## CHARITABLE TRUSTS BILL 2022

*Committee*

Resumed from 20 October. The Deputy Chair of Committees (Hon Dr Brian Walker) in the chair; Hon Matthew Swinbourn (Parliamentary Secretary) in charge of the bill.

Progress was reported after clause 1 had been agreed to.

**Clause 2: Commencement —**

**Hon MATTHEW SWINBOURN**: The last time we debated this bill, which I believe was Thursday last week, a number of matters arose in the clause 1 debate that I undertook to pursue further. I want to address a couple of things that, hopefully, will clear up some of these issues. I wanted to clarify something from my reply to the second reading debate. I said that a deficiency with the current law is the inability to remove the trustees when they are not doing the right thing. I wanted to be clear that this power is not contained in the current act. However, the Attorney General has standing, as part of his role as parens patriae, to apply under the courts' inherent jurisdiction for the removal of a trustee of a charitable trust. The bill not only makes this power explicit, but also corrects the deficiency that the power was limited to trustees. Under the bill, it will be expanded to cover other people involved in the administration of a charitable trust. That is to clarify something that I said in my reply. It is not something that Hon Nick Goiran had raised.

I would like to table a document that Hon Nick Goiran had sought, which is a comparison between the Njamal inquiry recommendations and the relevant provisions that will implement those recommendations. I seek to table this document.

[See paper 1773.]

**Hon MATTHEW SWINBOURN**: That document was provided to Hon Nick Goiran behind the chair earlier, so I hope the member has found it to be of assistance. The member sought an explanation of why the Auditor General had not been consulted on this bill. It is not so much a correction, but perhaps to put things a bit straighter, we provided the member with a list of 14 stakeholders who had been consulted on the bill and the Auditor General was not one of those persons who were included on that list of 14 stakeholders because, technically, the Auditor General was not consulted on the bill. However, at an early stage in the development of this law reform, the Auditor General was consulted on the relevant Njamal inquiry recommendations, and before drafting the bill had commenced. We were not trying to be tricky there, of course. It was that the consultation on the bill itself did not include the Auditor General. There were quite good reasons for that. The Auditor General expressed the view that the bill, as drafted, does not affect the Auditor General, and she had not been included in later consultation because it did not affect her jurisdiction. We still have to come back to the issue of the recommendation arising from the Njamal report.

I can table correspondence—I hope this is of assistance to the member—between the Auditor General and an early instructing officer from the State Solicitor's Office on the development of the Charitable Trusts Bill.

[See paper 1774.]

**Hon MATTHEW SWINBOURN**: Perhaps I will pause while the member gets a copy of it. I may speak more generally to it. The Njamal inquiry report came down in November 2018. This correspondence is dated 24 May 2019. The State Solicitor's Office was engaging with the Auditor General on recommendation 54. Alan Sefton had made the recommendation that the Charitable Trusts Act be amended to give the Auditor General, or a delegate generally or by arrangement with the Attorney General, powers to perform audits. I will not read all the recommendations, but that is the nature of the audit.

In substance, in this correspondence the Auditor General essentially said that she does not support that recommendation. I know that the member is still waiting for a copy of that document, but perhaps it would assist if I read part of it. It has a covering letter and then an appendix, which details the Auditor General's view. If the member would like to follow along, I am about to quote from page 2, where the dot points are.

**Hon Nick Goiran**: The appendix?

**Hon MATTHEW SWINBOURN**: Yes, the appendix. The Auditor General says —

> Any proposal to:
>
> - *require* the Auditor General to provide independent assurance of charitable trusts
> - amend the Charitable Trusts Act to allow the Attorney General to *appoint* or *direct* the Auditor General to provide that assurance
>
> would compromise the independence of the Auditor General and potentially impact the ability of the Auditor General to deliver a comprehensive audit program that provides the level of assurance across public sector activity required by Parliament.

I take the member to the summary, which is the last two lines on that page. It states —

> In summary, we do not support amending the Charitable Trusts Act as recommended, as it directly contradicts the intent of the AG Act regarding independence and would potentially impact the ability of the OAG to deliver its core functions on behalf of the Parliament, as outlined above. Section 22(1) of the AG Act already allows the Auditor General to enter into an arrangement with the Attorney General to conduct this work.

The Auditor General made some other comments, which I am not sure quite posit where we are at, but the Auditor General generally made the point that she remains available to have matters referred to her under the existing regime and is willing to provide some guidance for auditing arrangements in that regard. I do not want to paraphrase it because the member now has a copy of that correspondence. As indicated, that was from 24 May 2019. To a significant extent, the Auditor General, for want of a better word, "dealt" herself out of the reforms. What was the government left with when it was talking about the concept of the charitable trust commissioners and who should have that responsibility? The Auditor General indicated that she did not want to take on that role and that is why the Ombudsman then came into the frame. Again, I hope that is of assistance to the member and it provides him with an understanding of how this bill was formulated.

I will add that the Attorney General went out of his way to contact the Auditor General to make sure that she was comfortable with this correspondence being tabled in Parliament today. Obviously, the member implores us on many occasions to pick up the phone. The Attorney General has done it this time. I am sure the member will come back to this at a later date and ask us why we do not do it in other matters, but I know he will take it in the good faith that it is intended to help with the debate on this bill.

I do not want to cover why the Ombudsman was selected because I think the member can now understand why it was not the Auditor General. We have explained why we picked the Ombudsman. I am sure the member can go to the details of that.

The member stated —

> I note that following this report from Mr Sefton, the Attorney General said that he had—past tense—referred these matters to the Australian Securities and Investments Commission for appropriate action as a matter of urgency. I would be grateful if the government would update the house on the outcome of that referral.

That is in relation to the Njamal matter. No enforcement action was taken by the Australian Securities and Investments Commission as a result of the Attorney General's referral of the Njamal inquiry matters to that body. We did refer the matter and it did not take any further action. Unfortunately, we are not in a position to provide any further comment on its deliberations or decisions.

The member also stated —

> … subsequent to the Sefton report, there were further behavioural issues with the functioning of this charitable trust.

He referred to Mr Sefton's confidential letter to the Attorney General dated 8 November 2018. Then he asked —

> What, if any, action has been taken by the Attorney General as a result of those further behavioural issues?

I can inform the chamber that the Attorney General did take action as a result of the serious matters raised in Mr Sefton's letter dated 8 November 2019, which was tabled with the inquiry's report. The Attorney General has had a long involvement in various matters relating to the trust following the inquiry, seeking to protect the trust and ensure that the inquiry's recommendations were implemented and that the trust was able to operate with more stability and better governance. He engaged with the trustees and the Australian Charities and Not-for-profits Commission, including holding a meeting here at Parliament House in May 2019 to discuss the future of the trust. That meeting was attended by the Attorney General; Minister Wyatt, the then Minister for Aboriginal Affairs; representatives of the Australian Charities and Not-for-profits Commission; members of the trust advisory committee; and other senior Njamal people. The honourable member may recall that the concerns raised in Mr Sefton's letter related to alleged behaviour as part of attempts to replace Indigenous Services Pty Ltd as the trustee of the Njamal people.

**Hon Martin Aldridge**: We should bring timed speeches back.

**Hon MATTHEW SWINBOURN**: That is a matter that sits outside of the current bill before us, member.

As I was saying before I was interrupted, following the May 2019 meeting, the Attorney was advised that the trust advisory committee had decided to keep ISPL as trustee of the trust and allow it time to implement the recommendations of the inquiry. That was the Attorney's preferred option, to better protect the trust. It was consistent with the inquiry's recommendations. However, attempts to remove ISPL as trustee, as referred to in Mr Sefton's letter, were raised

last year and were the subject of legal proceedings heard in the Supreme Court in September 2021. In October 2021, the Supreme Court dismissed that application, finding that ISPL remain as trustee. The Attorney General was a party to those proceedings and made submissions in support of that conclusion. Since those proceedings, the State Solicitor's Office has continued to engage with the trustee about its ongoing implementation of applicable recommendations from the Sefton report. The member may also note that Mr Sefton's letter included that the State Solicitor's Office took steps to inform ASIC of the allegations, so those allegations were also considered by that agency. I think we may have covered that off.

Hopefully, that addresses the matter that the member raised as to where things are at. As the member could appreciate, with any charitable trust, including this one, unfortunately there will be moments of conflict between those who are connected to the trust. Whether this matter can be resolved or not, we hope that the reforms to the Charitable Trusts Act and the structure that we are seeking to put in place will hopefully deliver a more constructive opportunity for people to resolve their differences without necessarily resulting in legal action.

Hon Nick Goiran also raised issues about the Kimberley Sustainable Development Charitable Trust and what is happening with the concerns that members of the community have raised with the Attorney General. Again, I am paraphrasing the member. The Attorney General recognises and acknowledges that certain issues have been raised with the member, but no inquiry has yet been established. What is happening with that matter more particularly is that it is intended that the issues that have been raised with the Attorney General will be actioned by the Ombudsman as a result of the passage of the bill, which was the member's question.

The trustee has been engaged with by the Attorney General and has provided a response to clarify its position in relation to various issues raised. The Attorney General has also recently been provided with a redacted copy of the independent report of Mr Tony Power, Senior Counsel, I believe—if not, maybe soon. I do not know. The member does not need to check that. That is all right.

**Hon Nick Goiran**: You will deal with that in *Hansard*.

**Hon MATTHEW SWINBOURN**: Yes, that is right.

That report was commissioned by the Kimberley Land Council and is about the Kimberley Sustainable Development Charitable Trust. The report has also been made public. I am not sure whether the member has had access to it. If the bill is passed, the Attorney General will consider on a case-by-case basis which, if any, charitable trust matters that have been raised with him will be referred to the Ombudsman.

The member may recall that the first question that he asked in committee, which we stumbled on, was whether consideration had been given to amending the current act rather than repealing it and substituting it with a new act. I can answer affirmatively that yes, it was considered. If the member looks at the letter from the Auditor General—which gives it away—he will see that the Auditor General talks about amendments to the act rather than a rewriting of the act. The decision was made that, given the age of the current act and the extensive nature of the proposed amendments, it would be more appropriate to repeal the current act and replace it with a new act with modern drafting.

I lastly want to address the question that the member raised about which matters in the current Charitable Trusts Act have potentially been omitted in this bill. I can refer to three matters of substance in the current act that have not been picked up in the bill. As the member can appreciate, in rewriting the bill, obviously language has been changed for modernising purposes. I know the member is not interested in those, perhaps, rats and mice issues, but rather in matters of substance. Two of those matters are in part 3 and relate to schemes. They have previously been advised in written answers to the questions on notice posed at the opposition's briefings. The first is that the current section 7(3)(a) has been removed. This was a complex provision for lapse of gift when there was no general charitable intention, as an exception from the usual rule in section 7(1) that enables property and income to be disposed of for other charitable purposes in accordance with an approved scheme. This subsection was often raised in argument, but the courts found it difficult to interpret, and nobody has ever successfully opposed a scheme on the basis of this exception. It therefore added complexity and cost without changing the outcome. The new clause 10 equivalent to the current section 7 does not include this exemption, so that is, obviously, a departure.

The second is that the provision for termination of small trusts in section 7A of the current act has been removed. This section applies only to trusts that, first, do not permit disbursement of capital as opposed to income; and, second, have a balance of less than $30 000. Given this limited application, the State Solicitor's Office is not aware of it ever having been successfully applied. Under the bill, these situations would instead be dealt with with more flexibility under clauses 10(1)(b), 11 or 12.

The final matter omitted is the current section 21(1)(c), which allows the court to make an order excluding any purpose from the purposes for which the trust property can be applied. This power is to remove a purpose if a charitable trust is not found in clause 44, the equivalent of section 21. Any purpose removed by this provision would by definition be a charitable purpose. Since it is a purpose of a charitable trust, it was considered inappropriate to change the purposes of a charitable trust without following the usual procedures in part 3 of the bill. In particular, the

scheme process under part 3 allows for public advertising of a proposed scheme to change the purposes of the trust and allows any person to make submissions opposing the scheme if they wish to do so. Again, the State Solicitor's Office is not aware that the omitted provisions in section 21(1)(c) have ever been applied.

**Hon NICK GOIRAN**: Both good news and bad news arises from the response just provided by the parliamentary secretary. On a positive note, I want to acknowledge the comprehensive response that has just been provided by the parliamentary secretary, as per usual. I note that he will probably be the first to also recognise those who are capably assisting him with this matter. I thank everyone involved in comprehensively dealing with those matters that were raised on the last occasion that this bill was before the chamber. I also note in passing that, once again, this demonstrates the benefit of what I would describe as adjournments during the course of the chamber's consideration of a bill, because it provides a minister or parliamentary secretary a proper opportunity to consider and research the concerns that have been raised, and to then get on the parliamentary record the response to those matters.

In further charitable good news, a number of papers have been tabled this afternoon by the parliamentary secretary. One is a document that I acknowledge was provided to me by the parliamentary secretary behind the chair, as a professional courtesy, in advance of today, and I thank him for that. This document deals with each of the recommendations in the Sefton report and sets out the clauses that the government says will implement those recommendations. I can see, having had, to the best of my recollection, a couple of days to consider this matter, that that has also been a piece of good and useful work that will guide and facilitate an efficient Committee of the Whole House process.

It is also charitable good news that another significant document has been tabled by the parliamentary secretary today. That is the letter from the Office of the Auditor General dated 24 May 2019. Anyone who is serious about the consideration of the bill presently before the chamber needs to be aware of and consider that letter, particularly in light of recommendation 54 made by Mr Sefton in his inquiry. We will get to that at a later stage as we consider the bill.

The bad news is that it is odd that it required this level of energy and scrutiny on the part of the opposition to extract this document. To provide the proper context, members need to understand that the genesis of the bill before us is the Sefton report. Mr Sefton said to the government that it needed to appoint the Auditor General as the person who will make these types of inquiries. The opposition has repeatedly asked the government the question: why is the Ombudsman the person who will be appointed under the bill before the chamber rather than the Auditor General? It is only now that we find out the real reason for that. The criticism with respect to the decision-making outcome is not with government. We will unpack this a bit further. The Office of the Auditor General has made her views on this matter very clear to government. We can in due course consider whether we agree with the Office of the Auditor General and the strength of her response and this notion of protecting her independence. I intend to also tackle that later.

There is no criticism on my part of the government with regard to the outcome. We now have what I would describe as new information—not to be confused with fresh information, because it was plainly available to the government on the last occasion. This new information explains why the bill before us introduces the notion of the Ombudsman rather than the Auditor General, contrary to the recommendation of Mr Sefton. What is not explained in all this is why this information is being provided to Parliament and the opposition only now? I hope, again, that the government will take this in the spirit that I now intend, because even over the course of our consideration of this clause, I recognise the incremental improvements occurring in the transmission of information to Parliament—proper scrutiny, proper exchanges of information and debate between the opposition and the government, and the role of the Legislative Council. I acknowledge and am pleased to see those improvements. But when the opposition—it was me in this case—during a briefing from the government asked, "Who was consulted with regard to this bill", and was then provided a response from government saying that 14 stakeholders were sent a consultation draft of the bill and it then set out the 14 stakeholders, it is incredibly misleading.

I am not suggesting at this point in time that it was done intentionally, because all my interactions with regard to the consideration of this bill, pre it coming into the chamber and since, have been positive. Under no circumstances am I suggesting that this has been done on purpose, but it is incredibly misleading to a member of the house of review to be told by executive government that executive government consulted 14 stakeholders in respect of this bill. Obviously, there was consideration and consultation with the Office of the Auditor General. The Auditor General herself says —

> Thank you for your correspondence and subsequent contact to my Office inviting comments on the Attorney General's proposed amendments to the above Act …

Were I to be less charitable, I would say it is trickery to then respond to a question from a member of the opposition and say that 14 stakeholders were sent a consultation draft of the bill. Evidently, that is a matter of fact. It is true that 14 people were sent a copy of the bill by executive government and it asked what their view is with regard to these matters. One of those parties was not the Office of the Auditor General. Why? It is because the role of the

Office of the Auditor General had been expunged by virtue of prior consultation. When an opposition member asks the government in good faith, "Who have you consulted with regarding this bill?", I do hope that executive government—not only in the Department of Justice, but all portfolios from here on in—do that unintentionally. As I said, I do not believe there was any bad intent here.

I will be careful with my words at this point. I just hope that advisers and members of the executive in all good faith can understand that when a member asks, "Who was consulted with regard to this bill?", it is not intended to mean, "Once you have completed your drafting process, who did you send the bill to?" In actual fact, it is often the case that next to nobody is provided the bill at that late stage. It is obviously intended to mean in the process of crafting the bill, pre and post, including circumstances in which the government has proposed specific amendments to the Charitable Trusts Act 1962 to the Office of the Auditor General that that ought to be included. I will leave it at that stage. I am mildly disappointed that this information has only come to our attention now.

**The DEPUTY CHAIR**: Hon Nick Goiran.

**Hon NICK GOIRAN**: When I consider all the elements of this matter as a whole, I am confident that this has not been done on purpose. I will just describe this as an omission, without any bad intent, but it clearly should have been brought to our attention long before now. It is a significant issue. The independent officer to Parliament, the Office of the Auditor General, has made her views very clear that she wants no part in the matter that is presently before us. As I said, we will unpack that a little further later as to whether we think that is appropriate. It is fine for the Office of the Auditor General to say that, including the fact that she says this is crucial to the independence of her role. The question that immediately arises is: why does the Ombudsman not seem to think that he needs this crucial level of separation and independence? Perhaps we best deal with that when we get to clause 29.

Having made all those remarks, and despite the fact I perhaps took a little time on the latter portion, I want to once again reiterate that on the whole, this has been a very positive adjournment and it will expedite the passage of the bill from here on in. At this time, noting the response from the Office of the Auditor General dated 24 May 2019 on page 3, she states —

> Section 22(1) of the AG Act already allows the Auditor General to enter into an arrangement with the Attorney General to conduct this work.

Can the parliamentary secretary confirm that nothing that is presently before us changes or impacts upon that? In other words, prior to the introduction of this bill, the Attorney General had the capacity to enter into an arrangement with the Auditor General to conduct this work. Will that remain the case once the bill has passed?

**Hon MATTHEW SWINBOURN**: I think the short answer is no, but if I can refer the member to clause 32, "Investigation of charitable trusts", it states —

> (1) An investigation of a charitable trust or class of charitable trusts (an ***investigation***) may be carried out by the following (an ***investigator***) —
>
> (a) an authorised person acting at the direction of the Attorney General —
>
> (i) on a complaint to the Attorney General; or
>
> (ii) on the Attorney General's own initiative;

That will allow the Attorney General to refer matters to the Auditor General if the Attorney General so wishes. In effect, it has no bearing on the Auditor General's capacity to do that.

**Hon NICK GOIRAN**: I will just round this point out now rather than getting back to it at clause 32. We are saying that clause 32(1)(a)(ii), when read with section 22(1) of the Auditor General Act, will allow the Attorney General to continue to refer this type of work to the Auditor General with the consent of the Auditor General, given that they need to enter into an arrangement?

**Hon MATTHEW SWINBOURN**: Yes, member.

**Hon NICK GOIRAN**: I thank the deputy chair and the chamber for the leeway to enable the parliamentary secretary and I to really round out matters that would ordinarily be considered on clause 1, knowing we are on clause 2. I just have one question on the clause before us. I note that at subclause (b), the significant majority of the bill presently before us is not yet ready for commencement. Could the parliamentary secretary give an indication to the house why that is the case and, perhaps even more importantly, when it is intended that this new act—the Charitable Trusts Act 2022—will be fully operational?

**Hon MATTHEW SWINBOURN**: My advice is that our intention is to commence the rest of the act immediately after royal assent. There are no regulations attached to this and our advice from the Ombudsman is that he is ready to go pretty much as soon as the act comes into force. There is no intention for any delay between those two events.

**Hon NICK GOIRAN**: Why does the bill not do that then? As is customary in these circumstances, why does it not read at clause 2(b), "the rest of the act on the day after assent"?

**Hon MATTHEW SWINBOURN**: I do not know whether I am quite going to answer what the member specifically asked. I think the only reason is the possibility for the Ombudsman to make adjustments, but the Ombudsman has been very clear that once the act is given royal assent to the commencement of those other parts, it is not going to be necessary to make adjustments. There is no need to amend the act to reflect that it should commence all in one go because that is just a process of properly proclaiming it. I reiterate that there is no intention to proclaim the rest of the act on different days or anything like that after it is given royal assent. If there is the need for any variation because something arises, we have that flexibility, but, as I said, there is nothing to indicate there will be any necessity for that.

**Clause put and passed.**

**Clauses 3 to 9 put and passed.**

**Clause 10: Property disposed of for other charitable purposes —**

**Hon NICK GOIRAN**: I ask the parliamentary secretary to consider clause 10(4). He will see that it reads —

> In any of the circumstances referred to in subsection (1)(a) to (e), the persons in whom the property is vested must, as soon as reasonably practicable after becoming aware of those circumstances, submit to the Attorney General for approval a scheme for the application of the property to an alternative charitable purpose.

Appreciating that it is not a matter of specific days, what is the intended time frame? What guidance are we able to provide for what we intend at this present time by the words "as soon as reasonably practicable"?

**Hon MATTHEW SWINBOURN**: I have a bit of a lawyer's answer to start with, which is that it will depend on the circumstances, of course. To bring some light to that, a charitable trust can be created in a will, so the executor might be a relative of the person who is going through a grieving process. What would be reasonably practicable in their circumstances would be very different from someone who is a professional trustee, who might very well be in a position to act immediately, once they became aware of any of the matters in clause (10)(1)(a) to (e), in accordance with their professional and ethical obligations. I have an example of what would not be reasonably practicable. In one case, the executor of a will waited over 14 years before applying to the Supreme Court for a scheme to vary a charitable trust created by a will in circumstances in which there was a gift to an institution that had never existed. That would not be considered reasonably practicable under almost any circumstances I can imagine, so it would not be used. It will very much depend.

The context here is that charitable trusts can be in the millions and millions of dollars and sometimes much more modest amounts and the people involved go from ordinary laypeople to highly sophisticated professional people. It will depend on all those matters.

**Hon NICK GOIRAN**: I refer to a person who has this responsibility under clause 10(4). At this point, I might wrap up clause 12(4) in which a similar scenario occurs so we do not have to consider this point again. If a person fails to comply with their obligations under clause 10(4) or clause 12(4), what are the consequences?

**Hon MATTHEW SWINBOURN**: There are no punitive consequences. It is not criminal in nature. Some consideration was given to whether it should be necessary to make noncompliance with duty in clause 10(4)—and I presume also clause 12(4)—a criminal offence, but it was not deemed necessary because the breach of a trustee's duty does not, as a general rule, constitute an offence. If a trustee breaches a duty, the Attorney may take proceedings against the trustee for the breach of the trust or apply to a Supreme Court to remove the trustee and appoint a new trustee. It was about creating a positive duty to act in a certain way and the consequence if they fail to do that is to be removed and replaced. It is not creating a criminal or even a civil penalty type regime, because the issue is protecting the trust property. I do not know that somebody failing to act could necessarily be equated with the kind of thing that needs a punitive type of sanction rather than just trying to remedy the problem that they have.

**Hon NICK GOIRAN**: If the only sanction would be removal, is it the intention of the Attorney General that, should those circumstances arise—that is, a breach under clauses 10(4) or 12(4)—they would trigger a removal?

**Hon MATTHEW SWINBOURN**: I think there is a spectrum of behaviour that we can talk about here. It might be that in some instances, people just do not have the will to act. They might be aware of issues that have arisen under clause 10(1)(a) to (e), but they are just not taking the necessary steps. In the first instance, they would be encouraged to exercise their responsibilities and to deal with it in that way. I am advised that, in most instances, when it is brought to people's attention that they should deal with these matters, they take steps to do so. Obviously, there will be those who will be recalcitrant and refuse. It is really more of an act of omission than wilful conduct. It will not necessarily be the case that once it is brought to the Attorney General's attention, someone will be removed. The thing will be to get them to do their duty, and, if they fail to do that, to take the necessary steps.

**Clause put and passed.**

**Clauses 11 to 27 put and passed.**

**Clause 28: Terms used —**

**Hon NICK GOIRAN**: How does clause 28 give effect to recommendation 55 of Mr Sefton's report?

**Hon MATTHEW SWINBOURN**: I am advised that it is through the definition of "requirement". It says —

> ***requirement*** has the meaning given in section 32(2);

That is the relevance to recommendation 55. In the table that we provided to Hon Nick Goiran, the reference to clause 28 was only for the purpose of being thorough. Obviously, "requirement" is fully defined within clause 32(2), which states —

> An investigator may, in the performance of a function under this Act, give to a person a written notice (a ***requirement***) …

That is why we included the reference to clause 28 in the table we provided to the honourable member.

**Clause put and passed.**

**Clause 29: Western Australian Charitable Trusts Commission established —**

**Hon NICK GOIRAN**: A number of questions arise at this point, including about the decision to ensure that the commission is constituted by the parliamentary commissioner, being the Ombudsman. This intersects with the issue we touched on earlier, specifically recommendation 54 of the Sefton report, which reads —

> The *Charitable Trusts Act* … and/or the Auditor General Act be amended to enable the Auditor General or a delegate to be appointed by the Attorney General to make an inquiry or examine under section 20 of the *Charitable Trusts Act* … or to assist in such process.

We established earlier that recommendation 54 is not being implemented, in the sense that it calls for the Auditor General to be the person to make the inquiry or the examination. Obviously, a decision has been made to include the Ombudsman. Earlier, we touched on the response of the Office of the Auditor General, dated 24 May 2019, which I tabled. As I mentioned earlier, I think it is particularly enlightening that the Auditor General said, at page 2 —

> In summary, we do not support amending the Charitable Trusts Act as recommended, —

I will pause there to note that the words "as recommended" are evidently a reference to recommendation 54. She goes on to say —

> as it directly contradicts the intent of the AG Act regarding independence …

A few matters arise from that. First of all, did Mr Sefton consult the Auditor General prior to making recommendation 54?

**Hon MATTHEW SWINBOURN**: We do not know whether Mr Sefton did that, and the reason is that the process was treated as an independent inquiry. It was separate from the State Solicitor's Office advisers whom we have here. When Mr Sefton was appointed as the inquirer for the Njamal issue, although he was Deputy State Counsel, he was performing that role—to use a colloquialism—on contract, as an independent investigator. We do not have the insight into the processes of an independent investigator that we might have if it were done without that independence. I am not sure that I am going to be able to give the member that level of information.

**Hon NICK GOIRAN**: I am happy to take this by way of interjection, if it assists. Is that something that can be taken on notice—to confer with Mr Sefton and establish whether this has occurred? Presumably, it can be taken on notice.

**Hon MATTHEW SWINBOURN**: No, I think we are going to try to find the answer. We will investigate. I do not think that we are going to finish the bill by 6.20 pm, so we will make inquiries.

**Hon Nick Goiran**: I think you might struggle at this point.

**Hon MATTHEW SWINBOURN**: That is okay. We will make inquiries. It may be the case, given the independent nature of his role, but let us find out.

**Hon NICK GOIRAN**: The Office of the Auditor General has made its view very clear here that it wants no part of this, pleading this principle of independence and a desire to continue to not be directed. Has the Ombudsman raised any such concerns?

**Hon MATTHEW SWINBOURN**: My advice is that to the extent that the advisers at the table are aware, the answer is no. There were different advisers on the development of this bill, because obviously it goes back to 2019, but since then the issue of independence has not come up. I also make a broader point about the Auditor General's and Ombudsman's capacities to be directed. I bring the member's attention to section 15(1) of the Parliamentary Commissioner Act 1971, which provides —

> Either House of Parliament, or any committee of either of those Houses, or a joint committee of both Houses of Parliament, may refer to the Commissioner, for investigation and report, any matter which is within his jurisdiction and which that House or committee considers should be investigated by him.

I raise that because it makes reference to the difference between the Attorney General and the Parliament, but in terms of the nature, we do not think that the Auditor General has a similar capacity to be directed by the houses of Parliament to undertake such an investigation. In terms of the level of independence, both are independent, but one sees the role of the Western Australian Charitable Trusts Commission as potentially interfering with that independence while the other has raised no concerns about it. It might be because of the different nature of their roles. The other thing is that the Ombudsman is a complaint-receiving body. Obviously, the Ombudsman decides whether to investigate any individual complaint that is raised with them. I am not sure whether the member has ever referred a complaint to the Ombudsman; of course, many people have. It is somewhat different from the role of the Auditor General, which is to provide that auditing of government and public service activities.

**Hon NICK GOIRAN**: The Ombudsman has not raised any concerns about this principle of independence; the Auditor General has. I think that the parliamentary secretary has done a fair job of trying to reconcile those two positions, or to distinguish between the two. Do we even need the provision currently before us—that is, clause 29, for the establishment of this commission—in light of section 22(1) of the Auditor General Act?

**Hon MATTHEW SWINBOURN**: We do not see it as being the same. Section 22(1) of the act requires the Auditor General's consent, so the Auditor General could refuse, whereas this legislation would not require the Auditor General's consent for an investigation to happen. If there were a circumstance in which the Attorney General was strongly of the view that an investigation should happen, this provision would give him the power to engage someone else. Going to the Auditor General would create a level of complexity that we can avoid with the creation of this provision. I think I have indicated before that the Western Australian Charitable Trusts Commission will effectively be a shopfront for the community to more accurately interface with the Ombudsman. It does not necessarily give an explanation of the role of the Ombudsman. Unfortunately, within our community, most people do not understand the role of an Ombudsman, and when we refer to him as the Parliamentary Commissioner for Administrative Investigations, of course, people get even more confused. By way of example, when we dealt with the bill last night, the analogy occurred to me that within the Western Australian Industrial Relations Commission there are other bodies like the Public Service Appeal Board. It is essentially constituted in the public service —

**Hon Nick Goiran** interjected.

**Hon MATTHEW SWINBOURN**: Yes, but essentially, although they are jurisdictionally different, they are just the bodies that sit within the commission's infrastructure. If the member wants an analogous example, that is what we are doing here with this clause.

**Hon NICK GOIRAN**: That would be fair enough but for these comments by the Office of the Auditor General on page 2 of the letter of 24 May 2019. The Auditor General said —

> There are however already existing provisions that support the intent of the Inquiry report recommendations. Under section 22(1) of the AG Act, the Auditor General may enter into a fee-based arrangement with the Attorney General to carry out an audit of a charitable trust. This allows such work to occur, at the discretion of the Auditor General in consideration of existing resourcing and audit program requirements.

I think this is the important point at this stage —

> To our knowledge, there has never been an occasion where the Auditor General has declined such a request under s22 and the Office has previously supported the use of s22 for this purpose.

In light of that information, is it really necessary for us to establish the Western Australian Charitable Trusts Commission by virtue of this clause in a context in which the Auditor General has quite openly said to the government, "You can already do this under section 22 of my act, and, in fact, every time you've asked me to do this in the past, I've always done it, and, in fact, I support the use of section 22"?

**Hon MATTHEW SWINBOURN**: I make a point of clarification. I am told by my advisers that the reference here to a referral is not the referral of an investigation into a charitable trust, so no referral has occurred. Obviously, the provision at section 22(1) of that act allows for a range of referrals, which could include a referral for an investigation into a charitable trust, but, to the best of our knowledge, it has not included such a referral.

**Hon Nick Goiran**: The point the parliamentary secretary is making is that when that power has been used or enlivened, which evidently has happened on multiple occasions, it has not been in regard to charitable trusts?

**Hon MATTHEW SWINBOURN**: Yes. That is correct, member.

The other issue as well is if we think about the skill set of the Auditor General and the very competent staff that work for her, it is not necessarily apposite with what we want from the Western Australian Charitable Trusts Commission because the Western Australian Charitable Trusts Commission will be dealing with the very minor

disputations between people connected to a charitable trust to the most serious disputations, if we think that is appropriate. For example, if an annual general meeting has not been called, it does not seem quite appropriate to have the Auditor General's powers invoked through a process like this; rather, an individual will complain to the Western Australian Charitable Trusts Commission, which may very well use its informal powers or informal approaches to make sure that that then gets back on track and everybody is pointing in the same direction.

There is also the other issue here, more generally, of the Auditor General not wanting these powers given to her, and then trying to vest that onto the agency in any event.

**Hon NICK GOIRAN**: Through the chair to the parliamentary secretary, the last question that arises at this point on clause 29—after which I will be happy for us to proceed to clause 33, subject to the views of any other member—we have scrutinised at length the Sefton recommendation that it be the Auditor General, the views of the Auditor General, but the government's choice is to use the Ombudsman. The only question that now seems to need answering is: was any other body or person considered other than the Ombudsman in what I would describe here as the substitute for the Auditor General, in terms of the implementation of recommendation 54?

**Hon MATTHEW SWINBOURN**: I am advised that there was no serious consideration other than the Ombudsman. What I will say is that one of the advisers who was very involved in this early on became a member of the State Administrative Tribunal, so our capacity to engage with her on her part of this bill since she moved to that role is limited, so that is why I am qualifying my response. I just wanted to give the member that context. It is not an excuse, of course, but it certainly explains why there are some gaps in the knowledge of the early development of the bill. The current advisers have been very much involved, of course, for some time, but, as I say, we cannot just knock on her door and say, "Hey, can you give us this information?"

**Clause put and passed.**

**Clauses 30 to 32 put and passed.**

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

**Hon NICK GOIRAN**: Parliamentary secretary, the issue that arises here at clause 33 is the handing over of what can be described as royal commission powers. My question is: why does the government say that it is necessary to hand over those powers to the Western Australian Charitable Trusts Commission, and to what extent are those powers greater than the powers that Mr Sefton had for his inquiry?

**Hon MATTHEW SWINBOURN**: On determining that the Ombudsman was the appropriate entity to constitute the WA Charitable Trusts Commission, and that the WACT would be tasked with conducting investigations under the new act, it was considered appropriate to mirror the Ombudsman's existing powers of investigation under the Parliamentary Commissioner Act. Section 20 of that act confers the same rights, powers and privileges to the Royal Commissions Act to investigate matters under the Parliamentary Commissioner Act. In terms of the powers that Mr Sefton had, he had only the powers available to him under the current 1962 act, and I think that is contained in section 20. What his own investigation established was the limitations of those powers in terms of compellability, and so —

**Hon Nick Goiran** interjected.

**Hon MATTHEW SWINBOURN**: Yes, and the frustrations that resulted in properly getting involved in the matters, so I think he did identify them. I am not going to read out this section, but that was the genesis of then looking about. Also there was synergy of the Ombudsman and the Ombudsman's existing role, resources and capacity, and then just reflecting that with those royal commission powers.

**Hon NICK GOIRAN**: The parliamentary secretary indicated there then that this is merely the continuation of the Ombudsman's existing powers. We are not going to give him any new extraordinary powers that he does not already have.

**Hon Matthew Swinbourn**: By way of interjection, no new powers.

**Hon NICK GOIRAN**: Thank you. Are these powers currently also held by the Auditor General?

**Hon MATTHEW SWINBOURN**: I am conscious of the remaining time that we have. The member has actually asked a reasonably complex question because the Auditor General's powers do not evenly match up with the Ombudsman's powers and those of a royal commission, so it might require us to do a little bit more analysis of that. We just want to be clear, though, that when the member talked about the expansion of the Ombudsman's powers, this will be a move for the Ombudsman from public to private here because charitable trusts are a private arrangement and the Ombudsman's powers are currently related to public matters, and so —

**Hon Nick Goiran**: As would be the case with the Auditor General.

**Hon MATTHEW SWINBOURN**: That is correct, so that is really what has highlighted that position. But it is not really an expansion of powers because it is really the same powers but just in the context of a charitable trust.

**Hon Nick Goiran**: That is applied over a broader group.

**Hon MATTHEW SWINBOURN**: That is right, yes. But, currently, the Ombudsman does not have the power of a royal commission to inquire into a charitable trust, which is effectively what the new bill will do. But as I say, the Auditor General does not have that power either, and so even if we go back to section 22 of the principal act and its engagement, the Auditor General would still be limited by their powers that exist under the current act. Overnight, we will have a closer look at this theme.

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