

COURTS LEGISLATION AMENDMENT (MAGISTRATES) BILL 2021

Committee

Resumed from an earlier stage of the sitting. The Deputy Chair of Committees (Hon Jackie Jarvis) in the chair; Hon Matthew Swinbourn (Parliamentary Secretary) in charge of the bill.

Clause 1: Short title —

Progress was reported after the clause had been partly considered.

Hon NICK GOIRAN: Prior to the interval for the taking of questions without notice, Hon Dr Brad Pettitt asked a very important question about one or more of the stakeholders and, to the best of my recollection, he may have referred to a letter from the University of Western Australia Social Policy, Practice and Research Consortium dated 23 July 2021, which was signed by Dr Maria Harries and Dr Celine Harrison. I think that he might have perhaps touched on some other concerns from other stakeholders and, to the best of my recollection—I do not have the benefit of *Hansard* in front of me—it may have also included the Aboriginal Family Legal Services, which provided some advocacy with regard to its urgent concerns regarding the Courts Legislation Amendment (Magistrates) Bill 2021 at some point. I regret to say that I do not have a date of when those concerns were circulated, but prior to the interval I think the parliamentary secretary was taking advice or possibly even commencing a reply and an opportunity should be afforded to him to do so.

The DEPUTY CHAIR: I thank Hon Nick Goiran for that recap.

Hon MATTHEW SWINBOURN: I was conferring with my advisers; I was not seeking for the question to be put at this stage. We are still digging around for the letters that the member referred to. We received correspondence from the Aboriginal Family Legal Services, signed by Corina Martin, CEO. That was sent to not just the Attorney General, but also Simone McGurk and addressed to Hon Nick Goiran. I am sure Hon Dr Brad Pettitt was CC'd into that as well as it looks like other members were CC'd into that letter. That letter makes reference to *An assessment of the Children's Court of Western Australia: Part of a national assessment of Australia's Children's Courts*. Is that the correspondence that the member was referring to? We are still struggling a little with the University of Western Australia correspondence that he was talking about and are trying to pin that down. We had half an hour since we broke, so we are still making some efforts to do that. I do not want to get the member to table it or anything else, but perhaps the member could pass me a copy of it, and I could see what the member is referring to.

Hon Dr BRAD PETTITT: I do not have a printed copy, but I note that Hon Nick Goiran has a printed copy of the letter from the University of Western Australia.

Hon Matthew Swinbourn: Can we just look at it?

Hon NICK GOIRAN: I have not had the opportunity to confer with the authors about this letter. The letter that I have in my possession is dated 23 July 2021. Unlike the other letter referred to that the parliamentary secretary quite rightly identified was sent to three individuals including the Attorney General, myself and copied to Hon Dr Brad Pettitt—there does not seem to be any controversy about that letter—this one here, to the extent that I have any reservation, has been sent to only me. It might be identical to one that has been sent to others, but perhaps we could have an opportunity to confer with the authors. For what it is worth, I do not think there is anything controversial about it, to the point that I would be willing to quote the entire letter, but that said, I think what the parliamentary secretary is saying is that the government does not have that letter readily to hand and is it possible that the government never received such a letter?

The DEPUTY CHAIR: Before the parliamentary secretary responds, two members have asked similar questions. Rather than focus on the question, perhaps the question could be reworded to consider the impact on the substance of the clause 1 debate, which might make it easier for the parliamentary secretary to answer a question relating to the clause 1 debate.

Hon Dr BRAD PETTITT: I hope I might be of some assistance. The letter was also sent to the Attorney General on 23 July 2021; at least, that is when the letter is dated. A copy of that letter was forwarded to my office after that. I do not think there is a problem sharing it and I feel quite comfortable sharing it. It is a letter from the university to the Attorney General that was CC'd to my office.

The DEPUTY CHAIR: If you could perhaps reiterate your question in relation to that letter, that might provide some guidance.

Hon Dr BRAD PETTITT: I asked the question about it because these researchers raised a significant issue, which I raised during question time. Their fear was that if the amendment was passed, it would jeopardise the growth of the team of judicial officers who are experienced, skilled and knowledgeable in the complex needs of vulnerable, disadvantaged and struggling families and the impact of intergenerational trauma. The Children's Court obviously deals with a large number of these issues and certainly with a large number of Aboriginal families. The letter refers to 57 per cent of the children being Aboriginal and being in the care of the state, and those numbers are increasing annually. I thought that was a significant issue that had been brought to the attention of the Attorney General and

I wanted to make sure that it was being considered. Hence, my question was: what response was given by the Attorney General's office to those researchers and to the Aboriginal Family Legal Services?

Hon MATTHEW SWINBOURN: To be fair to the Aboriginal Family Legal Services, I do not think it quite understood what we were trying to achieve here. I think it was talking about taking away magistrates who have applicable skills who work well within the Children's Court, but that is not what we are trying to achieve here. I can hopefully provide some assurance to that organisation that the good work that the court is doing in the care and protect space and on those other things is obviously something that the government wants to continue to be done. The Attorney provided a response to that correspondence and said that he thought it would be inappropriate for him to comment on the matters, other than to emphasise that the bill does not prescribe what decisions ought to be made by either head of jurisdiction, and he suggested that the organisation refer its comments directly to the Chief Magistrate and the President of the Children's Court.

I think what the organisation was trying to get at is the way that the court conducts its judiciable matters rather than the administration of the court itself, which is what we are concerned with here: Does a magistrate sit in a particular location? If we have six and a half magistrates now, has the workload reduced so that we need only five and a half magistrates? We are concerned with the movement of those sorts of things and giving the president the same power and functions that the Chief Magistrate has in relation to those things. I gave a response to Hon Dr Brian Walker about that particular thing in that that is not what this bill seeks to do. The concerns of the Aboriginal Family Legal Services, although given earnestly, are matters that it should take up with the heads of jurisdiction themselves rather than government.

Hon NICK GOIRAN: That provides a response to the concerns raised by the Aboriginal Family Legal Services, but what was the outcome with the Social Policy Practice and Research Consortium? Just getting back to where we were at, is that the letter that the parliamentary secretary is still seeking to identify?

Hon Matthew Swinbourn: Yes. We do not have that report at the moment. We are still trying to establish whether that was received and whether we have a copy of it.

Hon NICK GOIRAN: Hon Dr Brad Pettitt indicated that he had been copied into a letter. I am going to work on the basis that the Attorney General has most probably—it is more likely than not—received a letter from the Social Policy Practice and Research Consortium not only on the basis of the information proved by the honourable member, but also because it seems likely that if it was going to contact me and Hon Dr Brad Pettitt, it most probably raised its concerns with the Attorney General.

I will quote from this letter dated 23 July 2021, which I have identified. If anyone asks me to table it, I will indicate that it is confidential on the basis that I have not conferred with the authors of the letter. I will quote this letter and seek the parliamentary secretary's response. They say —

We note with concern the advice provided by HT Legal (Terri Hatelie, 27/06/2021) that the amendment enabling the President of the Children's Court to remove a magistrate without recourse has the potential for abuse of power and that it is not consistent with the principles of administration of justice or the independence of judicial officers.

I again acknowledge that the parliamentary secretary does not have the benefit of having that letter in front of him. With respect to the principle that is articulated in that letter—that this will enable the President of the Children's Court of Western Australia to remove a magistrate without recourse—is it a correct understanding by the Social Policy Practice and Research Consortium that this bill will enable that?

Hon MATTHEW SWINBOURN: The member quoted from the letter. I think they have used the words “without recourse”. They have not defined what they actually mean by the word “recourse”. Do they mean is there a mechanism for appeal and those sorts of things? The way I will answer the question is by dealing with what is a statutory exercise of power. I might firstly try to assist members by clarifying the operation of the law as it applies to the exercise of statutory powers, which is what the President of the Children's Court would be doing if the president was in a position to deal with it. It comes back to the words “absolute discretion” that are used in proposed section 11, and I think that is what they were getting at in that letter. Again, I do not have the letter, but I think that is essentially what they were referring to.

As a matter of law, no statutory power is unfettered and unreviewable. Any suggestion that this bill seeks to enact an unfettered and unreviewable statutory discretion is incorrect. I take members to the High Court case of Minister for Immigration and Citizenship v Li (2013) 249 CLR 332. I am sure Hon Nick Goiran is familiar with that case. Chief Justice French stated at paragraph 23 of the judgement in that case —

Every statutory discretion, however broad, is constrained by law.

...

Every statutory discretion is confined by the subject matter, scope and purpose of the legislation under which it is conferred.

The discretion of the president, under proposed section 11(2) and (4), to request or return a magistrate resource is constrained by the subject matter, scope and purpose of the provisions of the Children’s Court of Western Australia Act. Under the particular provision in which the power is conferred, being proposed section 11, the exercise of the discretion by the president to issue a notice will clearly be confined by the statute to the workload of the court.

To look at the president’s function under the Children’s Court of Western Australia Act more broadly, under section 37(1), the president is responsible for the administration of the court, the disposition of the business of the court, and its practice and procedure. The reason for the breadth of the discretion is to enable the president to operate the Children’s Court in the manner that appears to be best to the president, with a view to ensuring that there is no wastage of judicial resources. The express reference to the discretion being exercised without regard to seniority, length of service or any other matter is to ensure that the president is able to make the most beneficial decisions for the operation of the court without any person having an expectation that they will remain in the Children’s Court upon the basis of their past service or conventions related to seniority. If a person is not required to perform functions as a Children’s Court magistrate, they will continue as a judicial officer. When I say “perform functions as a Children’s Court magistrate”, I mean specifically within the Perth Children’s Court and the one in Fremantle, not the general power of all magistrates to exercise the functions of the Children’s Court under their dual commission.

Progress reported and leave granted to sit again, on motion by Hon Matthew Swinbourn.