions inconsistent with the pertinent host legislation.

Structure 6: *Mutual Recognition*. Recognises the rules and regulation of other jurisdictions. Mutual recognition of regulations enables goods or services to be traded across jurisdictions. For example, if goods or services to be traded comply with the legislation in their jurisdiction of origin they need not comply with inconsistent requirements otherwise operable in a second jurisdiction, into which they are imported or sold.

Structure 7: *Unilateralism*. Each jurisdiction goes its own way. In effect, this is the antithesis of uniformity.

Structure 8: *Non-Binding National Standards Model*. Each jurisdiction passes its own legislation but a national authority is appointed to make decisions under that legislation. Such decisions are, however, variable by the respective State or Territory Ministers.

Structure 9: *Adoptive Recognition*. A jurisdiction may choose to recognise the decision making process of another jurisdiction as meeting the requirements of its own legislation regardless of whether this recognition is mutual.

APPENDIX 3

LETTER FROM THE SUBCOMMITTEE TO THE DEPARTMENT DATED DECEMBER 21 2001 AND THE DEPARTMENT'S REPLY DATED JANUARY 29 2002

Sent by courier
Wed Dec 2 2002

WESTERN AUSTRALIA

STANDING COMMITTEE ON LEGISLATION

SUBCOMMITTEE ON THE CHILD WELFARE AMENDMENT BILL 2001

Our Ref: 3601.cwa

Ms Jane Brazier
Director General
Department for Community Development, Family & Children's Services
189 Royal Street
EAST PERTH WA 6004

For the attention of: Ms Tara Gupta, Director Legal Services

Dear Ms Brazier

Inquiry into Child Welfare Amendment Bill 2001 (Bill)

The subcommittee has considered the Bill in light of submissions received and the Model Bill attached to the Department's letter dated November 13 2001. The subcommittee seeks the Department's comment on a number of issues that have arisen. Those are set out in the attached list.

It is normal practice for Legislative Council standing committees to authorise the publication of submissions (including correspondence) at some stage during its inquiry. These documents are then available to the public on request. It is important that any request to prohibit publication of all or part of the Department's response be attached when it is lodged. State why you want it confidential. If you want part of the response kept confidential please put that part on a separate page(s). The subcommittee will consider requests for confidentiality, but retains the power to publish any response. The Legislative Council may also authorise publication.

As there is a limited period in which the review of the Bill must be completed, the subcommittee would appreciate your response by **5.00pm** on **Friday January 25 2002**. If you are unable to respond by that date, please contact the Committee Clerk, Ms Jan Paniperis on 9222 7400.

Yours sincerely

G. Watson

Hon Giz Watson MLC
Convenor of subcommittee

December 21 2001

Enc. List of questions

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LEGISLATIVE COUNCIL STANDING COMMITTEE ON LEGISLATION
SUBCOMMITTEE ON THE CHILD WELFARE AMENDMENT BILL 2001

QUESTIONS FOR THE DEPARTMENT FOR COMMUNITY DEVELOPMENT, FAMILY AND CHILDREN'S SERVICES: DECEMBER 21 2001

Please note that this paper is provided for discussion purposes only and does not reflect any concluded view of the Subcommittee.

CLAUSE 5 (PROPOSED SECTION 3A): 'BEST INTERESTS OF THE CHILD' PRINCIPLE

Submissions received by the Subcommittee suggest that there should be some guidelines or checklists to ensure that a number of opinions are taken into account; and there is a mechanism for accountability as the standards of what is the best interest of the child is open to subjective views and application of personal beliefs, which may or may not be guided by up to date education on child development.

1. ***In Western Australia, how is the concept of 'best interests of the child' currently judged (on common law indications, by checklist or guidelines – compulsory or permissive)?***

2. ***Why are no factors stipulated in the legislation as they are in other states (for example, the Family Law Act 1975 (Cth), Children and Young People Act 1999 (ACT))?***

CLAUSE 7 (PROPOSED SECTION 10C): DISCLOSURE OF RELEVANT INFORMATION TO CERTAIN AUTHORITIES

Proposed Section 10C provides for exchange of information between the Director General of the Department and a "corresponding authority" or a "public authority". The information must be relevant to the health, safety or welfare of the child, or the performance of functions under the principal Act, defined as "relevant information" by the Bill.

Submissions received by the Subcommittee raise the question of '*how does this fit with new privacy legislation?*" and suggest that there may need to be inserted in the Bill a clause referring to the privacy legislation caveats, such as consent to use and disclose personal information.

The Subcommittee notes that the Child Welfare Amendment Bill 1998 (**1998 Bill**) (although dealing with the establishment and operation of a particular Register) contained provisions relating to the collection, collation, storage and destruction of and access to information on the identified register. It also created an offence in respect of unauthorised use and access to information stored on the register and exempted the access provisions of the *Freedom of Information Act* from information obtained for use on the register. The Legislation Committee of the 35th Parliament reported on the 1998 Bill and made a number of recommendations for amendment.

3. ***How will information obtained under proposed section 10C be stored and used (for example refer to the attached pages 31 –36 of Report 54 of the Legislation Committee of the 35th Parliament)?***

4. ***Why are matters addressed in the 1998 Bill not addressed in the Bill?***

5. ***Will these matters be addressed in a legislative or administrative manner?***

CLAUSE 9 (PROPOSED SECTION 67): WARRANT TO APPREHEND CERTAIN CHILDREN

It is usual for legislation to place the onus on the person exercising a warrant to produce the warrant *prior to* executing its powers as opposed to upon request (proposed section 67(6)(7)).

6. ***Why is the warrant only to be produced in response to a request?***

7. ***When a warrant to apprehend a child is granted and the child is hidden or removed so that the apprehension order cannot be implemented, should a penalty be imposed, for example, a warrant for the arrest of the offender and/or a substantial fine?***

CLAUSE 10 (PROPOSED PART VIIIA): ss120C – 120F – ADMINISTRATIVE TRANSFER OF CHILD PROTECTION ORDERS AND PROCEEDINGS

Proposed section 120C – When Director-General may transfer order

Proposed section 120C(1) lists three factors which must be met when the Director General may make a transfer of a child protection order ("**administrative transfer**"), including the consent of the relevant interstate officer. The Model Bill lists a further factor missing from the Bill – that is, depending on the type of order, the consent of the child's parents and any other person who is granted access to the child under the order (clauses 3(1)(d) and 4 Model Bill). The Subcommittee refers to footnote 4 of the Model Bill.

8. ***Why does the Bill make no provision for the involvement of the child and his or her family in the decision about the transfer of the child protection order (either by consent or otherwise)?***

Generally the concept of natural justice requires that when a decision is to be made which will affect the rights, interests or legitimate expectations of a person, that person is to be accorded the procedural fairness of knowing about the pending decision an having an opportunity to make a submission. It is conceivable that a child's parent would have a right and interest in the administrative transfer of an order to do with their child and the provisions of the Bill do not appear to afford natural justice, although there is an ability to appeal a decision once it has been made.

9. ***How are natural justice issues addressed in respect of administrative transfers of child protection orders?***

Proposed section 120D- Matters to have regard to when considering an administrative transfer

Proposed section 120D provides for the Director General to have regard to certain matters when deciding whether or not to transfer a child protection order to another State. The Model Bill legislatively sets out matters that the [Director General] must have regard to when determining whether to transfer a child protection order by reference to section 119 of the *Children and Young Person's Act 1989* (Vic). Similar guidelines are absent from the Bill. The Subcommittee refers to footnote 5 of the Model Bill.

10. ***What criteria will guide the Director General when making an administrative transfer of a child protection order?***

11. ***Why is this criteria not set out in legislation?***

12. ***Why does the decision not also include an assessment of the impact of any Family Court proceedings?***

Proposed section 120E - Notification of decision to transfer

Proposed section 120E provides for the provision of notice of the decision to transfer to certain people, the contents of the notice and provides for dispensation of notice if "*it cannot be given after all reasonable efforts*". The proposed section requires notice to be given to "*Any other person considered by the Director-General to have a direct interest in the care, welfare or development of the child*". This is additional to the Model Bill.

13. ***What does "direct interest" mean? Please give an example.***

14. ***How and when will the purpose, nature and implications of the proposed transfer of a child protection order be explained to the child, the child's parents, and any person with a "direct interest"?***

15. ***Will this be by way of guidelines as in Victoria? If so what is the status of these guidelines?***

Proposed section 120F, 120L and 120Q - Limitation periods for appeals

Proposed section 120F(1) provides limitation periods for appeals to the Supreme Court from administrative transfers of child protection orders. The clause also provides that the Supreme Court may not extend the time limit in which an appeal may be instituted. The respective time limits being 21 days after the decision of the Director General to transfer a child protection order.

Notice of the administrative decision to transfer (proposed section 120L) must be given to specified persons as soon as practicable but in any event no later 3 working days after the decision was made. The time within which to apply for a judicial review must be made within 21 working days after the date of the decision. In some cases this may mean that a person has only 18 days to lodge a review.

If administrative transfers could only occur where the consent of relevant parties such as the child and the child's parent and the child's carer had been obtained then the effect of the limitation of review may be less objectionable.

Proposed sections 120L(2) and 120Q(2) provide limitation periods for appeals to the Supreme Court from judicial transfers of child protection orders and transfers of child protection proceedings. Each clause also provides that the Supreme Court may not extend the time limit in which an appeal may be instituted. The respective time limits being 10 days after the judicial order to transfer a child protection order or proceeding is made.

16. What is the standard period for appealing decisions made under the principal Act?

CLAUSE 10 (PROPOSED PART VIIIA): ss120G – 120L – JUDICIAL TRANSFERS OF CHILD PROTECTION ORDERS

Proposed section 120I – Court to have regard to certain matters

Proposed section 120I sets out matters that the Children's Court must have regard to when determining whether to transfer a *child protection order* to another state. This reflects the Model Bill except the Model Bill also requires Court to have regard to specified matters (reference to section 87 (1) of the Victorian Act). The Subcommittee refers to note 11 to the Model Bill.

The Model Bill also requires the Court to have regard to any information given to the court by the [Director General] under that person's obligation to inform the court of certain matters in relation to sentencing orders in force in respect of a child, or criminal proceedings pending against a child. The Subcommittee refers to note 14 to the Model Bill. It is noted that Bill requires the court to have regard to such information when making a transfer of a child protection proceeding: proposed section 120O(2).

17. In what circumstances would the Director General apply for judicial transfer of a child protection order?

18. What criteria will guide the Children's Court when making an order to transfer a child protection order?

19. Why is this criteria not set out in legislation?

20. Why does the Bill not include reference to matters the subject of clause 12 in the Model Bill, in respect of the judicial transfer of child protection orders?

21. Commentary on Model Bill suggests that there could also be a provision requiring the [secretary] to seek to explain as far as practicable, the purpose, nature and implications of the proposed transfer of a child protection order to the child and the child's parents. Victoria is implementing this provision by way of guidelines. Refer to note 13 to the Model Bill. How is this matter to be dealt with in WA?

22. What matters would the report envisaged by proposed section 120K address?

23. How is the manner of consulting and liasing with indigenous groups addressed? (Refer to note 11 to the Model Bill)

CLAUSE 10 (PROPOSED PART VIIIA): ss 120M – 120O – JUDICIAL TRANSFERS OF CHILD PROTECTION PROCEEDINGS

Proposed section 120N – Service of application

24. The Model Bill provides for notice to be issued to the child's parents or other person with whom the child is living; and the child if he/she s above the age of 12 years. The Bill does not address notice to the child. Why not?

25. The Bill refers to notice to any other person with a direct interest. What does "direct interest" mean? Please give an example.

26. Would "direct interest" always include the child's parents even if not a party to the proceedings?

Proposed section 120O – Court to have regard to certain matters

Proposed section 120O sets out matters that the Children's Court must have regard to when determining whether to transfer a child protection proceeding to another state. This reflects the Model Bill except the Model Bill also requires Court to have regard to specified matters (reference to section 87 (1) of the Victorian Act).

27. What criteria will guide the Children's Court when making an order to transfer a child protection proceeding?

28. Why is this criteria not set out in legislation?

Commentary on Model Bill suggests that there could also be a provision requiring the [Director General] to seek to explain as far as practicable, the purpose, nature and implications of the proposed transfer of a child protection proceeding to the child and the child's parents. Victoria is implementing this provision by way of guidelines. Refer to note 16 to the Model Bill.

29. How is this matter to be dealt with in WA?

CLAUSE 10 (PROPOSED PART VIIIA) – DIVISION 4 – REGISTRATION

Commentary on the Model Bill suggests that there could also be a provision requiring the [Director General] to seek to explain as far as practicable, the purpose, nature and implications of the order to the child and the child's parents. Victoria is implementing this provision by way of guidelines. Refer to note 18 to the Model Bill

30. How is this matter to be dealt with in WA?

CLAUSE 10 (PROPOSED PART VIIIA) – DIVISION 5 – MISCELLANEOUS

Commentary on the Model Bill suggests that there could also be a provision for Maori children requiring courts to have regard to, amongst other matters, the family and community groups. Refer to note 21 to the Model Bill. This matter is absent from the Bill. A provision in relation to child protection departments (not the court) is contained in the Protocols.

31. In the context of this Bill, how are the interests of Maori and other indigenous children dealt with or proposed to be dealt with in WA?

Proposed section 120Z enables the Director General to disclose to an interstate officer such information necessary for the interstate officer to perform his or her child welfare duties and responsibilities. Commentary on the Model Bill moots that "*each state would ensure that it had adequate confidentiality clauses in its legislation (eg all states would ensure that they have legislation to protect the confidentiality of notifier details).*" Refer to note 24 to the Model Bill. The Subcommittee notes that the 1998 Bill contained quite detailed provisions dealing with the ramifications of the *Freedom of Information Act.*

32. How have these matters been addressed in WA?

CREATION OF AN OFFENCE AND PROTECTION AGAINST DOUBLE JEOPARDY

The Model Bill contains provisions, absent from the Bill, relating to the creation of an offence if a person without lawful authority withdraws a child from the place in which the child had been placed under a child protection order. Commentary on the provisions note that it would be desirable for each jurisdiction to adopt the offence provision, but not mandatory (refer to note 27 to the Model Bill).

33. How are these matters addressed in WA?

The Model Bill contains provision, absent from the Bill, relating to protection against double jeopardy.

34. How are these matters addressed in WA? ***END***

Department for **Community Development**
Government of **Western Australia**

RECEIVED
30 JAN 2002

Your Ref: 3601.cwa

Hon Giz Watson MLC
Convenor of Subcommittee
Legislation Council Standing Committee on Legislation
Subcommittee on the Child Welfare Amendment Bill 2001
Parliament House
PERTH WA 6000

Dear Ms Watson

Inquiry into Child Welfare Amendment Bill 2001

Thank you for your letter of 21 December 2001 seeking a response from the Department for Community Development to questions which have arisen as a result of the subcommittee's considerations.

I enclose the Department's response for the subcommittee's consideration.

Your letter refers to the normal practice of Legislative Council standing committees to authorise the publication of submissions (including correspondence) at some stage during its inquiries, which are then available to the public on request.

The Department for Community Development does not regard its response as confidential and therefore makes no request to prohibit publication.

Please contact Tara Gupta, Director Legal Services, on 9222 2690, if you have any queries concerning the Department's response.

Yours sincerely

Jane Brazier
ACTING DIRECTOR GENERAL
DEPARTMENT FOR COMMUNITY DEVELOPMENT

29 January 2002

Office of the Director General
189 Royal Street, East Perth WA 6004 *(PO Box 6334 East Perth WA 6892)*
Telephone (09) 9222 2505, Facsimile (09) 9222 2653

Legislative Council Standing Committee on Legislation
Inquiry into Child Welfare Amendment Bill 2001

Department for Community Development Response
to
Questions raised by the Subcommittee on the
Child Welfare Amendment Bill 2001

CLAUSE 5 (PROPOSED SECTION 3A): 'BEST INTERESTS OF CHILD' PRINCIPLE

1. ***In Western Australia, how is the concept of 'best interests of the child' currently judged (on common law indications, by checklist or guidelines – compulsive or permissive)?***

In Western Australia, 'best interests of the child' are determined according to the individual circumstances and relevant factors of each case, together with the use of common law indications. The Department is of the view that this system works well and provides decision makers with the greatest degree of flexibility to determine the child's best interests.

2. ***Why are no factors stipulated in the legislation as they are in other states (for example, the Family Law Act 1975 (Cth), Children and Young People Act 1999 (ACT))***

There is debate as to whether or not provisions detailing what constitutes 'best interests of the child' should be defined in legislation. While the *Family Law Act 1975 (Cth)*, and *Children and Young People Act 1999 (ACT)* insert such guidelines, there is other successfully operating legislation, (for example, *Adoption Act 1994 (WA), Children and Young Persons Act 1989 (Vic)*), which does not define 'bests interests of a child' in a prescriptive sense. The *Adoption Act 1994 (WA)* is administered by the Department for Community Development.

The Department's preferred position is that the legislation should not be overly prescriptive. Maximum flexibility needs to be available to decision makers when determining the best interests of a child. Otherwise it may be too restrictive for some cases, as it may not allow consideration of certain factors in a case, which obviously contribute to determining the best interests of the child, but which are not prescribed in the legislation.

CLAUSE 7 (PROPOSED SECTION 10C): DISCLOSURE OF RELEVANT INFORMATION TO CERTAIN AUTHORITIES

3. ***How will information obtained under proposed section 10C be stored and used (for example refer to the attached pages 31 – 36 of Report 54 of the Legislation Committee of the 35th Parliament)?***

4. ***Why are matters addressed in the 1998 Bill not addressed in the Bill?***

5. ***Will these matters be addressed in a legislative or administrative manner?***

There are no provisions in the existing *Child Welfare Act 1947* that provide for the exchange of information between government departments and the Department for Community Development. From time to time, at a practice level, some Government departments and agencies have been reluctant to release information that would assist the Department in its efforts to protect children, particularly in relation to investigations of child maltreatment allegations. Proposed section 10C in the 2001 Amendment Bill is specifically aimed at addressing this problem. It is not intended to replicate the objectives or purpose of the 1998 Amendment Bill. Its aim is to remove barriers to communication and information exchange between public authorities when general concerns exist for a child's safety and health. This will strengthen avenues for case collaboration and joint working between the Department and public authorities. Such collaboration is vitally important when the Department is seeking to substantiate incidences of reported child maltreatment.

It is emphasised that proposed clause 10C does not authorise release of information to non-government organisations or third party individuals. Further, it is only an enabling provision for government agencies to exchange information. Government agencies do not have to provide the information requested and have the opportunity to discuss any concerns with the Department prior to making a decision whether or not to release the actual information.

It is planned to implement proposed section 10C administratively through expansion of existing reciprocal guidelines with relevant public authorities.

Information obtained under proposed section 10C will be recorded and stored in Department for Community Development files, in accordance with the Department's administrative instructions. In addition, Public Sector Administrative Instruction 711 (covering all of government) prevents a public officer from disclosing information except in the course of his or her official duty and with the express permission of the chief executive officer.

CLAUSE 9 (PROPOSED SECTION 67): WARRANT TO APPREHEND CERTAIN CHILDREN

6. ***Why is the warrant only to be produced in response to a request?***

The Department's policy is to have the greatest amount of flexibility so that warrants can be validly executed whether or not anyone other than the child is at home and

whether or not the warrant was shown (unless, of course, the occupier asked to see the warrant).

Parliamentary Counsel has advised the Department that there are examples of legislation where authorities or warrants need only to be produced if someone asks to see the warrant.

Criminal Code s. 232 (general duty of person executing any process or warrant to have it with him, and to produce it if required)
Agriculture and Related Resources Protection Act 1976 s. 11(2)
Agricultural Produce (Chemical Residues) Act 1983 s. 6(2)
Energy Operators (Powers) Act 1979 s. 46(16)
Environmental Protection Act 1986 s. 87(3), 88(4)
Fish Resources Management Act 1994 s. 178, 179(4)
Fuel Suppliers Licensing Act s. 56(5)
Health Services (Conciliation and Review) A
t 1995 s. 65(1)
Liquor Licensing Act 1988 s. 161(2)(b)
Mines Safety and Inspection Act 1994 s. 27(1)
Occupational Safety and Health Act 1984 s. 42(2)
Osteopaths Act 1997 s. 59(5), 62(1)
Perth Parking Management Act 1999 s. 21(3)
Petroleum Safety Act 1999 s. 28(1)
Seeds Act 1981 s. 14(2)
Travel Agents Act 1985 s. 42(3)
WA Meat Industry Authority Act 1976 s. 24G(2)

7. ***When a warrant to apprehend a child is granted and the child is hidden or removed so that the apprehension cannot be implemented, should a penalty be imposed, for example, a warrant for the arrest of the offender and/or a substantial fine?***

The intent of the provision is the location and return of the child rather than the imposition of criminal sanctions against a person who has unlawfully taken the child. In the vast majority of cases, such a person is an aggrieved parent or relative of the child. Wherever possible, the Department endeavours to work cooperatively with the child's family with the ultimate objective of returning the child to the family. The imposition of criminal sanctions can be counter productive to achieving this objective.

Existing sections 125 (Offence of interfering with wards or children placed under control of the Department) and 142 (General Penalty) of the *Child Welfare Act 1947* gives the Department some flexibility to seek criminal sanctions when considered appropriate in specific cases.

CLAUSE 10 (PROPOSED PART VIIIA): ss120C – 120F – ADMINISTRATIVE TRANSFER OF CHILD PROTECTION ORDERS AND PROCEEDINGS

Proposed section 120C – When Director General may transfer order

8. Why does the Bill make no provision for the involvement of the child and his or her family in the decision about the transfer of the child protection order (either by consent or otherwise)?

General Comment: An interstate working party was established under the Community Services Ministers' Council and the Standing Committee of Community Services and Income Administrators to assist with the development of the Model Bill by Victoria. Western Australia was represented on the working party, which deliberated on the clauses of the Model Bill in great detail. During the preparation of the Model Bill, it was agreed that some provisions were to be common to all states while other provisions were to be at the discretion of states.

Child welfare legislation in other states has a range of child protection orders that can be imposed by the court. For example, some orders enable the parents to retain parental responsibility and others enable access rights by law. The *Child Welfare Act 1947* does not have such flexible options. A child protection order granted by the Children's Court of Western Australia effectively transfers guardianship of the child from the parents to the Director General for the duration of the order. Parents are not afforded legal access rights under such orders.

Issues of involvement by the child, the parents, and family when considering an administrative transfer will be addressed administratively through case practice procedures.

The Department is currently developing replacement legislation that will address the obvious inadequacies of the *Child Welfare Act 1947*. The administrative transfer provisions in the Amendment Bill will subsequently be modified for inclusion in the new replacement legislation.

9. How are natural justice issues addressed in respect of administrative transfers of child protection orders?

Natural justice issues are addressed administratively as part of the case planning process.

Proposed section 120D- Matters to have regard to when considering an administrative transfer

10. What criteria will guide the Director General when making an administrative transfer of a child protection order?

The 'best interests of the child' is the paramount consideration in determining the appropriateness of making an administrative transfer of a child protection order. Further assistance is provided by proposed section 10D and by the 'Protocol for the transfer of child protection orders and proceedings and interstate assistance' which

has been operational in the Department since 1999. Administrative guidelines will be amended if required as part of the implementation procedures to be developed in readiness for the Amendment Bill becoming operational.

11. Why is this criteria not set out in legislation?

The *Child Welfare Act 1947* does not have an equivalent provision to section 119 of the *Children and Young Person's Act 1989 (Vic)* which can be cross referenced in the Amendment Bill. The new replacement legislation being developed by the Department will address this issue and the transfer provisions will be modified accordingly.

12. Why does the decision not also include an assessment of the impact of any Family Court proceedings?

It is most unlikely that there would be any Family Court proceedings in relation to a child in the care of the Department because of the limitations to Family Court jurisdiction if there is an order under the *Child Welfare Act 1947*. Refer section 202 *Family Court Act 1997(WA)*.

Proposed section 120E – Notification of decision to transfer

13. 'What does "direct interest" mean? Please give an example.

Direct interest refers to a person who has an appropriate connection to the child as determined by the Director General according to the individual circumstances of each case. An example might be a relative of the child, such as a grandparent or aunt, who has had previous physical care of the child.

14. How and when will the purpose, nature and implications of the proposed transfer of a child protection order be explained to the child, the child's parents, and any other person with a "direct interest"?

Such explanations will normally occur as soon as possible before the decision is made to seek transfer of a child protection order or proceeding. The explanations will normally be provided in person by Departmental officers (such as the officer responsible for supervising the child's placement in Departmental care). In some circumstances, where relevant, the foster parents of the child may provide assistance with explaining the situation to the child.

15. 'Will this be by way of guidelines as in Victoria? If so what is the status of these guidelines?

Yes implementation will be by way of guidelines. Existing administrative guidelines will be expanded as part of the implementation procedures being developed in readiness for the Amendment Bill becoming operational.

Proposed section 120F, 120L and 120Q – Limitation periods for appeals

16. What is the standard period for appealing decisions made under the principal Act?

Appeal provisions from the Children's Court to the Supreme Court must be instituted within 21 days pursuant to Orders 63 Rule 4 and 65A Rule 9 of the Supreme Court Rules (see also Part 5 of the *Children's Court Act of Western Australia 1988*).

In cases regarding children, it is important that there is no undue delay due to the legal system. The time for appeals is deliberatively restricted. Unlike most other decisions, a decision to transfer an order (or proceeding) can not become operative until after the appeal period. It is important that the child concerned not remain in limbo for any longer than is necessary.

CLAUSE 10 (PROPOSED PART VIIIA): ss120G – 120L – JUDICIAL TRANSFERS OF CHILD PROTECTION ORDERS

Proposed section 120I – Court to have regard to certain matters

17. In what circumstances would the Director General apply for judicial transfer of a child protection order?

This option is most likely to be used by the Director General in complex cases where there is dispute with the child's parents.

It could also be used when it is in the best interests for the child to be subject to a transferred child protection order in the receiving state which is not exactly the same as the original child protection order in Western Australia under the *Child Welfare Act 1947*.

18. What criteria will guide the Children's Court when making an order to transfer a child protection order?

The 'best interests of the child' is the paramount consideration in determining the appropriateness of making a judicial transfer of a child protection order. Further assistance is provided to the Children's Court by proposed section 120I(a) and (b).

19. Why is this criteria not set out in legislation?

The *Child Welfare Act 1947* does not have an equivalent provision to sections 49 and 87(1) of the *Children and Young Person's Act 1989 (Vic)* which can be cross referenced in the Amendment Bill. The new replacement legislation being developed by the Department will address this issue and the transfer provisions will be modified accordingly

20. Why does the Bill not include reference to matters the subject of clause 12 in the Model Bill, in respect of the judicial transfer of child protection orders?

This was an optional provision for states to consider. Not all states have inserted the provision. The Department considers the provision more relevant to child protection proceedings whereby issues of guardianship of the child and whether the child is in need of care and protection are still to be considered by the Court. Hence insertion of proposed section 120O(2).

The 'Protocol for the Transfer of Child Protection Orders and Proceedings and Interstate Assistance' contains a requirement for a Departmental officer in the sending state to provide prescribed information to the receiving state which includes information of any known criminal proceeding or order which relates to the child and is still current.

21. Commentary on Model Bill suggests that there could also be a provision requiring the [secretary] to seek to explain as far as practicable, the purpose, nature and implications of the proposed transfer of a child protection order to the child and the child's parents. Victoria is implementing this provision by way of guidelines. Refer to note 13 to the Model Bill. How is this matter to be dealt with in WA?

The matter will be dealt with in WA by way of guidelines, similar to Victoria.

22. What matters would the report envisaged by proposed section 120K address?

It is most likely that the report would include matters, where relevant, such as:

- the current care arrangements for the child, including the degree of attachment which the child has to the family who is caring for the child;
- the reasons for wanting to transfer the child interstate and the estimated duration of the transfer;
- the possible impact on the child if not transferred to the proposed receiving state;
- the proposed care arrangements for the child in the receiving state;
- the child's stage of development;
- the views of the child (depending on the child's age);
- the views of the child's parents, significant relatives and other significant persons in the child's life;
- indigenous child placement issues (covering Aboriginal, Torres Strait Islander and Maori children where relevant).

23. How is the manner of consulting and liasing with indigenous groups addressed? (Refer to note 11 to the Model Bill)

Child welfare legislation in all other states of Australia has indigenous child placement principles in their respective legislation. In Western Australia, such principles are part of Departmental guidelines

At a practice level, the Department employs Aboriginal officers throughout the state who liaise between Departmental case workers and local Aboriginal communities.

The 'Protocol for the Transfer of Child Protection Orders and Proceedings and Interstate Assistance' includes special comment concerning interstate placement of indigenous children and refers to the 'Indigenous Child Placement Principle' as Schedule A to the Protocol.

The new replacement legislation being drafted by the Department will contain indigenous child placement principles and provision concerning the requirement to consult with Aboriginal officers.

CLAUSE 10 (PROPOSED PART VIIIA): ss 120M – 120Q – JUDICIAL TRANSFER OF CHILD PROTECTION PROCEEDINGS

Proposed section 120N – Service of application

24. The Model Bill provides for notice to the child's parents or other person with whom the child is living; and the child if he/she is above the age of 12 years. The Bill does not address notice to the child, Why not?

Proposed section 120N requires notification to be given to 'each party to the child protection proceeding the subject of the application'. The child will be given notice of the transfer application by virtue of being a party to the child protection proceedings pursuant to section 30(3)(b) of the *Child Welfare Act 1947*.

25. The Bill refers to notice to any other person with a direct interest. What does "direct interest" mean? Please give an example.

Direct interest refers to a person who has an appropriate connection to the child as determined by the Director General according to the individual circumstances of each case. An example might be a relative of the child, such as a grandparent or aunt, who has had previous physical care of the child.

26. Would "direct interest" always include the child's parents even if not a party to the proceedings?

The parents of the child are a party to the proceedings pursuant to section 30(3)(b) of the *Child Welfare Act 1947*.

Note clause 6 of the Bill, which is a proposed amendment to section 4 of the *Child Welfare Act 1947* concerning the definition of 'parent' (which currently does not include a father who has never been marries to the child's mother). The proposed amendment will ensure that the unmarried father of a child who is the subject of child protection proceedings is recognised as a party to the proceedings.

Proposed section 120O – Court to have regard to certain matters

27. What criteria will guide the Children's Court when making an order to transfer a child protection proceeding?

28. Why is this criteria not set out in legislation?

The 'best interests of the child' is the paramount consideration in determining the appropriateness of making a judicial transfer of a child protection order. Further assistance is provided to the Children's Court by proposed section 120O.

To some extent, proposed section 120O sets out in legislation criteria for the Court to follow when considering an application to transfer child protection proceedings.

The *Child Welfare Act 1947* does not have an equivalent provision to section 87(1) of the *Children and Young Person's Act 1989 (Vic)* which can be cross referenced in the Amendment Bill. The new replacement legislation being developed by the Department will address this issue.

29. How is this matter to be dealt with in WA?

The matter will be dealt with byway of guidelines rather than legislation.

CLAUSE 10 (PROPOSED PART VIIIA): - DIVISION 4 – REGISTRATION

30. How is this matter to be dealt with in WA? '

The matter will be dealt with by way of guidelines rather than legislation.

CLAUSE 10 (PROPOSED PART VIIIA): - DIVISION 5 - MISCELLANEOUS

31. In the context of this Bill, how are the interests of Maori and other indigenous children dealt with in WA?

The matters will be addressed administratively through guidelines. The 'Protocol for the Transfer of Child Protection Orders and Proceedings and Interstate Assistance' includes the 'Indigenous Child Placement Principle' as Schedule A to the Protocol. Departmental officers are required to comply with the Protocol.

The new replacement legislation being drafted by the Department will contain indigenous child placement principles and provision concerning the requirement to consult with Aboriginal officers.

32. ***How have these matters been addressed in WA?***

The Department currently addresses issues of confidentiality by way of guidelines and administrative instructions. For example, there is a specific administrative instruction which directs Departmental officers not to release the name of a person who notifies the department of a child maltreatment allegation or information which may identify such a person, except in the course of court proceedings or in order to protect a child and only with the endorsement of the Director Legal Services.

The new replacement legislation being developed by the Department will contain confidentiality provisions. The Department will rely on administrative instructions and guidelines until such time as the provisions in the new legislation are introduced.

CREATION OF AN OFFENCE AND PROTECTION AGAINST DOUBLE JEOPARDY

33. How are these matters addressed in WA?

34. How are these matters addressed in WA?

A number of other states have not included these provisions.

These provisions do not refer to the interstate transfer of child protection orders and proceedings per se but to interstate applicability of offences in relation to non-transferred orders. Due to the legal complexity (including matters of extra-territorial application) of these provisions and their potential interaction with current provisions in Part IX of the *Child Welfare Act 1947*, it was decided that these provisions would be included in the new replacement legislation being drafted by the Department.

APPENDIX 4

LETTER FROM THE SUBCOMMITTEE TO THE DEPARTMENT DATED FEBRUARY 6 2002 AND THE DEPARTMENT'S REPLY DATED FEBRUARY 11 2002

STANDING COMMITTEE ON LEGISLATION

SUBCOMMITTEE ON THE CHILD WELFARE AMENDMENT BILL 2001

Our Ref: 3601.cwa

Ms Jane Brazier
Director General
Department for Community Development, Family & Children's Services
189 Royal Street
EAST PERTH WA 6004

For the attention of: Ms Tara Gupta, Director Legal Services

Dear Ms Brazier

Inquiry into Child Welfare Amendment Bill 2001 (Bill)

Thank you for your letter dated January 29 2002 (Department's Response) which was considered by the subcommittee at its meeting on February 6 2002. The subcommittee seeks the Department's comment on the following issues.

As there is a limited period in which the review of the Bill must be completed, the subcommittee would appreciate your response by **10.00am** on **Tuesday February 12 2002** for consideration at the subcommittee's meeting on Wednesday February 13 2002. If you are unable to respond by that time, please contact the Committee Clerk, Ms Jan Paniperis on 9222 7400.

1. **Answer 1 of the Department's Response:** The Department's answer that "*the concept of 'best interests of the child' is determined according to the individual circumstances and relevant factors of each case, together with the use of common law indications*" is noted. Is there a checklist, instruction, practice note or other written material used by the Department when considering this matter? If so, please provide copies.

2. **Clause 6 of the Bill:** The proposed amendment to the definition of 'parent' includes reference to 'stepmother' and 'stepfather'. It is noted that these terms are not defined in legislation although 'step-parent' is defined in the *Family Court Act 1997* with reference to marriage which would exclude same-sex partners who cannot legally marry and persons in de facto relationships (s. 3).

   A de facto partner, which is in the process of being defined by the Family Court Amendment Bill 2001, (which proposed definition includes same-sex partners in de-facto relationships) is not included in the definition of 'parent'.

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E-MAIL (GENERAL OFFICE): council@parliament.wa.gov.au

a) Is it the intent of the Bill's definition to exclude a stepmother or stepfather whether in a heterosexual or same-sex de facto relationship from the definition of 'parent'?

b) If so, it appears that a de facto stepmother and stepfather will not be caught within the proposed definition of a 'parent' and will not be in the same position as a stepmother or stepfather that is or has been married to a birth parent of a child.

c) The definition of 'parent' could be extended to a de facto stepmother or stepfather (whether in a heterosexual or same-sex de facto relationship) by including 'de facto partner' in the definition of 'parent'. This mechanism would tie into the proposed definition in the Family Court Amendment Bill 2001 which Bill proposes to introduce a definition of 'de facto partner' and 'de facto relationship' into the *Interpretation Act 1984*. The subcommittee seeks the Department's comment on this proposal.

3. **Child advocate**: One submission raised the issue of a child advocate (independent from the Department). The subcommittee notes that there is currently a pilot project "The Columbus Project" being conducted in WA courts. Is it intended that the issue of a child advocate/independent legal representation for children will be addressed in the proposed review of the *Child Welfare Act 1947* (**Principal Act**) and included in the new legislation?

4. **Clause 9 of the Bill, proposed section 67 - warrants:** The Clause Notes to the Bill state that warrant provisions are currently not available in the Principal Act. However the subcommittee notes s.29 (power to apprehend child in need of care and protection without warrant); s.46 (power to apprehend absconders without warrant); and s.138B (apprehending a child without warrant) of the Principal Act.

   a) How do these existing sections in the Principal Act interrelate with proposed sections 67 and 68?

   b) How does the Department currently apprehend children who have been committed to the care of the Director General and unlawfully removed?

   c) Is there any limitation on the exercise of powers depending on who is present? For example, whether or not there is an adult present or if the child is alone?

5. **Answer 8 of the Department's Response:** The Department's answer states that it is currently developing replacement legislation that will address the obvious inadequacies of the Principal Act and that the administrative transfer provisions in the Bill will subsequently be modified for inclusion in the new legislation.

   Please clarify whether this answer means that:

   - the range of child protection orders will be addressed by the new legislation?
   - whether the new legislation will address the criteria to be considered by the Director-General when making an administrative transfer?

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- Whether the new legislation will address the involvement of a child, parents and near relative in decisions for administrative transfers and if so, whether this will be a requirement for consultation, consent or notification?

It is normal practice for Legislative Council standing committees to authorise the publication of submissions (including correspondence) at some stage during its inquiry. These documents are then available to the public on request. It is important that any request to prohibit publication of all or part of the Department's response be attached when it is lodged. State why you want it confidential. If you want part of the response kept confidential please put that part on a separate page(s). The subcommittee will consider requests for confidentiality, but retains the power to publish any response. The Legislative Council may also authorise publication.

If you have any queries please do not hesitate to contact me on 9222 7472.

Yours sincerely

MBotjeman

Ms Mia Botjeman
Principal Advisory Officer

February 6 2002

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Department for **Community Development**
Government of **Western Australia**

RECEIVED
21 FEB 2002

Your Ref: 3601.cwa

Hon Giz Watson MLC
Convenor of Subcommittee
Legislation Council Standing Committee on Legislation
Subcommittee on the Child Welfare Amendment Bill 2001
Parliament House
PERTH WA 6000

Dear Ms Watson

Inquiry into Child Welfare Amendment Bill 2001

Thank you for your letter of 6 February 2002 seeking a response from the Department for Community Development to further questions from the Subcommittee.

I enclose the Department's response for the Subcommittee's consideration.

Your letter refers to the normal practice of Legislative Council standing committees to authorise the publication of submissions (including correspondence) at some stage during its inquiries, which are then available to the public on request.

The Department for Community Development does not regard its response as confidential and therefore makes no request to prohibit publication.

Please contact Tara Gupta, Director Legal Services, on 9222 2690, if you have any queries concerning the Department's response.

Yours sincerely

Jane Brazier
ACTING DIRECTOR GENERAL
DEPARTMENT FOR COMMUNITY DEVELOPMENT

11 February 2002

Office of the Director General
189 Royal Street, East Perth WA 6004 *(PO Box 6334 East Perth WA 6892)*
Telephone (09) 9222 2500, Facsimile (09) 9222 2653

Legislative Council Standing Committee on Legislation
Inquiry into Child Welfare Amendment Bill 2001

Department for Community Development Response
to
Further questions raised by the Subcommittee on the
Child Welfare Amendment Bill 2001

8 February 2002

1. ***Answer 1 of the Department's Response: The Department's answer that "the concept of 'best interests of the child' is determined according to the individual circumstances and relevant factors of each case, together with the use of common law indications" is noted. Is there a checklist, instruction, practice note or other written material used by the Department when considering this matter? If so, please provide copies.***

Department's Response:

The Department does not have a specific checklist or instruction concerning the "bests interests of a child". However, numerous casework guidelines for departmental officers are drafted from the perspective of the best interests of a child, as is the Department's philosophy of professional practice. In particular, the Department has a detailed Case Practice Manual, which is an important tool to assist staff in providing the best possible services to children and their families. Other procedures to assist case workers include Director General Instructions (which detail departmental policy and procedures) and the Administrative Procedures and Approvals in Casework Manual. These manuals are easily accessible to departmental officers through the Department's intranet site. Copies of the manuals can be forwarded to the Committee if required.

Professional training for officers involved in child protection matters also covers 'best interests of child' issues.

Senior Casework Supervisors are located in each of the Department's geographical zones throughout the state with the responsibility for overseeing quality assurance in case practice matters and decision making with respect to the best interests of the child.

2. ***Clause 6 of the Bill: The proposed amendment to the definition of 'parent' includes reference to 'stepmother' and 'stepfather'. It is noted that these terms are not defined in legislation although 'step-parent' is defined in the Family Court Act 1997 with reference to marriage which would exclude same-sex partners who cannot legally marry and persons in de facto relationships (s. 5).***

   A de facto partner, which is in the process of being defined by the Family Court Amendment Bill 2001, (which proposed definition includes same-sex partners in de-facto relationships) is not included in the definition of 'parent'.

   a) ***Is it the intent of the Bill's definition to exclude a stepmother or stepfather whether in a heterosexual or same-sex de facto relationship from the definition of 'parent'?***

   b) ***If so, it appears that a de facto stepmother and stepfather will not be caught within the proposed definition of a 'parent' and will not be in the same position as a stepmother or stepfather that is or has been married to a birth parent of a child.***

   c) ***The definition of 'parent' could be extended to a de facto stepmother or stepfather (whether in a heterosexual or same-sex de facto relationship) by including 'de facto partner' in the definition of 'parent'. This mechanism would tie into the proposed definition in the Family Court Amendment Bill 2001 which Bill proposes to introduce a definition of 'de facto partner' and 'de facto relationship' into the Interpretation Act 1984. The subcommittee seeks the Department's comment on this proposal.***

Department's Response:

Section 30(3)(b) *Child Welfare Act 1947* identifies the 'parents' as parties to proceedings. The intention of the proposed amendment is to remove the existing anomaly whereby ex-nuptial fathers are not recognised as parties to child protection proceedings. The Drafting Instruction that was approved by Cabinet was for the definition of 'parent' to be amended to include a father who is not married to a child's mother. There was no intention (or Cabinet approval) to alter the existing provisions in relation to step-parents. One of the important factors in drafting the amendments to the *Child Welfare Act 1947* was that the amendments are viewed as an interim, minimal measure until the more modern comprehensive replacement legislation is finalised.

Discussions have more recently occurred with the Crown Solicitors Office who instruct Parliamentary Counsel in relation to Lesbian and Gay law reform. The Department has undertaken to ensure that the new replacement children and community development legislation does not discriminate on the basis of sexual orientation or marital status.

The Department's preferred position in relation to parties to child protection proceedings (as reflected in the replacement legislation being developed) is that only the child, Director General, and persons who have lawful parental responsibility for a

child should have automatic right to be considered as a party to proceedings. In addition, the Court should have the discretion to include any other person who is considered by the Court to have a direct interest in the care, welfare or development of the child.

Therefore, in summary, the Department would prefer to proceed with the amendments as proposed in the knowledge that the proposed replacement legislation will be consistent with recent law reform amendments to ensure that there are no discriminatory laws with regard to de facto couples and same sex relationships.

3. ***Child advocate: One submission raised the issue of a child advocate (independent from the Department). The subcommittee notes that there is currently a pilot project "The Columbus Project" being conducted in WA courts. Is it intended that the issue of a child advocate/independent legal representation for children will be addressed in the proposed review of the Child Welfare Act 1947 (Principal Act) and included in the new legislation?***

Department's Response:

Yes, the issue of legal representation of children in care and protection proceedings will be addressed in the new children and community development legislation.

4. ***Clause 9 of the Bill, proposed section 67 - warrants: The Clause Notes to the Bill state that warrant provisions are currently not available in the Principal Act. However the subcommittee notes s.29 (power to apprehend child in need of care and protection without warrant); s.46 (power to apprehend absconders without warrant); and s.138B (apprehending a child without warrant) of the Principal Act.***

   a) ***How do these existing sections in the Principal Act interrelate with proposed sections 67 and 68?***

   b) ***How does the Department currently apprehend children who have been committed to the care of the Director General and unlawfully removed?***

   c) ***Is there any limitation on the exercise of powers depending on who is present? For example, whether or not there is an adult present or if the child is alone?***

Department's Response:

Section 29 of the *Child Welfare Act 1947* relates to the initial apprehension of a child into the care of the Department rather than the issue of unlawful removal to a possibly unknown place. Sections 46 and 138B of the *Child Welfare Act 1947* are relevant, in particular to adolescent children. Currently there are no provisions which provide an efficient and effective mechanism to enable the return of a younger child who has been removed from departmental care by another person.

At present the Department has considerable difficulty recovering children who have been unlawfully removed. Local police are notified but sometimes query the extent of their powers in the absence of a warrant. It is not possible without a warrant to use the Commonwealth *Service and Execution of Process Act 1992*, to recover a child unlawfully taken interstate.

In response to (c) the proposed provisions do not distinguish between cases depending on who is present.

5. ***Answer 8 of the Department's Response: The Department's answer states that it is currently developing replacement legislation that will address the obvious inadequacies of the Principal Act and that the administrative transfer provisions in the Bill will subsequently be modified for inclusion in the new legislation. Please clarify whether this answer means that:***

   - ***the range of child protection orders will be addressed by the new legislation?***
   - ***whether the new legislation will address the criteria to be considered by the Director-General when making an administrative transfer?***
   - ***whether the new legislation will address the involvement of a child, parents and near relative in decisions for administrative transfers and if so, whether this will be a requirement for consultation, consent or notification?***

Department's Response:

Yes, it is proposed that the new legislation will provide for a wider range of child protection orders.

The new legislation will contain a set of guiding principles, which will apply to all care and protection processes including an administrative transfer of an order.

The new legislation will emphasise the importance of the child's involvement in decisions concerning him or her. Reference will also be made to the participation of parents in case planning processes. The legislation will specifically provide for parental consent to the transfer of supervision orders.

APPENDIX 5

SECTION 13 *CHILDREN AND YOUNG PEOPLE ACT 1999* (ACT)

CHILDREN AND YOUNG PEOPLE ACT 1999 (ACT) - SECTION 13.

13 How to apply the best interests principle

(1) In making a decision or taking action under this Act in relation to a child or young person, a person applies the best interests principle if-

(a) the person finds out whether the child or young person is indigenous and, if the child or young person is, ensures that any relevant indigenous organisation is consulted in relation to issues affecting the child or young person; and

(b) the person takes into account the following matters so far as they are relevant:

(i) the need to protect the child or young person from harm;

(ii) if the child or young person has been abused or neglected-the importance of responding to his or her needs;

(iii) the capacity of each parent, or anyone else, to provide for his or her needs;

(iv) the wishes stated by the child or young person and the factors (for example, his or her maturity or level of understanding) that the person considers are relevant to the weight that should be given to the childs or young persons wishes;

(v) the nature of his or her relationship with each parent and with anyone else who is significant in his or her life;

(vi) the attitude to the child or young person, and to parental responsibilities, demonstrated by each parent;

(vii) the importance of continuity in the childs or young persons care and the likely effect on the child or young person of disruption of that continuity, including separation from-

(A) a parent or anyone else with parental responsibility for the child or young person; or

(B) a sibling or other family member; or

(C) a carer or anyone else (including a child or young person) with whom the child or young person is, or has recently been, living; or

(D) anyone else who is significant in his or her life;

(viii) the practicalities of the child or young person maintaining contact with his or her parents, siblings and other family members and anyone else who is significant in his or her life;

(ix) the age, maturity, sex and background of the child or young person.

(2) Subsection (1) does not limit the matters that the person may take into account."

APPENDIX 6

SECTION 68F *FAMILY LAW ACT 1975* (CTH)

FAMILY LAW ACT 1975 (Cth) - SECTION 68F

68F How a court determines what is in a child's best interests

(1) Subject to subsection (3), in determining what is in the child's best interests, the court must consider the matters set out in subsection (2).

(2) The court must consider:

(a) any wishes expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's wishes;

(b) the nature of the relationship of the child with each of the child's parents and with other persons;

(c) the likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from:

(i) either of his or her parents; or

(ii) any other child, or other person, with whom he or she has been living;

(d) the practical difficulty and expense of a child having contact with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis;

(e) the capacity of each parent, or of any other person, to provide for the needs of the child, including emotional and intellectual needs;

(f) the child's maturity, sex and background (including any need to maintain a connection with the lifestyle, culture and traditions of Aboriginal peoples or Torres Strait Islanders) and any other characteristics of the child that the court thinks are relevant;

(g) the need to protect the child from physical or psychological harm caused, or that may be caused, by:

(i) being subjected or exposed to abuse, ill-treatment, violence or other behaviour; or

(ii) being directly or indirectly exposed to abuse, ill-treatment, violence or other behaviour that is directed towards, or may affect, another person;

(h) the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents;

(i) any family violence involving the child or a member of the child's family;

(j) any family violence order that applies to the child or a member of the child's family;

(k) whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child;

(l) any other fact or circumstance that the court thinks is relevant.

(3) If the court is considering whether to make an order with the consent of all the parties to the proceedings, the court may, but is not required to, have regard to all or any of the matters set out in subsection (2).

(4) In paragraph (2)(f):

Aboriginal peoples means the peoples of the Aboriginal race of Australia.

Torres Strait Islanders means the descendants of the indigenous inhabitants of the Torres Strait Islands."

APPENDIX 7

FORMER LEGISLATION COMMITTEE'S REPORT NO 54: CHAPTER 7

PAGES 31 – 36

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

INTRODUCTION

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

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

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

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

SUBMISSIONS

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

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

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

[69] Submission 9, HALO, p 3.

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

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

General security measures

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

7.8.1 *Location of register* [72]

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

7.8.2 *Back-up of information* [73]

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

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70 Submission 13, CPUPMH, p 4.

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

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

73 Submission 3B, FCS, p 1.

7.8.3 *Data Security*

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

7.8.4 *Entry of Information onto the register*

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

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

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

74 Submission 3A, FCS, p 10.
75 Submission 3B, FCS, p 2.
76 Ibid, p 2.
77 Ibid.
78 *Evidence*, FCS (Perth, June 21 2000) p 13.
79 Submission 3B, FCS, p 2.
80 Ibid, p 3.

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

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

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

7.8.6 *Search capabilities and statistical reports* [81]

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

Unauthorised access and transfer of information.

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

81 Ibid, p 4.

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

7.11 FCS have advised the Committee that:

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

Access by parents and guardians of maltreated child

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

COMMENTS

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

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82 Submission 4, WAGRO.

83 Submission 3B, FCS, p 3.

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

85 Submission 3A, FCS, p 10.

86 Submission 14, FCS, p 7.

87 Submission 13, CPUPMH, p 5.

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

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