CHARITABLE TRUSTS BILL 2022

Second Reading

Resumed from 16 June.

HON NICK GOIRAN (South Metropolitan) [5.03 pm]: I rise as the lead speaker for the opposition and as the shadow Attorney General as we consider the Charitable Trusts Bill 2022. I draw to members' attention that this 43-clause bill is another bar-2 bill. There has been some tinkering.

Hon Matthew Swinbourn: It has 58 clauses.

Hon NICK GOIRAN: Thank you, parliamentary secretary. This is a 58-clause bill.

Several members interjected.

Hon NICK GOIRAN: The parliamentary secretary has been resting all week, waiting as twelfth man. He is already performing most admirably late on a Thursday, and I thank him for that correction. It is a 58-clause bill. I draw to members' attention, but not to the parliamentary secretary, who will be well across this point, that this is a bar-2 bill that had some changes made to it in the other place. We will examine them in due course. I flag with the government a request at an early stage, potentially in reply, for it to outline the basis or genesis for those amendments made in the other place, as that will facilitate a more speedy Committee of the Whole phase of the bill.

The purpose of this bill as drafted is to make provision for five key matters. The first is for charitable recreational facilities such as a sporting field or community centre. The second is schemes for property held for charitable purposes. The third is investigation of charitable trusts by the Attorney General under a newly established Western Australian charitable trusts commission that will be constituted by the Ombudsman of Western Australia. The fourth is for proceedings in the Supreme Court to be undertaken in relation to charitable trusts. The fifth is to deal with gifts by certain trusts for philanthropic purposes. The genesis of the bill before us is this massive report by the then Deputy State Counsel—I do not think he is the Deputy State Counsel anymore—Mr Alan Sefton. This massive *Report on Njamal people's trust* is dated December 2018.

Members and parliamentary secretary, do not be too concerned that we need to scrutinise each page of this report in consideration of this bill, because for reasons that I will outline momentarily, a substantial part of this mammoth report deals with issues associated with this particular trust. There are then a series of recommendations that bring us to the bill presently before us. Nevertheless, this report by Alan Sefton to which I will be referring to hereon in as the Sefton report was dated December 2018. It is the genesis for the legislation before us today. His inquiry commenced in May of 2017. It concluded in 2018 and made some 63 recommendations. It is notable that although the trust itself was formed in 2003, it was its operation during a five-year period between 2014 and 2018 that became the focus of that particular inquiry by Mr Sefton. That inquiry was focused on several key things: the trusteeship transition from Abbott to Australian Executor Trustees Ltd to the current trustee Indigenous Services Pty Ltd; the financial performance and position of the trust; the internal governance and procedures over the course of the trusteeship; and the role of the key personalities involved in the trust.

When members have an opportunity—or perhaps they will not—to read and consider this mammoth report, they will see that Mr Sefton identified five key themes. Those five key themes can be described as follows. The first is the dealing with the issue of control by the Njamal people of their own destiny and control by certain people, both Njamal and non-Njamal, of the trust fund. The second theme he identified was that of tension between the desire of the Njamal people and the current trustee ISPL to use the trust fund to improve the economic position of the Njamal community through the development of commercial enterprise and the structures of the trust deed, the rules of equity, and the prescriptions of statute that restrict the way in which the trust fund can be used. The third theme identified by Mr Sefton in his report is the theme of change. He specifically speaks of change in how the business of the trust has been done since 2003 until the date of the inquiry and change in how the business might best be affected in the future, including by way of amendments to the trust deed and the legislation that governs this area. It is that latter point that will be particularly exercising the minds of members as we consider the bill before us.

The fourth theme that Mr Sefton covers in his report is outcomes, and specifically how they are defined, measured and achieved. The last of the themes he covers is self-interest, making mention that that is an ever-present risk to guard against in this area, whether it be the self-interest of those who may operate trusts and seek to profit, the self-interest of persons with whom they might contract or the self-interest of individuals and families who may understandably seek to encourage decisions that will serve their own rather than collective self-interests.

As I mentioned earlier this afternoon, the Sefton report provides some 63 recommendations. The first 47 of these recommendations are specific to the trust, so I do not intend to address them in my second reading contribution, nor, mercifully for the parliamentary secretary, under clause 1 or any other clause during the consideration of the bill. However, chapter 13, "Legislative Reform", provides recommendations 48 through to 61, which are specific

to amending the Charitable Trusts Act 1962. I recommend that those members who are particularly interested in this area familiarise themselves with those 14 recommendations, because they will be the subject of some discussion—some more than others—as we consider this bill, particularly during the Committee of the Whole stage. In the limited time that we have, I want to touch briefly on a couple of those recommendations. I begin with the first sub-recommendation in recommendation 55, which reads —

> Section 20 of the *Charitable Trusts Act 1962* be amended to:
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> - clearly specify the grounds on which a person may refuse to comply with a compulsory request to answer questions or produce documents;
> - require that if a person so refuses, they must specify the ground of their objection;
> - expressly abrogate the right to privilege against self-incrimination/exposure to a penalty, with certain safeguards to prevent those answers or documentation being used against the person who otherwise would have been entitled to assert that claim of privilege.

The second sub-recommendation in recommendation 55 reads —

> Consideration be given to whether in making any such amendments the right to claim legal professional privilege:
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> - be abrogated in the case of a trustee where the communication relates to or concerns the management and administration of the trust and its property, and what safeguards should be imposed in relation to the use of the information or documentation disclosed;
> - be otherwise protected in the event that a person elects not to maintain objections to answering a question or producing a document to an inquiry or examination on that ground but indicates that they otherwise seek to maintain the benefit of that privilege.

It appears that this substantial recommendation 55 of the Sefton report is somewhat addressed by the government in clause 40 of the bill before us, but it does not necessarily provide the level of specificity set out in recommendation 55. I ask the government to advise the house whether it has itself been advised and is satisfied that clause 40 will give effect to all of recommendation 55.

I turn now to recommendation 61, which reads —

> The *Charitable Trusts Act 1962* or other relevant legislation be amended to:
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> - permit evidence on applications in relation to a charitable trust brought by the Attorney General or a person authorised by the Attorney General, or otherwise with leave of the Court, to be given other than in accordance with the ordinary rules of evidence, and be based on information or belief; and
> - if considered appropriate, make the decisions and findings of other relevant regulatory bodies, such as ASIC in deciding to disqualify a person from managing corporations, admissible in evidence (albeit not determinative) on such applications.

We ought to be considering whether recommendation 61 has been addressed in the bill at all. If it has been, I ask the parliamentary secretary to identify the provisions that give effect to recommendation 61.

In somewhat typical fashion, which is becoming a pattern of behaviour, the opposition has concerns at this time about the lack of transparency by the government regarding the consultation process that has been embarked upon that has led to the bill before us. The opposition has been briefed by the government on the bill. I posed a number of questions at the briefing and they were generally adequately addressed. However, the issue of the lack of consultation and transparency most certainly has not been. Unless government members of this place have received some special treatment, the Legislative Council at the present time—certainly the opposition—is not aware of any express concerns by stakeholders or, more importantly, whether their concerns have been adequately addressed in the bill. As part of the briefing process, I asked who was consulted on the bill. We were informed that 14 stakeholders were sent a consultation draft of the bill. They are the Department of the Premier and Cabinet Aboriginal Policy and Coordination Unit; the Parliamentary commissioner—that is in reference to the Ombudsman—the Australian Charities and Not-for-profit 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, who conducted this inquiry.

Apart from asking about who was consulted—it was those aforementioned 14 people—I asked how recent this consultation was. I was informed that the consultation occurred from May to July last year. I also asked what the

nature of the concerns raised were, if any, in the consultation. The response was that the consultation process was undertaken by the State Solicitor's Office and the Attorney General's office on a confidential basis and that stakeholder feedback was taken into account during the drafting. Lastly, I asked to what extent this bill has addressed these concerns. The response was to refer to the previous response. In other words, it was undertaken on a confidential basis. That is not satisfactory. There is no reason why the government cannot go to each of those 14 individuals and ask them whether their feedback can be provided. Their concerns can be raised with the opposition and can be provided on a de-identified basis. The opposition is not particularly concerned whether the issues were raised by Senator Dodson, the Law Society, the Chief Justice or the Public Trustee. We simply want to know what these expert stakeholders have said to government about this. Why is it being hidden from the Parliament and the opposition?

As I said, there is a pattern of behaviour here. This seems to happen frequently on bills. Ironically, it is not all bills. We just dealt with a bill earlier today and, after some extensive cross-examination by Hon Martin Aldridge and me, we eventually managed to extract, albeit from a different agency, a consultation paper that was fundamental and important to the consideration and scrutiny of the legislation. In fact, it led to the government moving amendments to the bill to change the legislation. There is no good reason why information cannot be provided to Parliament. If the consultation was done on a confidential basis, pick up the phone, talk to the stakeholders and ask them whether they are happy for their feedback to be provided to the opposition and the Parliament either on an identified or a de-identified basis. This simple putting up of shields time and again is unsatisfactory; therefore, I simply ask why the government consistently runs and hides behind these shields of secrecy. What is the material that is being hidden from the Parliament at the present? I hope that when this bill next comes before us, that information might be available.

I also remain concerned about this bill because it will, once again, give another job to the Ombudsman of Western Australia. The Ombudsman of Western Australia already has a very significant range of tasks and functions that he must undertake. As a result of this bill, we will add another thing to that pile of functions.

Debate adjourned, pursuant to standing orders.