WORKING WITH CHILDREN (CRIMINAL RECORD CHECKING) AMENDMENT BILL 2022

Committee

Resumed from 17 November. The Deputy Chair of Committees (Hon Dr Sally Talbot) in the chair; Hon Matthew Swinbourn (Parliamentary Secretary) in charge of the bill.

Clause 14: Section 13A amended —

Progress was reported after the clause had been partly considered.

The DEPUTY CHAIR (Hon Dr Sally Talbot): Members, the question before the chamber is that clause 14 do stand as printed. Before I give the call to the parliamentary secretary, I draw members' attention to supplementary notice paper 81, issue 2.

Hon MATTHEW SWINBOURN: When we considered this bill last Thursday, Hon Nick Goiran requested that specific consideration be given to a proposal to delete proposed section 69 of the bill, and whether such a deletion would be sufficient to remove the in-perpetuity element of the transitional arrangements and/or would cause any unintended consequences in the bill. This was raised specifically in the context of persons who are identified as having a current working with children card while also having a conviction for an offence committed when an adult, which is proposed to be moved into class 1 as part of the amendments to the act's offence categorisations.

The government has given considerable consideration to the implications of removing the in-perpetuity—for want of a better word—element from the transitional arrangements and how this might best be achieved. The government wants to reiterate the point made previously that any person who has been issued a working with children card to date has received such card only on the grounds that a thorough assessment of risk has been completed and the person has been found at the time of that assessment not to be an unacceptable risk of harm to children. That being said, careful consideration has been given to the request made by Hon Nick Goiran in the course of the debate and the intention to ensure that the level of protection afforded by the new offence categorisations is entered into on a consistent basis going forward.

As such, the government agrees to the removal of the in-perpetuity element of the transitional arrangements. Unfortunately, the in-perpetuity element is not confined to proposed section 69 but rather is woven through a number of proposed new sections in the transitional provisions. The member's proposed amendment on the supplementary notice paper is the deletion of proposed section 69 of the bill. I note that is not the entirety of section 69; it is only an element of it. The deletion of any part of only section 69 in itself would not remove the in-perpetuity element of the transitional arrangements. Rather, to achieve this intended outcome, a number of other changes are also required.

Following consideration of the honourable member's request, the government is committed to amending the bill. However, we need more time, in conjunction with Parliamentary Counsel's Office, to appropriately finalise those amendments. We do not have those amendments, and we have not put them on the supplementary notice paper for that reason. The government's intention is to table these proposed amendments to the bill on the supplementary notice paper when they are finalised in order that we can achieve these outcomes when we get to consideration of clause 44. I add that we understand that all the necessary amendments are restricted to clause 44. We should be able to continue with our consideration of the remainder of the bill, and, depending upon where we are at when we get to clause 44, either postpone consideration of that clause, or adjourn the debate. I understand that there have been discussions with the member behind the chair and that both the member and the government are dealing with this issue in good faith. We would hope that once the amendments are prepared, and of course subject to the member having had a chance to look at them, we would receive the support of the opposition for what we propose.

Hon NICK GOIRAN: I respond simply by noting a few things. First of all, I believe we are on consideration of clause 14. When we were considering clause 13, quite lengthy discussions took place between me and the parliamentary secretary because clause 13 looks to amend section 12 of the act. It deals with the various scenarios that might present before the CEO, who is the person permitted by law to make a decision on these applications. There is a table in section 12, which is being amended by clause 13. Much of that table intersects with the transitional provisions that are found later in the bill. As the parliamentary secretary drew to our attention, they are contained within clause 44. Clause 44 is a very substantial provision, commencing at page 74 of the bill and continuing through to page 85. Those who have been following the passage of the bill will be aware that we spent some time considering clause 44 when we were examining clause 13. In particular, I asked a range of questions pertaining to proposed subdivision 2, "Classification of offences", and, at first instance, whether one mechanism to address the concern might be to delete all of proposed subdivision 2. It was very quickly acknowledged and recognised that that would not be possible and would have a range of unintended consequences. We narrowed it down to proposed section 69. As a result of that and what I would describe as the lack of communication from the government to me since the bill was last before the house on Thursday, I took it upon myself on behalf of the opposition, with the concurrence of my colleagues, to put on the supplementary notice paper the amendment that is currently in my name. That

amendment seeks to delete a portion of proposed section 69, specifically proposed subsection (1), which seems to me, on the basis of the discussions that took place last Thursday, the best provision to deal with the problem of the at least seven Western Australians who might in perpetuity have the capacity to take advantage of the old classification scheme.

I was pleased earlier this afternoon to receive a telephone call from the Minister for Child Protection. I thank her for that call. As the parliamentary secretary has quite correctly and faithfully outlined, that discussion took place on very much a good faith and goodwill basis. I thank the minister for giving this matter due consideration. I indicated to the minister that, obviously subject to having the opportunity to view the proposed amendment, I would certainly be supporting it and then facilitating the speedy passage of the bill, noting that we have only next week before the commencement of the long recess. It is certainly my view, and I get the impression that it is also the view of the Minister for Child Protection, that it would be highly desirable if this bill were to pass before the long recess because the department needs to undertake a number of things, not least of which is the preparation of some regulations. We have previously been told this will take between three and six months. The sooner we get to that point, the better. That said, we are not about to rush things over the course of the next week and a half until we have nailed this provision and this particular issue. I hasten to add that I agree wholeheartedly with the parliamentary secretary that nothing prevents us from proceeding in earnest with the remaining clauses, commencing with clause 14. Hopefully by the time we get to clause 44, the hardworking drafters will have located and assessed the other provisions—that is, the provisions other than lines 10 to 25 on page 79—that will remove this highly undesirable transitional provision.

I will leave it at that, because as much as it may be tempting to make further political comments and statements, I will refrain entirely from doing so. I genuinely thank all those involved, including the Leader of the House who originally had carriage of the bill last Wednesday, the parliamentary secretary who took over on Thursday when the Leader of the House was away on urgent parliamentary business and then the minister today. Little is to be gained by going over the chronology of how we got to this point in the first place; the most important thing, as an adviser remarked to me earlier today, is that the outcome will be better for the children of Western Australia. I would like to think this is an example of the house of review doing precisely what it ought to be doing.

With those introductory remarks in response to the parliamentary secretary's comments, I have only a small number of questions on clause 14. I note that clause 14 will amend section 13A of the act. The parliamentary secretary might recall that when the matter was last before the chamber, we noted the curious numerical order of the sections that contain the number 13—that is, section 13A, with section 13 as a standalone provision, and proposed section 13AA, which will shortly make its way into the bill as a result of clause 15. What recourse would an applicant have if the interim negative notice provided, issued or delivered to their prospective employer is based upon an error—for example, mistaken identity—and, as a result, the applicant is not employed by the employer? They lose that opportunity to be employed by the employer, and by the time the error is rectified, the employer has moved on and employed somebody else. What recourse would a person have in that instance?

Hon MATTHEW SWINBOURN: I am advised that within the act itself and the bill there is no recourse for the kind of scenario the honourable member described for an individual. I am contemplating it, because the member described a circumstance in which an interim negative notice is issued that denies that person employment so that person would therefore have potentially suffered loss as a consequence of that error. Errors occur for a range of reasons; they can happen in good faith and in bad faith. If, for example, an error happened in good faith because it was something such as identifying a Mr John A. Smith as a Mr John A.A. Smith and no negligence was involved, there is unlikely to be any recourse for that individual from a statutory point of view. If, however, the act was done in negligence with some malice, common law remedies are potentially available for that person to take. Owing to that, no immunity covers the field, if that is the question the member is asking, for the conduct in that circumstance. We would hope, of course, that the circumstances the member described are extremely rare and do not happen at all. It can happen, but of course the overriding principle of the bill is the protection of children. Unfortunately, that can have a deleterious effect on people who are, in good faith, seeking to get their working with children card, so we have to balance those two things—that very high goal that we are trying to achieve in that regard. The circumstances that the member is describing that might happen will hopefully be extremely rare or not happen at all, but whenever humans are involved, there is always the potential for people to err.

Hon NICK GOIRAN: Further, has the Department of Communities in its various iterations since the enactment of this scheme in 2004 been the subject of litigation for this type of situation? It may not be the specific scenario that I outlined in which a person had lost an employment opportunity, but when a person claimed they were wrongfully denied a working with children card. Has the department been a defendant in such proceedings since the act commenced in 2004?

Hon MATTHEW SWINBOURN: We have to distinguish, of course, between matters when someone challenged the CEO's decision not to issue a card on the basis of, for want of a better word, merit and an error. That is obviously a process whereby someone has said that they do not agree with the discretionary exercise of the CEO's power. That is not what the member is talking about; I just wanted to distinguish that from a circumstance in which a card

has been denied on the basis of an error. The advisers that I have at the table are unaware of any litigation with regard to that kind of scenario.

Hon Nick Goiran: Which goes to the earlier point that we would hope it would be a very rare scenario.

Hon MATTHEW SWINBOURN: Absolutely.

Clause put and passed.

Clause 15: Section 13 replaced —

Hon NICK GOIRAN: I indicate that I have questions at clauses 15, 16, 17 and 19, and then we can move to clause 24, subject to the time available this evening.

Clause 15 talks about the CEO giving a notice of intention to issue a negative notice. If an applicant were to receive one of these notices of intention and they then make a submission—in other words, they deliver a response to the CEO to that notice of intention—would there be a set time frame within which the CEO must make a final decision?

Hon MATTHEW SWINBOURN: The applicant will have 28 days to make the submission that the member has talked about; however, there is no set time frame and there is no proposal to set a time frame. The reasoning is that it largely depends on the information that might come back from that applicant. As we can imagine, there is a process for assessing the application in the first place. The CEO will issue the notice of intention to issue a negative notice. That person may give a bit of information back; they may give none. They may give a little or they may give a lot, which would then, on the CEO's part, or the CEO's delegate's part, institute further investigations and require interaction with others. Of course, in those circumstances, it would be difficult for the department to say that it was going to respond within 14 days. It is probably more likely that the response will be something like, "There is insufficient information and the time available has expired; therefore, we will issue the negative notice because we will always err on the side of caution in relation to children" as opposed to, "It may take time", because it might have to interact with other agencies not only within Western Australia but also in the rest of Australia and potentially seek information from overseas as well. That is why there is no intention to set a time frame. Of course, the department in this instance is predicated on the basis that it wants to deal with these matters expeditiously. People's ability to earn a living is connected with this, so it is constantly aware of that, but there is also the impact on businesses that employ people with working with children cards. If they are waiting for someone to get approval, it will have an impact on those businesses. I think in those circumstances it is quite reasonable not to set a time frame.

Hon NICK GOIRAN: Is the reference to "specified time" in proposed section 13(5), at line 32 on page 20 of the bill, not intended to be that 28-day period that the parliamentary secretary referred to earlier insofar as we are not saying here that the CEO must make a decision within the 28 days?

Hon MATTHEW SWINBOURN: The reference to "specified time" in proposed section 13(5) needs to be taken back to proposed section 13(1), which states —

> If the CEO proposes or is required to decide an application under section 12 by issuing a negative notice to the applicant, the CEO must give the applicant a written notice that —
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> (a) informs the applicant of the proposal or requirement; and
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> (b) states the information about —
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> …
>
> and
>
> (c) invites the applicant to make a submission to the CEO, in writing or in another form approved by the CEO, within a specified time …

Proposed section 13(3) provides that that specified time is at least 28 days but it could be longer, so the reference then in proposed section 13(5) is to whatever period; it could be 28 days or longer depending on the circumstances of an individual case. That "specified time" is all about the time that is given to the applicant to provide a response.

Hon NICK GOIRAN: Proposed section 13 contemplates two scenarios whereby the CEO would be looking to give a notice of intention to issue a negative notice. The first scenario is that the CEO believes that he or she is required by force of law to issue a negative notice, and the second scenario is that the CEO proposes to use his or her discretion to issue a negative notice. Those two scenarios are materially different, albeit that both instances would result in the delivery of one of these notices of intention to deliver a negative notice. If such a notice of intention was issued, would the applicant be able to continue working with children?

Hon MATTHEW SWINBOURN: Yes, they could continue working if they had not been issued an interim negative notice.

Hon NICK GOIRAN: One would assume that if in the first scenario the CEO believes that by force of law he or she is required to issue a negative notice, the CEO would also issue an interim notice at the same time as the notice of intention. Is that the intended course of action?

Hon MATTHEW SWINBOURN: Yes. I think it ties in with proposed section 13AA(3), which states —

> The CEO must issue an interim negative notice to the person if the CEO is aware that the person —
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> (a) has been convicted of a Class 1 offence (other than a Class 1 offence committed by the person … or
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> (b) has a pending charge in respect of a Class 1 offence …

They are the "by force of law" provisions. Yes, it is mandatory for the CEO to issue an interim negative notice.

Hon NICK GOIRAN: The parliamentary secretary has conveniently taken me to where I would like to go, which is the intersection with proposed section 13AA. As the parliamentary secretary pointed out, there are also two scenarios at proposed section 13AA(3)(a) whereby an applicant has been convicted of a class 1 offence. I want to park that to one side and look at the second scenario, which is when an applicant has a pending charge in respect of a class 1 offence. If we examine that a little further, it is not difficult to contemplate a scenario whereby at the time the person makes an application for a working with children card, the person has been charged with one of these class 1 offences. As a result, the CEO would issue an interim negative notice, because he or she must do so under this proposed section. Evidently, when they did that, they would also issue a notice of intention to issue a negative notice. Then there would be a 28-day period during which the applicant could make any submissions. Let us say that in this scenario, because we know how long the criminal justice system can take, particularly if it is a defended matter, the outcome of the criminal charges were not yet known. In other words, they were still on foot. Consequently, the CEO issues a negative notice, the 28-day period passes and the applicant has not provided anything that has persuaded the CEO otherwise, and so a negative notice is issued.

What happens in the event that the charges are set aside or dismissed, the person is acquitted and the convictions are quashed or overturned on appeal? What recourse is available to the applicant in that situation?

Hon MATTHEW SWINBOURN: A person will have the right to apply to cancel a negative notice if the charge is subsequently withdrawn or they are acquitted in the circumstances that the member has described. Once that set of circumstances occurs, it opens up the opportunity —

Hon Nick Goiran: There will be a fresh application at that time?

Hon MATTHEW SWINBOURN: Yes.

Hon NICK GOIRAN: In other words, if a person receives a negative notice for any reason, there is nothing to stop that person at any later point in time from making a fresh application. Obviously, if they were to do so it would be prudent on their part to establish what the new circumstances are; it would be pointless and, indeed, frivolous to keep making applications just for the sake of it on entirely the same circumstances that led to a negative notice in the first place. Other than the pointlessness of doing that, is there no statutory prohibition on making fresh applications from time to time, notwithstanding that one has a negative notice?

Hon MATTHEW SWINBOURN: There is an effective limitation, in one respect. I take the member to proposed section 19 of the blue bill, which is headed "Application for cancellation of negative notice". The current section 19(1), which we are not interfering with, states —

> A person to whom a negative notice has been issued may apply to the CEO for the notice to be cancelled.

That creates an entitlement. However, section 19(2) continues —

> The application cannot be made sooner than 3 years after —
>
> (a) the negative notice was issued;

There then follows a range of other things. Section 19(3) creates an exclusion for the operation of subsection (2), so it does not apply under certain circumstances; I am not going to read through all of them, but —

Hon Nick Goiran: The prohibition for three years doesn't apply in certain circumstances?

Hon MATTHEW SWINBOURN: That is right. The one that the member described would fall within that category. The circumstances the member was talking about, in which someone puts in application after application, is actually not permitted under the act generally. Obviously, if there is a change in their circumstances—for example, they are acquitted or the charges are dropped—then their entitlement to essentially start the application process again is provided for through section 19(3). The amendments that relate to that are dealt with under clause 19 of the bill.

Hon NICK GOIRAN: The starting point for any person who has received a negative notice is that they must, effectively, have the negative notice removed; I think the technical phrase is "cancelled". A person cannot make an application for a working with children's card while they have a negative notice.

Hon Matthew Swinbourn: Yes.

Hon NICK GOIRAN: Their course of action is to have it cancelled; very good.

We discussed last week how bad class 1 offences are. At the moment, as I understand it, class 1 offences are essentially sexual offences against a child under the age of 13.

Hon Matthew Swinbourn: Yes, member.

Hon NICK GOIRAN: As we also discussed last week, this bill is going to increase the number of class 1 offences. As I understand it, they are going to include all sexual offences against a child, child exploitation material offences, homicide offences against a child in which an intent to kill was an element, abduction of a non-relative child, sex offences against an incapable person, and then what has been described to the opposition, during the briefing that we were provided, as animal offences. They seem to be the range of offences that will be added to class 1. I think everyone is of one mind that they are very serious offences. If a person is convicted of a class 1 offence, a negative notice must be issued to that person. However, if a person is acquitted, how will we deal with that person? Just because a person is acquitted of a class 1 offence at the criminal standard does not mean that, at the civil standard, the heinous act did not occur and that the person is otherwise suitable. Will anything in this bill change the way in which we deal with people who have been acquitted of a class 1 offence? In other words, will these people still be able to be considered by the CEO in some way, shape or form?

Hon MATTHEW SWINBOURN: The bill will not disrupt the current arrangement. As the member quite rightly pointed out, somebody might be acquitted of the criminal standard, but the circumstances that gave rise to the charge might mean that they have some other culpability, although not necessarily criminal culpability, or there was conduct involved that the CEO could continue to have regard to, notwithstanding their acquittal of the class 1 offence. That is not being disrupted. Quite appropriately, the CEO will still be able to consider all the circumstances in determining whether a person is an appropriate person to work with children.

Hon NICK GOIRAN: That is very good. I guess that will be of comfort to those who might be concerned about the class 1 offences, and particularly victims of crime. A victim will lodge a complaint with the police, and the police and the prosecution will use their best endeavours, but at the end of the day, the criminal justice system might acquit the person. That can often be a very traumatic experience for victims of crime. It will be of some comfort to them to know that this scheme is not being disrupted, in that notwithstanding a non-conviction, the fact that a person was simply charged will still be considered by the CEO in all the circumstances. However, they will not be given a mandatory negative notice, as is the case when there has been a conviction, for obvious reasons. Will that also be the case for class 2 offences?

Hon MATTHEW SWINBOURN: Yes; it remains the case. If I can draw the member's attention to the table in section 12 of the act, it deals with that particular one. It states —

> The CEO is aware that the applicant has a non-conviction charge in respect of a Class 1 offence or a Class 2 offence.

Hon NICK GOIRAN: That is excellent. That is, of course, item 6 of the table found at section 12. Why do we take a different approach when it comes to class 3 offences?

Hon MATTHEW SWINBOURN: It is a bit of a circular argument in some respects. Essentially, the class 1 and class 2 offences are the ones that we are most concerned about when it comes to children. The reason for that is even if a person has been charged but not convicted or acquitted, we want the CEO to still be able to have regard to those circumstances. The class 3 offences sit at the lower end of the scale. I do not want to diminish what they are, but in terms of us appreciating them as being inherent indicators of risk for children, we do not think that the class 3 offences fit into that category such that if a person were charged and the charge was dropped or the person was acquitted, they are then elevated to the same level of scrutiny as those of the class 1 and class 2 offences. If we thought that the class 3 offences were of that nature and they posed that inherent risk, they would be—as I say, it is a bit of a circular argument—neither a class 1 nor class 2 offence in the first place. Therefore, it is really that stepping up into the seriousness wherein the line is drawn between class 2 and class 3. I do not have a list of what the class 3 offences are, but they are not of the kind that we would —

Hon Nick Goiran: I think class 3 is everything that is not class 1 or class 2.

Hon MATTHEW SWINBOURN: Yes.

Hon Nick Goiran: Everything else on the statute book.

Hon MATTHEW SWINBOURN: Yes. Therefore, it could be fraud or something of that kind, which has nothing to do with a person's suitability of being given the responsibility to work with children. I do not know whether fraud features in there—I just threw that one in there; I should probably check before I speculate! But even, for example, stealing as a servant might have no bearing on that. The member identified the kind of thematic issues that those class 1 and class 2 offences relate to, so we can easily and logically see the connection about why we would

still want the CEO to have regard to a person who has been charged and that charge has been dropped or they have been acquitted or whatever, because we want the CEO to have regard to those circumstances.

Hon NICK GOIRAN: Of course, here it becomes apparent just how important the classification of the offences is. If a matter has been classified as class 1, it will have a number of significant consequences, particularly for applicants. If a matter has been classified as class 2, it will have a number of significant consequences. But everything else that has not otherwise been identified becomes a class 3 offence simply by default, so the categorisation is incredibly important and needs to be done very carefully. Certainly, I made the observation during our last consideration of the bill that I was surprised that some of the matters that are currently class 2 offences were not already classified as class 1.

What is the currency of the consultation that has been undertaken specifically on the classification of the three categories? For example, has there been very recent consultation with the Director of Public Prosecutions and the Commissioner of Police, being two obvious examples? Has there been very recent communication with the Commissioner for Victims of Crime and the Commissioner for Children and Young People? Have those particular experts, shall we say, concluded that the full range of offences that should be class 1 will now be classified as class 1 offences, and those that should be class 2 will now be classified as class 2? Are those entities personally satisfied, and have they given their expert advice to government that everything else can safely remain as class 3 offences? What is the currency of that level of in-depth consultation?

Hon MATTHEW SWINBOURN: I know that time is moving away from us on this. I will try to cover off this as much as I can. Of the four entities that the member identified, the DPP and the Commissioner for Children and Young People were consulted. The Commissioner for Victims of Crime and the WA Commissioner of Police were not consulted. When I say "consulted", they were not consulted specifically about the list. They were provided with a consultation draft of the bill and had the opportunity to have input on the particular things that the member has raised, and they did not raise any particular issue.

Hon Nick Goiran: That is the victims of crime and WA police commissioners?

Hon MATTHEW SWINBOURN: No, it was the Commissioner for Children and Young People and the Director of Public Prosecutions. My apologies—WA police did get successive drafts of the bill, so three of the four entities had the opportunity to have input on the bill. The Commissioner for Victims of Crime was not involved in that consultation. We say more generally that the Department of Communities, which has carriage of this bill, is a subject matter expert on risk for children in this matter, but the position on these things was also informed by the Royal Commission into Institutional Responses to Child Sexual Abuse recommendations and findings. That had some bearing on this matter. It was also about being consistent with national standards.

I would also like to mention, in the short time that is left before we are interrupted for members' statements, that we have to understand the development of this working with children regime as a continuum from where we were in 2004. I am sure the member is aware of that. The member has asked a number of times why these offences were not categorised as class 1 in the first place. I suspect that the people who were putting their mind to this legislation were starting from the situation in which there was no requirement for a working with children permit, and much focus was given to not interfering with people's presumed right to work with children at their whim. We have steadily and appropriately gone from where we were in 2004 and we have stepped this up.

The DEPUTY CHAIR (Hon Dr Sally Talbot): As the parliamentary secretary so astutely observed, I am obliged to leave the chair and report progress. I am sorry to cut you off in full flow.

Progress reported and leave granted to sit again, pursuant to standing orders.