

**CHARITABLE TRUSTS BILL 2022**

*Committee*

Resumed from 26 October. The Deputy Chair of Committees (Hon Peter Foster) in the chair; Hon Matthew Swinbourn (Parliamentary Secretary) in charge of the bill.

**Clause 33: Powers under *Royal Commissions Act 1968* —**

Progress was reported after the clause had been partly considered.

**Hon MATTHEW SWINBOURN:** When we concluded yesterday, an outstanding matter that Hon Nick Goiran asked us to take on notice was whether Mr Sefton, when he was the independent inquirer, had consulted the Auditor General prior to making recommendation 54. As the member is aware, the inquiry report has been completed, and Mr Sefton, in the performance of his role as the independent inquirer, has discharged his duties. It is important to emphasise that he performed his role independently in that context, notwithstanding that he is obviously within the State Solicitor's Office. His comprehensive report speaks for itself, and it is not appropriate to go beyond that report to look into what might have led to the findings or recommendations within it. We do not think it is appropriate for us to inquire. As I said, he sat as an independent inquirer, he conducted his inquiry and he has delivered his report. I think it is the substance of the report that we can rely on. As we reflected previously, that report informed the development of the bill.

**Hon NICK GOIRAN:** I thank the parliamentary secretary for taking that matter on notice and I note the response. With regard to the clause that is presently before us, where we left things yesterday —

**Hon Matthew Swinbourn:** Yes, member; I do have more to say. I just sat down prematurely.

**Hon NICK GOIRAN:** I thank the parliamentary secretary. Just to confirm, the question that we are up to at this point is the consideration of whether we are essentially empowering the Ombudsman with royal commission powers, at least for the role that he will have as the Western Australian Charitable Trusts Commission. The parliamentary secretary explained to us yesterday that there is nothing particularly peculiar about that, insofar as the Ombudsman already has this type of power with respect to his existing functions. Where we left things yesterday was that we wanted to clarify the extent to which the powers that we are going to be granting, if any, will be greater than those held by the Auditor General, keeping in mind the context of the original recommendation of Mr Sefton that the Auditor General should undertake this role.

**Hon MATTHEW SWINBOURN:** As I said, I sat down prematurely. We have an answer to the inquiry the honourable member made last night: to what extent are the powers greater than those available to the Auditor General? The powers available to the Auditor General correspond with those available to the commission under this bill, including clauses 32, 33, 34 and 35. There are the powers to obtain information documents and evidence on oath to override certain privileges, to carry out orders, and to enter premises. Although it is not exactly what the member asked, perhaps I can add that the consequence of noncompliance with those powers is somewhat different. Although the consequences of noncompliance and methods of enforcement of these powers differ, no greater powers are available to the commission. The Auditor General Act provides for an offence of noncompliance whereas the Royal Commissions Act provides that noncompliance is a contempt punishable as though it were a contempt of the Supreme Court. It is not quite the question the member asked but I have provided that additional context.

**Clause put and passed.**

**Clauses 34 to 36 put and passed.**

**Clause 37: Confidentiality —**

**Hon NICK GOIRAN:** Clause 37 in what will be a new act, the Charitable Trusts Act 2022, once the bill is passed, deals with the principle of confidentiality. Did any of the stakeholders consulted by government in the lead-in to the development of the bill, or subsequent to the development of the bill, raise any concerns about this provision?

**Hon MATTHEW SWINBOURN:** We have the advantage of the member providing some notice of these matters behind the chair. We appreciate the courtesy he has extended to us. Two stakeholders suggested additions to the list of exceptions under clause 37(3); that is, they suggested that disclosure be permitted to certain additional entities. Some of these suggestions were taken up and others were not. Those that were not adopted could be dealt with by prescription under regulations pursuant to clause 37(3)(h) should it be considered necessary in the future. Additionally, one stakeholder expressed the concern that the exceptions to the duty of confidentiality in the equivalent of clause 37(3) in the consultation draft could apply to a potentially large number of persons, particularly relating to a particular paragraph. The specific amendment suggested by that stakeholder was not adopted since it would not have achieved the purposes of the provision. However, the aim of the amendment suggested was to constrain the purpose for which disclosure would be permitted and an amendment was made that was consistent with that

intention. In summary, we effectively did not adopt the form that they were after but we did take up the substance and made a consequential amendment.

**Hon NICK GOIRAN:** The parliamentary secretary mentioned two stakeholders and, later in his response, mentioned one additional stakeholder. Was the additional stakeholder he referred to at that point intended to be one of the two stakeholders, or a third stakeholder?

**Hon MATTHEW SWINBOURN:** It is a third stakeholder. Two stakeholders raised one issue with clause 37(3) and an additional stakeholder raised an additional concern, if that makes sense.

**Hon NICK GOIRAN:** We established earlier, under clause 1 debate to the best of my recollection, that some 14 stakeholders were consulted by government. We now know that was after the bill had been prepared in that they were sent a consultation draft of the bill. We also know that the Auditor General was consulted prior to that. The Auditor General plus the 14 stakeholders were consulted. The 14 that were disclosed to the opposition during the briefing were: the Department of the Premier and Cabinet's Aboriginal policy and coordination unit; the Ombudsman; the Australian Charities and Not-for-profits Commission; the Office of the Registrar of Indigenous Corporations; the Law Society of Western Australia; the Western Australia Police Force; the Information Commissioner; the Chief Justice of the Supreme Court of Western Australia; the Public Trustee; the Department of Mines, Industry Regulation and Safety; the Western Australian Bar Association; the Charity Law Association of Australia and New Zealand; Senator Pat Dodson; and Alan Sefton, Senior Counsel. Are the three stakeholders that the parliamentary secretary referred to within that list of 14?

**Hon MATTHEW SWINBOURN:** I am advised yes, member.

**Hon NICK GOIRAN:** I am confident that one of the three stakeholders that the parliamentary secretary referred to is the Law Society of Western Australia. The reason I am confident about that is, as part of the opposition's work in readiness for this bill—this might be of interest to certain ministers of the Crown—the opposition took the opportunity to consult with one of the stakeholders, in this case the Law Society. It was quite some time ago, as far back as April this year. In part, a response was provided by the Law Society along the lines that it was invited to comment on the draft legislation. It had made some comments on it in June of last year. I quote —

The Law Society supports the purpose of the Bill to expand the powers of the Attorney-General in respect of Charitable Trusts so that these trusts can be held to account for any shortcomings of governance or performance that are discovered.

The Law Society in particular supports the whistle-blower protection in clause 37 and the ability to table investigator's reports found in clause 41.

However, it suggests that —

... exceptions to the duty of confidentiality in clause 36 as presently drafted apply to a potentially large number of persons, particularly in paragraph (e). The clause would be improved if disclosure to the categories of exception was qualified in relation to all categories by it being limited to disclosure for the purpose set out in paragraph (a).

Can the parliamentary secretary clarify whether the government is aware of those concerns raised by the Law Society, as I understand it, in June 2021? Can he confirm whether those concerns have been addressed completely in the bill that is presently before us or, if it has been addressed only in part, what part remains outstanding?

**Hon MATTHEW SWINBOURN:** There is a bit to go through here. It appears that the first thing the member did, I suspect, was to read from the same document I have in front of me, which is correspondence between the Law Society and the advisers, because the language the member used was identical.

**Hon Nick Goiran:** I can confirm for the record it is not the same document but actually a private email between the Law Society and me, but evidently they have used the same words.

**Hon MATTHEW SWINBOURN:** We disclosed that we consulted with the Law Society and the member put on the parliamentary record that he also consulted with the Law Society. To the extent that we are dealing with it now, we maintain our position on confidentiality on stakeholder engagement, but in this particular case, it is quite obviously the Law Society. What I am saying is that we maintain our principal position when engaging confidentially, but the Law Society quite clearly has put to the member the same concerns it raised with us about these provisions. The member read a paragraph that is identical, word for word, with what we have in front of us. The Law Society is entitled to do that because it is a private organisation that represents its members and it is entitled to disclose whatever it wishes through the course of its engagement with members of Parliament on these bills.

The Law Society was given a consultation draft but the bill now represents something different from the provisions in the consultation draft that it was provided. As I said, we did not address the Law Society's specific concerns about putting all matters in clause 36(3)(e) of the consultation bill into clause 37(3)(a) of this bill. We did not think

that the Law Society's suggestion to narrow confidentiality to the extent that it related only to the purposes of a charitable trust was appropriate, because, for example, if criminal conduct were raised, we should be able to disclose those matters to the Commissioner of Police for investigation and prosecution if necessary, or to other regulatory and prosecutorial agencies that have a proper interest in upholding the law of the land. We did not want that narrowed down too far, but we did make amendments, as I indicated, consistent with the general suggestion to narrow down the confidentiality requirements. As I said, we did not adopt the form suggested by the Law Society, but we took the spirit of that matter to the extent that we thought was appropriate, and that is what is represented in the bill before us.

**Hon NICK GOIRAN:** The only element of complexity here is that, of course, as a member of the opposition, I do not have the benefit of the consultation draft that was provided to the Law Society. When it refers to a concern about clause 36(3)(e), which provision of clause 37 correlates with that, to the extent that it still exists?

**Hon MATTHEW SWINBOURN:** I ask the member to bear with me because I want to help to make this make sense. The Law Society's reference to paragraphs (a) and (e), as the member identified, do not correlate with this bill. For the member's benefit and the benefit of posterity, I will read in the provisions of the consultation draft that related to those provisions and identify what the Law Society refers to when it refers to paragraph (a). At that stage of the consultation draft, it was proposed section 36(3)(a), which states —

- (3) A person subject to a duty of confidentiality must not record, disclose, or make use of a document or information provided by a provider except —
  - (a) for a purpose related to the performance of a function under this Act or any other function of the Attorney General under the law relating to charitable trusts; or

Then it states —

- (e) to a person or class of persons, or to a person or body representing a person or class of persons, intended to benefit from the application of trust funds from the relevant charitable trust; or

Those are the paragraphs (a) and (e) in the consultation draft that were referred to. Paragraph (a) of the consultation draft now corresponds with clause 37(3)(b); and paragraph (e) in the consultation draft corresponds with clause 37(3)(b)(ii). I hope that assists the member.

**Hon NICK GOIRAN:** I thank the parliamentary secretary for clarifying that and reconciling clause 36 of the consultation draft bill and clause 37 in this bill. To close this out, is it fair to summarise that there have been some drafting, formatting and numerical changes between what was in clauses 36(3)(a) and (e) in the consultation draft and what is in clause 37(3)(b) of the bill before us and that notwithstanding those drafting, numerical and other changes, the substance of the two matters are essentially the same, even though the Law Society's concerns remain, and that the government has considered that and is satisfied that it does not need to be addressed along the lines of the suggestion of the Law Society? Is the government satisfied with the version that is presently before us?

**Hon MATTHEW SWINBOURN:** The member's characterisation is not quite right and the reason is—sorry, I need to understand my notes—the purposes that were originally limited in paragraph (e) did not have any limitations. There were no restrictions for the purposes of paragraph (e); however, the limitations are now restricted for the purposes that are identified in paragraph (b). To be fair, I think we went from a position where there were no restrictions, to one where a person is limited to those matters that are identified in paragraph (b) in the bill. Clause 37(3)(b) includes —

for the purpose of enabling or assisting the Western Australian Charitable Trusts Commission or Attorney General to perform or exercise any functions or powers under this Act or another law relating to charitable trusts, including disclosing it —

It then goes on to list those matters. It went from being open to being specific. That is the indication I am getting. In our view, it addresses the concerns that were raised with us by the Law Society of Western Australia.

**Hon NICK GOIRAN:** Suffice to say, I really wanted to get to whether the society's concerns have been addressed and I think that the parliamentary secretary has been helpful and has now clarified that they certainly have been, from the perspective of government. From what I can assess on the fly here, without the benefit of the consultation draft document, that seems to be correct.

**Clause put and passed.**

**Clauses 38 to 42 put and passed.**

**Clause 43: Recovery of costs and expenses of investigation of charitable trust —**

**Hon NICK GOIRAN:** I give notice that, at this point in time, the only other clause that I wish to examine is clause 48 of the bill presently before us.

Dealing now with clause 43, I have essentially the same question about whether any of the stakeholders raised concerns about this clause. It will not surprise the parliamentary secretary that I can indicate that I am aware that at least one stakeholder has raised a concern about this matter. Once again, I seek confirmation that the government has considered it. To what extent does the clause before us leave those concerns unaddressed or, alternatively, addressed either in part or in full?

**Hon MATTHEW SWINBOURN:** One stakeholder raised it with us. I think we both probably know who that stakeholder was. Let me just read my notes rather than going on the fly and then I will not get into trouble! One stakeholder raised a concern that the provision for cost recovery against the complainant could be used to dissuade complainants, and that it would be incongruous if another regulator subsequently found the charity was noncompliant; however, the provision applies only if the complaint is frivolous or vexatious, or not made in good faith. We would say this is a high standard. It is almost impossible to envisage a frivolous or vexatious complaint that could cause another regulator to find noncompliance. In the past, there have been court proceedings in which the Attorney General has sought and obtained costs orders against the plaintiff when the complainant lacked merit and caused unnecessary costs to the trust. We think it is appropriate that a similar power exist for investigations. Two stakeholders raised concerns about allowing the recovery of investigation costs from the trust property. The issue of cost recovery was raised with us. We obviously considered it but we did not agree with the position and we persisted with that.

This is another issue. I think the member asked whether one falls within the other. In any event, two stakeholders raised concerns about allowing for the recovery of investigation costs from the trust property; however, in the usual case, the primary responsibility for investigating issues with the trust lies with the trustee, with funds recoverable from the trust. The state should not have to bear these costs when the trustee fails to carry out such responsibilities. Any award of costs under this provision will be made at the court's discretion and take all the circumstances into account, including the impact on the trust assets. Again, the two stakeholders have raised their concerns. We have considered them but we do not agree with them and we have persisted with the provisions in the way that they are now before the chamber.

**Hon NICK GOIRAN:** I know that one of the stakeholders who raised a concern with what was then clause 42 of the draft legislation but is now presumably the clause presently before us—clause 43—was not opposed to the notion of costs coming from the trust property itself. However, their view was that it should be discretionary and that the exercise of that discretion should be subject to an objective of preserving the trust assets for the beneficiaries of the trust. Is there anything in clause 43 or otherwise—not necessarily in the statute itself but as a matter of law—that would achieve that end? In other words, is there anything that would find the court seeking, whenever possible, to achieve this objective of preserving the trust assets for the beneficiaries of the trust?

**Hon MATTHEW SWINBOURN:** Under the provision, there is discretion for the court to determine that—the court will retain that discretion. I will deal with the issue raised by the stakeholder —

**Hon Nick Goiran:** That shalt not be named.

**Hon MATTHEW SWINBOURN:** Hon Nick Goiran can name them if he likes, but until he does, I will not. The stakeholder's concern about clause 4 was whether it would allow the recovery of assets and include the objective of preserving the trust assets. I am trying to get the wording right. That was the concern. The costs should be specified to be exercised subject to an objective of preserving the trust assets for the beneficiary of the trust. Because we have created this capacity to take costs from the trust, we have not met the objective because the trust assets will be drawn down if there is a cost order.

**Hon Nick Goiran:** Yes, they are not opposed to that. We have not picked up —

**Hon MATTHEW SWINBOURN:** — the objective. We have not specifically picked up that objective, but what we say is that the court will retain the discretion to take into consideration the impact that any cost order would have on the trust asset. For example, if the investigation costs were so large that they would consume all the trust assets and destroy the capital that sits in the trust, the court may very well say, "Notwithstanding all the behaviour of the parties concerned, we will not make a cost order within the ambit of our discretion because it will fundamentally destroy the cost." We do not expect that this provision will be routinely used for every investigation. However, we say that it is appropriate that the Attorney General has the power to apply for such costs to be recovered and that the court has the discretion to make such a cost order. I will use this as an example. In the first instance, obviously the Attorney General and his agents who are engaging in this matter would have an understanding of what the trust property is—how big it is and how appropriate it might be to make an application for an order in the first place—so there is a discretion there. In terms of the Attorney General making the decision to proceed with that matter, the court would exercise its discretion and the other parties would be in a position to say, "No order should be made." I confirm that nothing in this bill interferes with the court's jurisprudence and how it should exercise its discretion in those particular matters. I think the member's question was more pointed about whether I could point to any matters of law. We cannot say, for example, that a particular common law principle achieves the objectives that

the stakeholder was trying to achieve. However, we can say that the provisions in this clause will not interfere with the court's general jurisprudence—it is consistent with that jurisprudence—as it has developed over time.

**Hon NICK GOIRAN:** Clause 43(2) will give the Attorney General discretion to apply for costs, which will, in itself, be subject to a discretionary decision on the part of the courts. Was consideration given to giving the Western Australian Charitable Trusts Commission the discretion to make such an application?

**Hon MATTHEW SWINBOURN:** I am advised that consideration was given but, effectively, it was considered not appropriate to give it that power. The first context is that it will be the Attorney General, or the Attorney General's agents, who will take court action, not the Western Australian Charitable Trusts Commission. It might also be inappropriate because the commission might be a witness in the proceedings and it might have recommended that the Attorney General take that action. The role of the commission does not sit at the point at which costs might be pursued and determined. Yes, it was considered, but it was considered to not be appropriate.

**Clause put and passed.**

**Clauses 44 to 47 put and passed.**

**Clause 48: Terms used —**

**Hon NICK GOIRAN:** This is the first of the clauses in part 6 of the bill. As I understand, this 68–2 bill was amended by the other place prior to its passage to us, in part, regarding the provisions in part 6. Was it the case that either the aforementioned 14 stakeholders or the Auditor General—most likely not—drew the government's attention to concerns about part 6 that brought about those changes? If it was not one of the stakeholders, what was the genesis of those matters?

**Hon MATTHEW SWINBOURN:** In my second reading reply, and I do have before me the *Hansard* —

**Hon Nick Goiran:** You did touch on this issue.

**Hon MATTHEW SWINBOURN:** — in which the member admitted that he was not being helpful! He says, "I am not helping." Obviously, the tone and context are sometimes lost in *Hansard*. Those are frivolous comments on my part.

I indicated that the feedback was from Professor Ian Murray and Herbert Smith Freehills on behalf of the Charity Law Association of Australia and New Zealand. Professor Ian Murray and the Charity Law Association of Australia and New Zealand were included within the 14 stakeholders. Herbert Smith Freehills' involvement was in connection with that association, if I can describe it that way; it was not a separate stakeholder, but it obviously had some connection. The member asked for the genesis of the amendments. This issue was initially raised in an informal arrangement with the State Solicitor's Office. Then, once it became apparent that amendments were needed, there was further engagement, as I previously indicated, with Herbert Smith Freehills and Professor Ian Murray.

**Hon NICK GOIRAN:** I have no further questions about clause 48, part 6 or any other provisions in the Charitable Trusts Bill 2022. I know that the parliamentary secretary is keen, as I am, to see this bill passed this afternoon. Rather than make any third reading remarks, I will simply close by indicating the opposition's ongoing support for the Charitable Trusts Bill 2022. I thank the parliamentary secretary for the approach that he has taken in the carriage of this bill. In particular, I recognise the assistance that he has obviously been receiving from his advisers; it is very much appreciated by the opposition. With those remarks, we reiterate our support for the bill.

**Clause put and passed.**

**Clauses 49 to 58 put and passed.**

**Title put and passed.**

#### *Report*

Bill reported, without amendment, and the report adopted.

#### *Third Reading*

Bill read a third time, on motion by **Hon Matthew Swinbourn (Parliamentary Secretary)**, and passed.