

**COURTS LEGISLATION AMENDMENT (MAGISTRATES) BILL 2021**

*Committee*

The Chair of Committees (Hon Martin Aldridge) 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 MATTHEW SWINBOURN:** Yesterday, I undertook to investigate a couple of matters for Hon Nick Goiran. I will deal with the second of those matters. I think he wanted me to ask the Attorney General whether the heads of jurisdiction would give permission for their feedback to be provided to the Legislative Council. I made that request and I can confirm that that will not occur. It is consistent with the position that I made in my reply to the second reading. The other, more substantial, matter related to undertaking to confirm to Hon Nick Goiran that this is not in dispute and that the government accepts, out of myriad things that might have been occurring in this matter, that at the genesis of it, amongst other things, President Quail wanted Magistrate Crawford to move out of the Children's Court. There was a discussion about that. I will give this answer and, hopefully, fingers crossed, we will be able to make progress.

The member asked me to confirm the genesis, to use his words, of a dispute between two judicial officers, which ultimately resulted in one judicial officer commencing litigation in the Supreme Court against another. That dispute was ultimately discontinued by the applicant. I am not in a position to confirm—I cannot and will not speculate—the genesis of a dispute that led to Supreme Court proceedings being commenced and discontinued without any findings being made. I can confirm that the government understands that a point of law raised in that litigation related to the power of the president to issue directions to magistrates performing functions within the Children's Court. This issue goes to the heart of the president's powers and statutory responsibilities as principal judicial officer of the Children's Court to manage the administration of that court. That question of law is the principal matter this bill seeks to address. The bill does not seek to resolve any particular issues in relation to any particular individuals or factual scenarios. It is of no assistance to the passage of this bill before the house to delve into facts or speculation about past disputes or disagreements between individuals. As I have said, this bill will resolve for future purposes issues about the scope of the powers of the president of the Children's Court to manage the administration and workload of the court. Yesterday I understand the member sought to point out that this bill does not only deal with the present power to direct magistrates, but also the president's power to seek additional resources from the Chief Magistrate. I can confirm that the bill does deal with both those matters and it must, as those matters are inextricably linked as a consequence of the structure of the court frameworks and the commissioning of magistrates.

The Children's Court and the Magistrates Court are administered by common individuals—that is, duly appointed magistrates. In order to address the ambiguity that currently exists about those individuals performing functions in different jurisdictions, as they are commissioned to do, proposed section 11 will introduce an administrative power that permits the allocation of proper workload across two courts. Presently, there is no statutory framework for this to occur. As I have said repeatedly, the litigation between Magistrate Crawford and President Quail brought to light the fact that there is currently ambiguity about the power of the president to manage the workload and administration of the court. There is no secret about that.

I appreciate that the member may wish to ask more questions about particular facts or circumstances of dispute, disagreements or discussions between members of the judiciary. I take the opportunity to clarify now that I am not in a position to take the matter any further on questions of that kind. I am able to confirm that the litigation between Magistrate Crawford and President Quail brought to light that there is currently ambiguity about the power of the president to manage the administration of the Children's Court. This bill has been developed to resolve those ambiguities by, firstly, providing a framework for the allocation of judicial resources between the Magistrates Court and the Children's Court; secondly, clarifying the powers of the Children's Court and the Chief Magistrate in respect of issuing directions to magistrates; and, thirdly, ensuring a flexible magistracy that is available to perform the various functions for which magistrates are appointed. I am of course happy to take questions from the member on how the clauses of the bill deliver on those matters.

**Hon NICK GOIRAN:** I thank the parliamentary secretary for following up on those two very important matters that were left hanging yesterday. One pertains to the request I made yesterday that the Attorney General of Western Australia contact the heads of jurisdiction that the parliamentary secretary indicated he and the government have consulted with and obtain their consent to release their feedback on this bill. I confirm for the record that today the parliamentary secretary has indicated, as he said he would, that he made that request to the Attorney General. According to my notes of what the parliamentary secretary just said, the Attorney General has declined to do so. For the record, the Attorney General of Western Australia, the head of the judiciary in our state, is not willing to

speak to the heads of jurisdiction about this bill that impacts on the judiciary. He is not willing to ask them whether they would mind consenting to him releasing that information. He has been asked, through the hardworking parliamentary secretary, and he has declined to do so. He refuses to provide information that he has at his disposal to the Parliament. Guess what, Attorney General? That triggers section 82 of the Financial Management Act. He may want to have a conversation with the Auditor General about that. There is no doubt that the Attorney General will now concoct some kind of reason he does not need to comply with section 82 of the Financial Management Act as well.

**Hon Kyle McGinn:** Give it a rest.

**Hon NICK GOIRAN:** The honourable member would like me to give this a rest. If the honourable member had the courage to stand up and give a speech on this bill —

**Hon Kyle McGinn** interjected.

**Hon NICK GOIRAN:** Would the member like me to sit down so he can make an intelligent contribution?

*Point of Order*

**Hon MATTHEW SWINBOURN:** The standing orders require comments of members to be passed through the chair, not across the chamber. Chair, could you please remind members of that.

**The CHAIR:** Yes, parliamentary secretary, the standing order is relevant. However, the chair does allow for some latitude in debates. The chair will call the house to order when it gets too unruly. I remind members to address their remarks through the chair.

*Committee Resumed*

**Hon NICK GOIRAN:** Mr Chair, I say to Hon Kyle McGinn that he might like me to put this to rest but I will not put to rest allegations that evidence has been tampered with, least of all until such time as the Attorney General puts together a judicial commission. The Attorney General, Hon John Quigley, has the responsibility to look into these matters. I will certainly not put it to rest when the parliamentary secretary indicated yesterday, in response to my very first question on clause 1, that the genesis of this matter was a dispute between those judicial officers. One of those portions of dispute is that apparently a judicial officer has tampered with evidence. Somebody needs to be held accountable for that. We cannot sweep that under the carpet. That is why I will continue to raise these matters not only during the course of our consideration of this bill, but also into the future, because it is absolutely clear that this will not be resolved today.

I will quote from the uncorrected proof *Hansard*. It is always helpful for us to have the *Hansard* at our disposal. I quote from the uncorrected proof of yesterday, Wednesday, 16 February 2022, when the parliamentary secretary said —

What has brought this to the fore is the issue that arose with Crawford and the requirement of Quail wanting to remove Crawford from the Children's Court back to the Magistrates Court and the Chief Magistrate not agreeing to that.

Was what the parliamentary secretary said yesterday to the house accurate, or was that a false statement?

**The CHAIR:** Parliamentary secretary, just before I give you the call, can I just provide some caution to the remarks of Hon Nick Goiran. I draw members' attention to standing order 45, "Imputations and Personal Reflections". It states —

All imputations of improper motives and or personal reflections on the Sovereign, the Governor, any Member of either House of Parliament or a judicial officer, are disorderly other than by substantive motion.

I am concerned that some of the debate is heading into that territory, and I will monitor that closely.

**Hon MATTHEW SWINBOURN:** Thank you, chair; I appreciate your guidance on that point. I was going to make the point that this bill does not deal with judicial misconduct. It does not fall within the ambit of the bill, so I am not sure how that is relevant to the debate. The honourable member has quoted from *Hansard* a comment that I made. *Hansard* is *Hansard*, but he also needs to have regard to my further comments in which I sought to qualify what I said. I am not sure whether I used the word "misspoke"; I gave it a generalised term in that regard. I made a lengthy statement at the beginning of this debate regarding the matters of Quail and Crawford, and I cannot and will not take that matter any further.

**Hon NICK GOIRAN:** For the record, and I said this yesterday, I am not judging the outcome of this dispute. All I know is that the public record reflects that there has been an allegation of bullying by one judicial officer against another. That is what the public record reflects. It is not me impugning anyone's reputation. I am simply regurgitating what is on the public record, and people, including those in the Parliament, should be concerned about such an allegation. As the parliamentary secretary said yesterday, these things remain untested and somebody needs to take responsibility for testing them. The other matter that has been raised on the public record is that there has been some tampering of evidence. Again, I am not impugning anyone's reputation at all; I am reflecting what is on the public record. Somebody needs to test those allegations and get to the bottom of them, and if those allegations are frivolous

and vexatious, somebody needs to say so. But if they are substantiated, there needs to be repercussions. What cannot happen is for the government to say that this dispute is the genesis of the bill that is before the house, and when the questions start to get awkward say, “We’re not taking that any further.” Worse than that is to have a situation in which the Attorney General of Western Australia is doing nothing about it. That cannot happen.

What is very interesting is that yesterday the parliamentary secretary also indicated, and I quote from the uncorrected proof —

... there is a general awareness about the gap in the powers of the Children’s Court president to manage the workload, which this bill will try to address.

Who brought to the government’s attention that there was a problem with managing the workload in the Children’s Court?

**Hon MATTHEW SWINBOURN:** I think I am in danger of repeating myself. The genesis of the bill was the dispute in some regard—we have said that—that was brought to the attention of the Attorney General by the President of the Children’s Court, and that has given rise to an awareness of this gap. There may have been awareness within the judiciary before that; I do not have any knowledge of that. But in terms of what was the genesis of this bill that we are debating today, it was the dispute, for want of a better word, in that regard.

**Hon NICK GOIRAN:** Parliamentary secretary, was that dispute about workload?

**Hon MATTHEW SWINBOURN:** Member, I am not going to get into the details of a dispute of which I do not know the full ambit and limits. I understand that there was an issue in terms of what the president could do within his own court in terms of the magistrates who rest under his responsibility and his relationship with the Chief Magistrate in terms of those resources. That issue is the genesis of this bill. That is the mischief that this bill seeks to address. I am not going to drill down into a he-said, she-said dispute between judicial officers. I am in no position to do that. I have indicated that before. I have covered that in detail. I realise that the member wants to forensically examine that particular aspect of it to find some issue of sensation that he can put in a media release somewhere. I get that. I understand that that is the member’s job, but I am in no position to take that any further.

**Hon NICK GOIRAN:** If it gives the parliamentary secretary any comfort whatsoever, I will give him an undertaking now that there will be no media release of that sort from me.

**Hon Matthew Swinbourn:** It gives me no comfort, member.

**Hon NICK GOIRAN:** No. I would not have thought so because the situation is incredibly awkward for the government already. There is no need to be able to drill down to everything. The problem is, at the moment, as things sit, there is a stench over the government and its lack of willingness to deal with this matter. That is how it sits at the moment. The irony here is that if there were some responses provided to these matters, there would be the opportunity for the stench to be removed. But the government is quite happy to leave things like this with these allegations, as the parliamentary secretary repeatedly said, untested. I keep saying, “Who is going to test them?”

The parliamentary secretary wants us to come back to what he considers to be the focus of the bill, and that is what I have indicated to him. Yesterday, he said that there is a general awareness about the gap in the powers of the Children’s Court president to manage the workload, which this bill will try to address. The parliamentary secretary has indicated on behalf of the government that this is what this bill is all about. This bill is going to address, apparently, the powers of the Children’s Court president to manage the workload. I have just asked the parliamentary secretary whether the dispute was about workload and we cannot even get a straight answer about that. I do not think there would be anything controversial about it unless the dispute had nothing to do with workload and that it is all a fiction.

The problem here, parliamentary secretary, is that the public record reflects not only the comments that were made yesterday, but also in the transcript—do not worry; I will get to the transcript in a moment—that indeed there was a letter between President Quail and the Attorney General and if my memory serves me correctly a meeting as well whereby there was a very clear indication that President Quail wanted to remove Magistrate Crawford from the Children’s Court. I understand that the parliamentary secretary has said that he does not want to get into all of that and so forth, but my point is this: What does that have to do with workload? What would the removal of a magistrate out of the Children’s Court have to do with workload? I am not sure whether the parliamentary secretary is able to shed any light on that, because, as I said, he has indicated that this bill is all about managing the workload. Is that an indication that at the moment there is a surplus number of magistrates in the Children’s Court—they are surplus to requirements—and therefore as part of managing that workload there is a current desire by the President of the Children’s Court to reduce the number of magistrates?

**Hon MATTHEW SWINBOURN:** I cannot speculate about the current workload of the Children’s Court. That is a matter for the president, in terms of how he manages his court, but I take the member back to the provisions of the bill and what it seeks to do. It seeks to provide a framework for the allocation of judicial resources between the Magistrates Court and the Children’s Court, and it does that through proposed section 11 and its particular

provisions. It clarifies the power of the President of the Children's Court and the Chief Magistrate in respect of issuing those directions to magistrates. I think that is also dealt with under proposed section 12. That is what that will do. It is not just a single thing about workload; it is about functions as well, in terms of workload. That is set out initially in proposed section 11, which deals with a number of aspects that I am sure we will drill down into when we get to it. Under proposed section 12A, the president may assign duties to magistrates that deal with that sort of thing. That replicates the powers that the Chief Magistrate has under the Magistrates Court Act 2004 in relation to what he—it is currently “he”—can do to direct his magistrates when they are operating within his sole jurisdiction.

The other thing it does is clarify that the Chief Magistrate will have no capacity to direct magistrates, which is the proposed amendment to section 25(5), which will insert a new subsection (6). If a person holds office as both a magistrate of the court and as a magistrate of the Children's Court, the Chief Magistrate must not give a direction under subsection (1) in relation to the person's functions as a magistrate of the Children's Court. The case has in some respects highlighted the deficiency in the current president's powers with regard to magistrates who are exercising those powers in the Children's Court. That is what the genesis of this is. That is what we are trying to deal with here.

Although I acknowledge that the other matters raised by the member are important, they are outside the scope of what this bill does. What we are doing here, in the Committee of the Whole House, is about that part. The member is a very adept and able parliamentarian; there are many other forums through which he can pursue the kinds of questions he is asking me that I cannot answer, and I encourage him to do that and to focus on what we are doing here, which is this bill. These are my own words, and no-one else's. It is quite a niche issue, in many respects, and I have been trying to explain the bill to other members of the house. The member is a lawyer; I do not know whether he ever did any work in the Children's Court; I am sure he did work in the Magistrates Court, but for most people outside that little bubble, this is a niche issue. It is important, absolutely, but it is fairly niche.

**Hon NICK GOIRAN:** I thank the parliamentary secretary. I am hearing from all of that that there is no workload issue in the Children's Court. Despite the fact that the parliamentary secretary indicated that this bill is all about trying to structure a situation so that there can be management of the Children's Court workload, I am hearing from what he has indicated that there is no problem at the moment. If I understand the government's position as the parliamentary secretary has relayed it, there is no dispute at the moment. If I understand the government's position correctly, apparently President Quail and Magistrate Crawford are now getting along famously and there is no dispute between them. Things are extremely harmonious, everyone has put down their allegations, and there are no allegations currently before the government that would warrant investigation. That seems to be the government's position. In addition to that, it seems to be the position of the government that there are no workload issues in the Children's Court and there is no need to have any more or fewer magistrates, there is nothing to see here and there is no need to ask any further questions, yet we are expected to pass this bill without further question. If that is the case, why do we need the bill? I hasten to add that I have omitted one further character in this, the Chief Magistrate, as we discussed yesterday. Seemingly, there is also no dispute or disagreement at the moment between Chief Magistrate Heath and President Quail; all is well. There are no workload issues, so we can just move on and pass the bill. That is not possible to believe, because there is no way that this bill would therefore be the second priority of the McGowan government, least of all in circumstances in which the Law Society has indicated that a pause should be put on the bill and that instead a couple of other bills that are sitting on the weekly bulletin should be prioritised.

That takes me to the Law Society. The parliamentary secretary yesterday seemed to be quite annoyed with the Law Society and its letter of 14 February 2022, which I believe the parliamentary secretary tabled yesterday. I do not think he was having a go at me when he did so, although he noted that I had not tabled the letter —

**Hon Matthew Swinbourn:** Member, by way of interjection, I do not think Hansard picked it up but I just noted that you hadn't tabled it, and you indicated by interjection, which wasn't picked up by Hansard, that you had run out of time to do so. I was just noting that.

**Hon NICK GOIRAN:** That is right, and I am grateful for that.

That letter was responded to by the Attorney General yesterday, 16 February, and the parliamentary secretary also kindly tabled that document, which is tabled paper 1066. In his criticism of the Law Society yesterday, the parliamentary secretary said, according to the uncorrected proof —

One of the last paragraphs of the Law Society's correspondence states —

We also query whether the Parliament has had an opportunity to consider whether the Bill in its current form may be the subject of a legal challenge on the grounds that it interferes with the operation of Courts, contrary to chapter III of the Commonwealth Constitution.

It was very late in the day for that concern to have been raised, knowing full well that this bill has been before the house for some time.

Is it the position of the government that this letter of 14 February was the first time the Law Society had raised this concern with the government?

**Hon MATTHEW SWINBOURN:** I am cognisant of the time. I think the member is correct about the characterisation of me being a little annoyed by the letter from the Law Society. It holds itself up as the voice of the legal profession in Western Australia.

*Sitting suspended from 1.00 to 2.00 pm*

**Hon MATTHEW SWINBOURN:** If I recall correctly, we were dealing with the issue of whether the Law Society of Western Australia's raising of a potential constitutional issue earlier this week was the first time that it had been raised with the Attorney General. I think that the honourable member made some mention of my mood towards the Law Society yesterday, and that I was somewhat perturbed. I just want to make a few pointed remarks about the Law Society, which says it is the voice of the legal profession in Western Australia. I would expect the Law Society to understand the difference between the Legislative Council and the Legislative Assembly, and that the Attorney General is member of the Legislative Assembly and not the Legislative Council. If members of the Law Society are listening to this debate, could they stop referring to Hon John Quigley as a MLC and start referring to him as an MLA, because he does not have the privilege of being a member of our esteemed chamber; he is a member of the other place. As much respect as I have for the Attorney General, he is allowed to stay down there and I will stay up here! That is the first thing. Also, for the Law Society's benefit, I point out Joshua Thomson's name is not spelt with a P, and I am sure he would appreciate the Law Society having the courtesy to spell his name correctly in the correspondence it shares with honourable members of Parliament.

I turn to the point the honourable member raised with me on whether it was the first time that a constitutional issue had been raised by the Law Society. My advice is that the Law Society sent a letter to the Attorney General last year that raised some concerns it had with this bill, but that correspondence did not raise a constitutional issue. In my reply to the second reading debate, I noted that the Magistrates Society of Western Australia raised a constitutional issue last year. I acknowledge that the member referred to part of my speech, but I clarified that at that time the Magistrates Society had raised that constitutional issue. To the best of my knowledge and the advice I have at the table the first time the Law Society specifically raised that issue was by letter to members of Parliament, CC-ed to the Attorney General, on 14 February.

**Hon NICK GOIRAN:** When was the issue of the constitutional validity of the bill raised with the government by the Magistrates' Society?

**Hon MATTHEW SWINBOURN:** We are having trouble nailing down the exact date, because I think the member's question was about when it might have been raised by the Magistrates' Society with the Attorney General or generally in the community. I am not sure, but I think it was with the Attorney General. The Attorney General did have correspondence from the Magistrates' Society I think at the time the bill was first introduced last year, but I am not sure whether it specifically raised a constitutional issue. More broadly, noting the Solicitor-General's advice dated —

**Hon Nick Goiran:** It's 13 August 2021.

**Hon MATTHEW SWINBOURN:** That is right. Yes, it is 13 August 2021. In his advice to the government, at paragraph 2, he states —

The Magistrates Society of WA and the Law Society of WA have raised concerns about the constitutional validity of the Amendment Act.

As early, or as late, as 13 August 2021, the Magistrates' Society and the Law Society had raised issues. The member's first question was about when the Law Society first raised the issue with the Attorney General. As I say, from the advice I had at the table, with the correspondence that is available to us, we did not find any evidence in the correspondence that the society wrote to the Attorney General in August of last year that a specific chapter III constitutional issue had been raised. I hope that covers off that issue in terms of the progress of this legislation. Obviously at some point last year the government sought advice from the Solicitor-General, and I think there was some commentary in the public domain at that time from different organisations, such as the Law Society and the Magistrates' Society.

**Hon NICK GOIRAN:** It seems to me, parliamentary secretary, that the government owes the Law Society an apology. It was indicated yesterday, with some criticism, that the Law Society's correspondence of the 14 February 2022 was "very late in the day for that concern to have been raised". I asked earlier whether that was the first time it was raised and the parliamentary secretary indicated it was. Now, of course, when we read the Solicitor-General's opinion, which the parliamentary secretary quite rightly identified is dated 13 August 2021, we note that the chief legal adviser to the Attorney General was well aware of the concerns of the Law Society of WA as at that date. So much so that he thought it important enough to mention it in paragraph 2 of his opinion —

The Magistrates Society of WA and the Law Society of WA have raised concerns about the constitutional validity of the Amendment Act.

I think it is incredibly unfair for the government to be chastising the Law Society over raising this issue “very late in the day” when the government’s most senior legal adviser was well aware of the fact on 13 August 2021. Is the parliamentary secretary in a position to indicate when the Attorney General was first furnished with this opinion by the Solicitor-General?

**Hon MATTHEW SWINBOURN:** It was on or about the date of the opinion itself, which was 13 August 2021. It would have been on or about that time. Am I clear? Yes.

**Hon NICK GOIRAN:** As I say, the government should reflect on what has transpired and deliver an apology to the Law Society, but, that is a matter for government. That said, it is clear that on or around 13 August 2021 the Solicitor-General furnished an opinion on the constitutional validity of the “Courts Legislation Amendment (Magistrates) Act 2021”. I note that the parliamentary secretary seemed a bit annoyed that the Law Society made a typographical error referring to Hon John Quigley as an MLC instead of an MLA. No doubt it will have picked that up and chastised the person who hit C instead of A on the typewriter.

**Hon Alannah MacTiernan:** A bit of attention to detail would not be a bad thing in that role.

**Hon NICK GOIRAN:** I think it would be outstanding, Minister for Regional Development, and if only the McGowan Labor government and its cabinet ministers would do exactly that. The amount of times that the minister and other cabinet ministers have failed to pick up these things over the last five years has staggered me. Just be very, very careful to —

**Hon Alannah MacTiernan** interjected.

**Hon NICK GOIRAN:** I think the minister should be very, very careful. It is about time that the minister and her colleagues took the time to read some of these things. The point I make to the parliamentary secretary, who is waiting patiently, unlike the Minister for Regional Development, is that the opinion of the Solicitor-General refers to a “Courts Legislation Amendment (Magistrates) Act 2021”. Does any such thing exist?

**Hon MATTHEW SWINBOURN:** No, there is no act at this stage. The introduction to the Solicitor-General’s advice says “Courts Legislation Amendment (Magistrates) Bill 2021” and then in brackets refers to it as the amendment act. I think the member is referring to the bold reference at the top of that. But, no, there is no act; there is a bill at this stage. As a term of reference throughout the advice it is then referred to as the amendment act.

**Hon NICK GOIRAN:** Is the parliamentary secretary indicating that the title of this opinion contains an error?

**Hon MATTHEW SWINBOURN:** I am not going to debate the opinion of the Solicitor-General on those points. The member asked me a question about whether the “Courts Legislation Amendment (Magistrates) Act 2021” existed, and I think he is trying to lead me into making admissions about those sorts of things. The member is entitled to draw his own conclusions from that. The Solicitor-General’s advice stands as it is, and I will not be drawn into debate about the content of his advice. He is a far more senior legal practitioner than I ever was on those points. I get where the member is going, but I am not going to be drawn into that.

**Hon NICK GOIRAN:** That is fine, parliamentary secretary, I am happy to move on. I am simply making the point that it is easy to have a crack at the Law Society for hitting a C instead of A on the typewriter.

**Hon Matthew Swinbourn** interjected.

**Hon NICK GOIRAN:** No. Yet, the Solicitor-General, the most senior legal adviser to the Attorney General is providing an opinion on an act that does not exist, apparently. The parliamentary secretary made quite a big deal about this yesterday, about the fact that there was no precedent being set aside here and the waiver of the legal professional privilege with respect to this opinion. Anyway, I will not labour the point any further with the parliamentary secretary. I simply identify the point that, yes, we can have a crack at the Law Society about a typographical error, but we can also do the same with the Solicitor-General, which takes us nowhere.

**Hon Matthew Swinbourn** interjected.

**Hon NICK GOIRAN:** It takes us absolutely nowhere, parliamentary secretary. The point is that the Magistrates’ Society of WA and the Law Society of WA raised these matters with government prior to 13 August 2021, and I am trying to ascertain when both of those institutions brought their concerns to the attention of government. Does the parliamentary secretary have that information available?

**Hon MATTHEW SWINBOURN:** I do not have access to all the correspondence between the Attorney General, the Law Society or the Magistrates’ Society. We do not have that available. We have tried to drill down into as much detail as we can. It is apparent that the Solicitor-General was at least aware when he provided his advice on 13 August. The level of precision I can give is that those issues were raised some time in the period between when the bill was introduced in the Legislative Assembly and the time the opinion was given, and the Attorney General

became aware of them, whether that was through direct correspondence, comments made in the public sphere or other means. We were aware at that time that people were raising concerns about the constitutionality, hence advice was sought from the Solicitor-General. That is what would have precipitated it. As I say, I do not have the information available to drill down into any more detail. I do not know how it helps with the progress of the bill to be sure about those things. If the member is going to draw my attention to something that is critical to our understanding of this bill, I would appreciate he do that.

**Hon NICK GOIRAN:** We can at least agree that the Law Society of Western Australia and the Magistrates' Society of our state both raised the constitutional validity question to government prior to 13 August last year. We are at least in agreement about that. Before I move to my question, we can also agree that the government's response to those concerns about constitutional validity are set out in the opinion by the Solicitor-General that the parliamentary secretary tabled yesterday, dated 13 August last year. I think we can agree on that. Did the Magistrates' Society or the Law Society raise any other concerns with the government about this bill?

**Hon MATTHEW SWINBOURN:** I am not in a position to ventilate the issues raised with the Attorney General by the stakeholders, other than those that everyone is aware of in terms of the Law Society of Western Australia's letters to members of Parliament on 14 February. The society raised its issues in relation to that, but I am not in a position to disclose issues, if any, that were raised between the Attorney General and the Magistrates' Society of Western Australia and in those other things because the nature of that correspondence, in a general sense, is not something that I am authorised to disclose.

**Hon NICK GOIRAN:** The extent that this government will go to not be transparent is quite extraordinary. When I asked earlier about the heads of jurisdiction, the great defence put up by the government was to say, "We can't possibly disclose that information because it would breach further consultations into the future between the Attorney General and heads of jurisdiction if we did that. It is very important that those discussions are kept confidential." I asked the government yesterday: will you ask those heads of jurisdiction if they will consent to the release of information? The government said no. It would not even ask them. Now we are talking about the Magistrates' Society of Western Australia. That is not a head of jurisdiction, but apparently we are still going to invoke that same principle: "We can't possibly tell anyone anything about those things because it all has to be kept secret." I find that quite extraordinary.

I want to ask a few questions about the concerns of the Magistrates' Society in a moment, but before I do, I want to round out one of the issues the parliamentary secretary raised with me two days ago—that is, the transcript that I quoted from extensively during my contribution to the second reading debate. I identified the transcript at the time. It was a transcript of proceedings between Catherine Patricia Crawford and His Hon Judge Hylton Quail that took place in the Supreme Court of Western Australia, CIV 1037 of 2021, before Hon Justice Allanson. This transcript is of proceedings that took place in the Perth Supreme Court on Monday, 11 October 2021. I quoted extensively from this document. Deputy Chair, you might recall that on Tuesday evening, the parliamentary secretary was very keen for me to table this document. I indicated that under the conventions or the stipulations of our standing orders, my obligation was simply to identify the document, which I had done. The document was otherwise confidential, in part because, as I explained yesterday, I had not been authorised to provide this information. Let us keep in mind that the government has repeatedly said over the last couple of days that it is not authorised to provide information, so it will not provide the information to the chamber. It is okay for government members to say, "We are not providing information to the chamber because we haven't been authorised", but if another member comes along and says, "I haven't been authorised to provide the information", that does not apply to them! There is always a different standard with the McGowan government. But unlike the McGowan government, I have spoken to the relevant individuals and sought their consent. I still cannot understand why it would be so difficult for the McGowan Labor government—the Attorney General or somebody from his office—to pick up the phone and say to the Chief Justice, "Would you mind if we relayed your support for this bill?" I presume that the Chief Justice must be an enthusiastic supporter of this bill. I do not know why the government would want to keep that a secret. Why does the government not call Chief Judge Julie Wager and say, "As a former President of the Children's Court and now Chief Judge of the District Court, we would like to tell all the members of Parliament, particularly in the Legislative Council, how much you support this bill, because when we consulted with you, you expressed your unequivocal support for the bill"? You raised no concerns with us and so we would like to satisfy the members who are very concerned that this might affect the independence of the administration of justice. Would you mind if we passed that information on?" But the government will not even do that. Nevertheless, I sought the consent and so I am now in a position, Deputy Chair, through seeking the leave of the house, to table this document that I have already identified.

[Leave granted. See paper [1071](#).]

**Hon NICK GOIRAN:** Thank you for that, members and Mr Deputy Chair. The parliamentary secretary indicated that he is not in a position to discuss the other feedback provided by the Magistrates' Society because he does not

seem to think that he has its consent. Is that something that he might be willing to seek from the society? Might he reach out to the society and ask whether he can relay its feedback on the bill?

**Hon MATTHEW SWINBOURN:** The member made a comment yesterday about the benefit of instant access to *Hansard*. I know some courts do it. I do not believe that how the member has characterised what I said is, in fact, correct. I said that I do not have the authority to give the information to the member. I did not say that that had come from the Magistrates' Society or otherwise. But I do not want to try to repeat something I said earlier. I have to say that it is just on the vibe. I do not think it is deliberate. I am not suggesting that the member is doing it deliberately, and I do not have the most perfect recall memory, but I do not think that is quite the way that I said it. What I am saying to the member is that I am not authorised, as the parliamentary secretary, to give the member that feedback. I act on instructions, as the member knows. It is not a defence or a shield for me; it is just the reality of the situation that I am in. The member referred to an article in which the Magistrates' Society said the proposed changes would make the Chief Justice subservient to the wishes of the Children's Court, and referred to a letter sent to the Attorney General, as seen by *The Australian*. The letter belongs to the Magistrates' Society. I do not know whether it gave it to *The Australian* or somebody else did, but it is really up to the society how it deals with its material. As I say, I am not prepared to do that. Its issues with the bill were raised in a public forum, or were reported in a public forum. I am happy to explore those issues in the clause 1 debate when we go over what the bill is trying to achieve and deal with and address those sorts of issues. But, as I say, the member also characterised, I think, consultation. I have been clear that in terms of the bill, the consultation was with heads of jurisdiction. There was no consultation with the Magistrates' Society, the Law Society or others on this bill. I am sure the member will probably ask why that might be the case, so I will give him an explanation. This is an internal court administration matter and the government was of the view that the views of the heads of jurisdictions were important to the development of the bill, but it was not in a position to explore the broader issue with the wider fraternity. The government is entitled to do that. It can be criticised, and I am sure it will be, for doing that, but that is the state of affairs. As I said, there has been some public ventilation of issues; I am happy to explore how those issues relate to the bill, but, as I said, I am not in a position to go into those other things because I do not have that authority to do so.

**Hon NICK GOIRAN:** The parliamentary secretary indicates that the views of the heads of jurisdiction in this matter are very important and that is why the government has consulted them. I am in furious agreement with the parliamentary secretary about that; the problem is that only the government has that information and it is being kept secret from the Legislative Council that is being asked, as the house of review, to agree with this legislation in the absence of that information. The government thought it was very important to consult the heads of jurisdiction. It was right to undertake that consultation. What is wrong is for the information to be hidden from the Legislative Council. Nevertheless, the parliamentary secretary has indicated and already provided to the house a copy of the opinion of the Solicitor-General dated 13 August 2021. Did the Attorney General obtain an opinion from anyone other than the Solicitor-General about the constitutional validity question?

**Hon MATTHEW SWINBOURN:** My advice is that no further view was sought on this bill other than from the Solicitor-General. The member used the word "obtain", which might have multiple meanings, so I will again be careful with how I answer that. Maybe I am anticipating or mis-anticipating where the member might be going with this, but I want to be clear that the only advice the Attorney sought was from the Solicitor-General.

**Hon NICK GOIRAN:** That is fair enough. Did he ever receive any other opinions, even if he did not seek it out?

**Hon MATTHEW SWINBOURN:** I think an opinion was provided, because I think it was sought by the Magistrates' Society—I might be corrected on that from the advisers. A copy was provided of the views of Mr Zelestis, Senior Counsel, and I think it may have even been made aware that he had given an opinion in some of the public material, but again, I might be misconstruing that, so perhaps do not rely on what I said about the public sphere. To answer the member's question directly, the Attorney General had a copy of the Zelestis opinion, for want of a better word, provided to him.

**Hon NICK GOIRAN:** When considering this very important constitutional question, the Attorney General had in his possession an opinion from Mr Zelestis, Queen's Counsel and an opinion from the Solicitor-General, Mr Thomson, Senior Counsel. Is that the sum total then of the opinions that the Attorney General had in his possession before coming to his own conclusion that he is satisfied that there is no constitutional validity question that remains outstanding?

**Hon MATTHEW SWINBOURN:** I think some of this stuff is protected by legal professional privilege regarding how the advice was provided and that sort of thing. I am not saying that to be cagey. My advice is that the two opinions were before the Attorney General. To be glib, the Attorney General receives a lot of people's opinions on a lot of matters—some of them are legally trained and many of them are not, of course. I am not trying to be glib, but I am trying to be clear on this sort of thing. There was a process for the development of the bill and government officers were involved in that. Undoubtedly, when they were drafting the bill, they themselves, probably all of them at the Parliamentary Counsel's Office legally trained, would have had regard to those sorts of issues. The only formal opinion, as the member and I would understand it, that we are aware of are the two that I previously mentioned.



**Hon NICK GOIRAN:** In fairness, that is a very comprehensive response and I thank the parliamentary secretary for it. I am characterising this matter in what we will describe as formal, written legal opinions that were in the possession of the Attorney General at the time. The two pieces that he had were one from Mr Zelestis, QC, and one from Mr Thomson, Senior Counsel. Then, obviously, the Attorney General had to satisfy his mind about that. For the benefit of the house we have a copy of the Thomson, Senior Counsel opinion from 13 August 2021. Can we be furnished with a copy of the Zelestis, QC opinion?

**Hon MATTHEW SWINBOURN:** I am not in a position at the moment to do that. I do not even know if we have a copy of it at the table, to be perfectly honest with the member, but as he can appreciate, there are probably some complexities going forward with us tabling someone else's legal advice regarding the circumstances in which it was given to the Attorney General. I will go back at some stage and determine whether we can table it or not. We are cautious of those things, and obviously tabling someone's opinion in Parliament is a serious thing to do. It is not the government's document and it was provided to us in those circumstances. I will take that under advisement and we can get back to the member about whether we can do that.

**Hon NICK GOIRAN:** There is no objection from me on that course of action. It is the prudent course of action that is once again consistent with how we have been operating, certainly in the course of this debate. We do not table documents unless we have the consent of individuals. I take it that the parliamentary secretary will at least make some inquiries to see whether consent can be obtained. That is how I have understood the response. Who knows what that will result in? It may result in a situation like we had earlier when the Attorney General was not even willing to ask for the consent. That could happen. Alternatively, perhaps the Attorney General will contact the Magistrate's Society and ask for its consent. That would seem to be the other course of action and one would like to think it would then provide that consent. Of course, it is all contingent on the Attorney General's will to expend the money to make one phone call. We will see whether that happens. In due course, the parliamentary secretary will inform the house and I will be obliged for that. Is the parliamentary secretary at least in a position to indicate to the chamber whether the opinion of Mr Zelestis is consistent with that of Mr Thomson?

**Hon MATTHEW SWINBOURN:** I cannot do that because I cannot give the member the substance of his advice in the circumstances in which, as I have just said, we need to seek authority to disclose it. If it is of any benefit to the member, I have no idea what his advice was in any event, so I am not playing cagey. The member is asking about the substance of his advice at the same time that I am saying that we cannot disclose a copy of his advice because it was not generated by and for government—rather, it was generated by another organisation—I cannot get into that at this stage. As I say, if we are able to table it, obviously we will be in a position in which we can discuss its contents.

**Hon NICK GOIRAN:** Okay. Was the opinion of Mr Thomson sought before or after the Attorney General obtained—I will correct the record—received the opinion of Mr Zelestis?

**Hon MATTHEW SWINBOURN:** I am advised that he received it before he sought advice from the Solicitor-General.

**Hon NICK GOIRAN:** That is certainly consistent with my understanding of the facts, parliamentary secretary. It would lead us to the conclusion, would it not, that the Magistrates' Society of Western Australia raised constitutional validity questions?

**Hon MATTHEW SWINBOURN:** I have taken further advice. I do not quite recall how I said it, but I think I said it awkwardly. The chronology was that the Attorney General received Zelestis' opinion, and after that fact he then received the opinion of the Solicitor-General. I am not sure whether I made that point. It was Zelestis first then SG. As it is always the case with any bills, issues of constitutionality were not thought of as an afterthought. In the development of the bill, as I have said previously, people who are legally trained have issues of constitutionality in mind. But in terms of a formal written opinion, I come back to that—the member described it as that—Zelestis did his and the Attorney General then sought the Solicitor-General's opinion. I might add that it was done in conjunction with another lawyer who does not seem to get a guernsey at all. I do not want to do a disservice to the parliamentary record, but it was also signed by Francis Cardell-Oliver. Francis gets a guernsey for the opinion, but it is the Solicitor-General's opinion.

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

**Hon Matthew Swinbourn:** Nothing turns on that; I am just being courteous.

**Hon NICK GOIRAN:** The parliamentary secretary might find that the same situation applies with the Zelestis opinion when in the fullness of time the parliamentary secretary gets an opportunity to peruse and consider it. In the interim, is it not the case that if the Attorney General received the Zelestis opinion first, and then decided that he needed to get an opinion from Mr Thomson, and the Zelestis opinion was provided to him, as I understand from what the parliamentary secretary said, from the Magistrates' Society, and the Thomson opinion says that the Magistrates' Society has raised concerns about the constitutional ability of the amendment act, does it not then follow that the Zelestis opinion is not consistent with the Thomson opinion?

**Hon MATTHEW SWINBOURN:** I cannot say that and I have indicated the reasons why at this stage. That matter is in motion because I am seeking further advice for Hon Nick Goiran. As I said, to speak about the substance of the opinion would be disclosing and breaching any possible issues that might arise between the confidentiality of the provision of that advice and the terms on which it might have been provided. Again, I am seeking further advice on that. I cannot go to that any further in terms of Zelestis.

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

**Hon NICK GOIRAN:** Thank you, Mr Deputy Chair.

**Hon Matthew Swinbourn:** There are strange and archaic rules around this stuff as you know. I know you'll come back to me about government secrecy and stuff like that, but I am genuinely trying to make sure that we are not upsetting some of those people.

**Hon NICK GOIRAN:** I am happy to facilitate that course of action. I make the point that the same should apply with regards to the heads of jurisdiction. It is okay to knock on the door of the Magistrates' Society and say to it, "Would you mind if we released the Zelestis opinion?" It is okay to knock on the door of the Chief Justice and say, "Would you mind us letting the Legislative Council know that this bill has your full unequivocal support", and the same with the Chief Magistrate and the other heads of jurisdiction. The same principle follows. I have no problem with the course of action that has been proposed with regard to the Zelestis opinion. I just wish that the same course of action would apply and there would be consistency with respect to the other matters. I do not think that there is any harm whatsoever in the Attorney General picking up the phone and having those conversations. There will not be any great disruption to any further consultations because, at the end of the day, those heads of jurisdiction can easily say, "No, Attorney General; we'd prefer that you didn't." At the moment, there is not even a willingness to knock on the door, and that is what makes us suspicious. There is something very, very shifty going on here, and that is what we are trying to get to the bottom of.

Did the Attorney General ever reply to the Magistrates' Society about its concerns regarding the constitutional validity question?

**Hon MATTHEW SWINBOURN:** I do not have that advice at the table, but we are making further inquiries to see whether a response was sent. I do not want to sit and wait for that confirmation to come. When it comes, I will let the member know.

**Hon NICK GOIRAN:** To facilitate the speedy passage of this bill, I indicate to the parliamentary secretary that the Attorney General did reply to the Magistrates' Society of Western Australia. The parliamentary secretary's officers who are busy conducting the search need look only for 3 August 2021 when the honourable Attorney General affixed his signature to this letter in response to the Magistrates' Society. What is interesting is that the letter is a government document, so before anyone gets excited about who will table the document, it will not be me, but I am happy to identify for the benefit of the chamber that this document is a letter dated 3 August 2021 and signed by Hon John Quigley. Unless I am told otherwise by the government, I consider this document to be confidential and I will not be tabling it, but I welcome the opportunity for the government to do so. Might I say that the second paragraph of it says —

I have taken advice on that opinion from the Solicitor General of Western Australia —

Of course, the opinion that he is referring to is the Zelestis opinion referred to in the first paragraph —

and am satisfied as to the constitutional validity of proposed section 11 of the *Children's Court of Western Australia Act 1988* (WA), when enacted.

Yours sincerely

Hon. John Quigley MLA

My question is: how could it be possible for the Attorney General to have taken that advice when, as the parliamentary secretary indicated, the advice was provided to him only on or after 13 August?

**Hon MATTHEW SWINBOURN:** The member is at an advantage over me because I do not have a copy of the correspondence before me. I appreciate that he is, to some degree, potentially protecting the confidentiality of it, notwithstanding that he has just read from it. I am not in a position to be certain about the dates that he is talking about. We are trying to find the letter. As I say, we do not carry all the correspondence relating to a matter into the chamber with us. We are trying to communicate with people at the ministerial office to see whether we can get our own version of it. I cannot answer the member's question about the timing between advice until I have seen a copy of that particular form. I do not think it is a solution that the member provide me with a copy of what he has, because I think we need to know what we have to make sure that we are comfortable with what we have. I do not cast any reflection on the member in that regard; it is just that we want to get the letter from our side of the fence, if I can put it that way.

**Hon NICK GOIRAN:** It is a truly remarkable set of circumstances that the Legislative Council finds itself in at the moment in that there are question marks around the constitutional validity of the bill before us. There is really no other clause on which we can have this discussion about the constitutional validity other than clause 1. We are trying to get to the bottom of whether this bill is constitutionally valid. Until this afternoon, members would have been totally unaware that there was an opinion in existence from a senior Queen's Counsel—one of the most senior Queen's Counsels in Western Australia—Mr Zelestis, about this matter that had been provided to the Magistrates' Society. Without members even having a copy of and reading the Zelestis opinion, they can obviously draw the conclusion that the opinion must have indicated that there is a constitutional problem here.

In response to that, the Attorney General went to his chief adviser, Mr Thomson, who says in the second paragraph that the Magistrates' Society has raised concerns about the constitutional validity of the amendment bill. The Magistrates' Society is hardly going to deliver to the Attorney General an opinion from Mr Zelestis saying, "Everything is fine here; it is constitutionally valid" and give him a pat on the back and a gold star. That is not going to happen. As a result of that, the Attorney General then instructed his chief legal adviser to spend substantial time preparing this lengthy opinion, which then appeared on 13 August. What makes it worse is that we then discovered—I appreciate that the parliamentary secretary is getting to the bottom of this—that Mr Quigley responded to the Magistrates' Society and said on 3 August that he had already sought the advice of the Solicitor-General and he had no concerns, yet the Solicitor-General provided the opinion to Mr Quigley only on 13 August.

I appreciate that the parliamentary secretary wants to take his time to get to the bottom of all this. As we identified a little earlier this afternoon, from time to time, people make typographical errors. The parliamentary secretary was very quick to point out some of the typographical errors of the Law Society, and, as I said in response, the government needs to look in its own backyard, because even the title of the Solicitor-General's opinion has a problem.

Who knows—I am being quite serious now—but the date of 13 August on here might be an error. I guess it is not completely out of the realms of possibility that the date of the opinion was 3 August and that the "1" before the "3" was put there in error. Then the dates would line up perfectly with the correspondence that was provided. I appreciate that, in all sincerity, the parliamentary secretary is trying to get to the bottom of this matter and he will report back to the chamber when that information is available to him. I sincerely hope that this is not yet another example of what has already been a stinking mess with the genesis of this bill and that we do not find that the Attorney General told the Magistrates' Society on 3 August that he had obtained an opinion from the Solicitor-General that he never had until 10 days later. I sincerely hope that that is not the case and that a plausible explanation is provided in due course. This has been, frankly, bad enough as it is without that going on as well.

Regrettably, as part of all that, we are not able to take the concerns of the Magistrates' Society any further, because the parliamentary secretary is seeking through the Attorney General's office to see to what extent he can disclose that information, so we will just have to park those concerns to one side. For all we know, of course, the only concern that might have been raised by the Magistrates' Society might have been the constitutional validity question. That is what I was trying to get to the bottom of. I accept that the Magistrates' Society has a view, which is position A, and the government has sought Mr Thomson's advice, which is position B. The government prefers position B and that, as far as the government is concerned, is the sum total response to the constitutional validity question. But, of course, other concerns may well have been raised with the government by the Magistrates' Society and, indeed, by others, but we will not know that until such time as the government has an opportunity to consult with those various bodies, particularly, in this instance, the Magistrates' Society.

I know that the parliamentary secretary said that he cannot disclose the responses that were provided by the heads of jurisdiction, but is he in a position to indicate who conducted that consultation with the heads of jurisdiction? Was it the Attorney General? Was it the Solicitor-General? Who might have conducted that consultation?

**Hon MATTHEW SWINBOURN:** The consultation process with the heads of jurisdiction was led by the Department of Justice, which had responsibility for the development of this bill.

**Hon Dr BRIAN WALKER:** The parliamentary secretary will be aware that my legal knowledge does not exceed that of a house cat. I have, however, been listening closely. I thank the department for the briefing we received prior to this. I was fully on board with everything that had been suggested, so I was surprised to hear the differing opinions coming to me when I was briefed by the Law Society of Western Australia, with whom I understand the government has some differences. But I need to ask these questions to satisfy my own curiosity—if nothing else, it is my duty to my electorate.

The first one arises from the questioning in the chamber yesterday. It was mentioned in *Hansard* that consultation had been thorough, including that with Chief Magistrate Heath. I heard today that two written pieces of information have been sought, or received, but I did not hear mention of Chief Magistrate Heath. I heard from the Law Society that it had not been consulted, and that neither the Attorney General nor the Solicitor-General had conferred with

the Chief Magistrate or the Magistrates' Society of Western Australia. I am, of course, seeking information from the Chief Magistrate himself, but could the parliamentary secretary confirm whether he was, in fact, consulted?

**Hon MATTHEW SWINBOURN:** The Chief Magistrate was consulted. I answered a question from Hon Nick Goiran and said that that consultation was led by the Department of Justice. We do not have any other information to suggest otherwise—I do not, anyway.

**Hon Dr BRIAN WALKER:** Bearing in mind that we do not have any confirmation that the Magistrates' Society was consulted, it would appear that it has expressed an open invitation to discuss its concerns.

**Hon Matthew Swinbourn:** By interjection, we did indicate that the Magistrates' Society was not consulted. Perhaps I should seek the call.

**The DEPUTY CHAIR:** Parliamentary secretary.

**Hon MATTHEW SWINBOURN:** Thank you. To be clear, the Magistrates' Society was not consulted in the development of the bill—I have been clear about that—and neither was the Law Society. The Chief Magistrate, Steven Heath, was consulted through the Department of Justice's process when it developed the bill. There are some distinctions there. The Magistrates' Society is effectively the union for magistrates—I do not think they appreciate being called that, but that is, in effect, what it is—so, obviously, it advocates on behalf of magistrates.

**Hon Dr BRIAN WALKER:** Thank you for that clarification. I understand it expressed an open invitation to discuss its concerns with the Attorney General. Could the parliamentary secretary confirm whether he has not availed himself of that opportunity? I believe that will be answered in the affirmative.

**Hon MATTHEW SWINBOURN:** Member, we were going through this with Hon Nick Goiran as to the Magistrates' Society. It is common knowledge that the society wrote to the Attorney General. I am seeking to clarify, based on a question asked by Hon Nick Goiran, whether the Attorney General formally responded. Hon Nick Goiran referred to correspondence that he has a copy of under the Attorney General's signature. I do not presently have a copy of that. We are trying to locate a copy of that. Until that happens, I cannot get into any more specifics on the member's line of questioning about engagement between the Attorney General's office and the Magistrates' Society.

**Hon Dr BRIAN WALKER:** Indeed, the parliamentary secretary has confirmed that my legal knowledge does not exceed that of a house cat.

I will move on to the next question. Some concerns were expressed that this would be difficult to bring into alignment with paragraph 6 of the "Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region" [1995] CCJAPRes 1 (19 August 1995), which I think was written by the late Hon David Malcolm and adopted by the Chief Justice of the High Court, Chief Justice Brennan. It states —

6. In the decision-making process, any hierarchical organisation of the judiciary and any difference in grade or rank shall in no way interfere with the duty of the judge exercising jurisdiction individually ... to pronounce judgement ...

That is double-dutch to me, of course, because of my cat knowledge. Whatever the intent, which I believe is fully honourable—I quite accept that—the impact of the wording of the bill, I am told, must be considered. That is of particular concern to me. I would like some clarification on this. Proposed section 11(6) provides for the president to have, and I quote —

... absolute discretion and is not required to take into account the seniority or length of service of the magistrate or any other matter.

That is clause 7 of the bill, which will insert proposed section 11(6) into the Children's Court of Western Australia Act. The problem is that the Legislative Council is being asked to support the devolution of power to one judicial officer over the state's granting of a commission in a way in which it means that if the president took a particular view on how the Children's Court's jurisdiction should be practised, then magistrates who do not fall into line could be removed by the president without challenge. That would cause me concern. Can the parliamentary secretary comment on that?

**Hon MATTHEW SWINBOURN:** I appreciate that the extent of the member's legal knowledge is no more than that of a house cat. My medical knowledge is probably no more than that of a house cat either, so we have that in common for our respective professions.

I need to make some important distinctions here. What this bill proposes to do will have no bearing on what a magistrate who is hearing a matter will do in terms of that matter. The President of the Children's Court cannot say to that magistrate, "I'm taking you off this case halfway through your determination of those things because I do not like the way that you're dealing with it." This is about workload. When a matter comes before any court—the Children's Court, the Magistrates Court or the Supreme Court—it has to be allocated to one member of that court.

The head of jurisdiction—his or her office—has the responsibility for allocating that file to a particular magistrate or judge, whether it is a District Court judge or a Supreme Court judge. I might add that it is usually the same process for commissions in the Industrial Relations Commission and the State Administrative Tribunal. That is how that works. Heads of jurisdiction manage the workload, or the case load, if can I use that term, as it comes in. Therefore, a judge would not be removed from a case by the president under the provisions that we are talking about. It will not give them the entitlement to interfere. When a judge is hearing a case, they go through from start to finish.

Occasionally, there are changes if a judge falls ill and is unable to perform their functions. That requires the court, at great cost to the parties, to begin proceedings again, because a magistrate or judge needs to hear the entirety of the matter. That is not being affected. The independence of magistrates and how they deal with cases will not be affected at all.

I draw the member's attention to the powers of the Chief Magistrate. The existing law for the Chief Magistrate can be found in section 25, which I will read for the member's benefit. It states —

**25. Chief Magistrate may assign duties to magistrates**

- (1) The Chief Magistrate, by directions given from time to time to a person who is a magistrate, may —
  - (a) specify which case or cases, or class or classes of case, the person is to deal with or in which division of the Court the person is to sit; and
  - (b) specify which class or classes of the judicial functions that the person has under written laws, whether as a magistrate or otherwise, the person is to perform for the time being; and
  - (c) specify which administrative duties the person is to perform for the time being; and
  - (d) specify where, when and at what times to deal with those cases or perform those functions or duties.
- (2) Such a direction given to a magistrate does not limit the functions of the magistrate.

This is the important subsection —

- (3) A magistrate must comply with such a direction.

This is the Chief Magistrate within the Magistrates Court. We are trying to deal with some of this stuff with the President of the Children's Court. It is not the clause 11 stuff—that is, proposed section 12A—on that sort of thing. This is, by comparison, for the member's benefit to understand that the head of a jurisdiction already has significant powers to decide how the court functions on that administrative level. The Chief Magistrate, the Chief Justice of the Supreme Court and the Chief Judge of the District Court do not tell another judge or magistrate how to conduct their individual cases. The legal process deals with that. At the end of that process, if the judge or magistrate gets the decision wrong—if I can use that term—parties are entitled to appeal, and any judges sitting in an appeal jurisdiction, whether that is the Supreme Court or any other jurisdiction, can make a judgement on the particular manner in which the case was dealt with. Nothing we are doing here will interfere with the independence of individual judicial members to decide the cases that they are sitting on. This comes back to where we and the Attorney General have issue with the position being put by the Law Society that the President of the Children's Court would exercise any of his powers differently to how the head of any other jurisdiction exercises their powers in relation to courts. The slur is to suggest that he would use any of these other kinds of matters to affect that. That is not accepted by the government in any way, shape or form. As I say, the Attorney General wrote back to the Law Society yesterday expressing his views about the position it put forward on the president.

**Hon Dr BRIAN WALKER:** I am very glad to hear that. It mirrors the briefing we had some time back.

The last point I would like to bring out—again this is something that I see as a layman—is that the concept that the legislation is likely to be challenged in the High Court, I believe, on the ground that it interferes with the operation of courts contrary to chapter III of the Australian Constitution. The parliamentary secretary has spoken about this before but I would like to be certain that the government is absolutely happy that, although predicting the outcome is never an easy thing, there no grounds for this to be taken to the High Court. Otherwise, we are busying ourselves with legislation that is liable to be struck down to the embarrassment of all concerned.

**Hon MATTHEW SWINBOURN:** We are comfortable with the constitutionality of this bill. For further assurance we have sought the advice of the Solicitor-General of Western Australia, who is a very esteemed legal mind. He has reinforced that in his view, which we have provided, unusually, to the house, this legislation is constitutionally valid. The member correctly pointed out that we can all make a prediction about which way the High Court might go on any particular issue, but it is the same for any bill that we pass in this place. A vexatious or a properly motivated individual might seek to challenge its constitutionality. If we were constantly worried about that, no bills would be passed here. We would say, "Someone might challenge it", and we would be stuck. In this instance we are happy and comfortable with the constitutionality of this bill.

**Hon NICK GOIRAN:** That was an interesting exchange between the honourable members. I will just add this note in passing. I think it would be fair to say that if somebody were going to launch a challenge based on an opinion of Mr Zelestis, QC, it would not be a frivolous application. For the benefit of the record, I am not suggesting that the parliamentary secretary suggested that because he also added another category of person who might make an application—that is, a person who moves with good intention. I think that would be the case in this instance.

Nevertheless, we will leave that where it is for the time being because the parliamentary secretary and the hardworking officers in the Attorney General's office are searching for this letter of 3 August 2021 under the signature of Mr Quigley to see what the story is with that date stamp of 3 August 2021 and the Solicitor-General's opinion dated 13 August. Until we get to the bottom of that, and the even more substantial question of whether any concerns were raised by the Magistrates Society other than the question of constitutional validity, could the parliamentary secretary assist the house by indicating whether this type of structure—this type of regime—that we are moving to with this legislation is in place in any other jurisdiction in Australia?

**Hon MATTHEW SWINBOURN:** The short answer is that this was not modelled on what anyone else does in any other jurisdiction. The limitation of the advice that I have at the table is that we could not say whether the way we structure our Magistrates Court with our Children's Court is comparable to any other Australian jurisdiction. If the member is going down that line of questioning, I do not have advice on what that might look like at the table at the moment. I do not know either. I am not sure whether the member knows, but I do not know how they structure those things in the other states and territories.

**Hon NICK GOIRAN:** Can we draw from that, parliamentary secretary, that piece of work was not done by government in the development of this bill?

**Hon MATTHEW SWINBOURN:** The short answer is no; it was not done. We were just focusing on the four walls of our jurisdictions and the structures that have developed in Western Australia.

**Hon NICK GOIRAN:** Is the parliamentary secretary happy for me to proceed?

**Hon Matthew Swinbourn:** Go on. It's a bit funny with the way that everything is set out now.

**Hon NICK GOIRAN:** I understand the practical difficulties that are being experienced here in the chamber at the moment.

I am curious to know about the time line for the development of this bill. We know that concerns around constitutional validity were raised in and around the month of August last year. We also know that there were some other concerns, because I read into the record the other day some of the Supreme Court transcript. The Supreme Court has been told, and I think we can at least proceed on the basis that the Supreme Court has not been misled by a document that was tendered there, an exchange between the President of the Children's Court and the Attorney General from January 2021, that there were obviously some concerns. Can the parliamentary secretary indicate to us the time frame for the development of this bill? Was the whole bill developed during the 2021 calendar year or did it precede that in the 2020 calendar year? Does the parliamentary secretary have the time line?

**Hon MATTHEW SWINBOURN:** To answer the question directly, it was developed over 2021, but to be more specific, the member understands that permission to print, time frames and all that stuff is subject to cabinet confidentiality. I am happy to confirm it was done over the course of 2021, when the bill was introduced into the Legislative Assembly. The member can make his own conclusions about the time frame.

**Hon NICK GOIRAN:** Just on the point of the confidentiality of cabinet, I am not sure that it has been practice in the past to disclose the date when cabinet approved a bill for drafting and printing —

**Hon Matthew Swinbourn** interjected.

**Hon NICK GOIRAN:** No, sure.

**Hon Matthew Swinbourn** interjected.

**Hon NICK GOIRAN:** The deliberations of cabinet will be confidential, but I do not know that the date a bill was sent to the printer is considered to be cabinet-in-confidence. I recall that information of that type has been provided for many bills. In any event, for the purpose of our discussion here, we note the courtesy of the kind advice provided by the parliamentary secretary that the entire sequence of events took place during the course of the calendar year 2021. Can the parliamentary secretary indicate to us how many draft bills there were?

**Hon MATTHEW SWINBOURN:** I am advised that there were four formal drafts, but there may have been some rats-and-mice amendments at the very end. I am just seeking confirmation about whether there may have been a fifth draft that picked up the sorts of typographical errors we have already talked about and those sorts of things, but I am advised that four formal drafts of the bill were done.

**Hon NICK GOIRAN:** Have I got this right: the bill was introduced into the other place of the Western Australian Parliament on 23 June last year? I go to the transcript of the court proceedings I tabled earlier. We were talking about

a date in January last year. I am not too sure of the significance of the January date; I think I might have taken that from the parliamentary secretary. According to the transcript, it looks as though there was a piece of correspondence between Judge Quail and the Attorney General, and the letter is dated 7 September. I take it that that would be 7 September 2020.

**Hon MATTHEW SWINBOURN:** I am fairly certain that the January reference for the letter to the Attorney General came from the member, because I think he was reading from it. I am not sure whether he was reading the transcript. I think I told the member that I have not seen that letter to the Attorney General from President Quail that he is referring to. Now he is referring to a letter of 7 September from the transcript. We do not know, sorry.

**Hon NICK GOIRAN:** As I say, the transcript is a tabled document. I refer to page 183. Mr Donaldson was providing his submissions to Justice Allanson on that day, being 11 October 2021. At page 183, he states —

Now, there was around this time correspondence also between Judge Quail and the Attorney General. Now, could I ask your Honour to turn to page—to tab 110, please. So tab 110, your Honour, is a letter of 7 September—just your Honour will recall that the letter that I spent some time taking your Honour to was on 3 September. So on 7 September—and again, your Honour, it is common cause—without notice, to Magistrate Crawford before this letter was sent or a copy of it being sent to Magistrate Crawford. But Judge Quail wrote to the Attorney General ...

I will not go through that again, because, as I say, there is a tabled document and it is already in the *Hansard* because I quoted it on Tuesday. That is effectively the letter that Mr Quail wrote to Mr Quigley indicating he had concluded an inquiry into Magistrate Crawford and, in summary, he was not happy with her. Again, that is me now paraphrasing. People can read the direct quotes about the letter. It is on the record. His concerns or dissatisfaction were not at a sufficient level to mean she was not a suitable person to continue being a magistrate. It says that all happened on 7 September. I am just trying to identify the sequence of events here. It would appear to me that that is 7 September 2020, and then over the course of 2021, the government developed the bill before us. Keep in mind what the parliamentary secretary said in response to my very first question on clause 1, which was: what is the genesis of this matter? The parliamentary secretary indicated it was the dispute between Magistrate Crawford and President Quail, so it would seem that this letter is from 7 September 2020. I appreciate that the parliamentary secretary does not have that letter at his disposal at the moment, but might he be able to ascertain from the Attorney General whether it is dated 7 September 2020?

**Hon MATTHEW SWINBOURN:** We are trying to get to the bottom of this. I have not read this transcript in any way other than through the matters the member has just brought to me. This transcript is from 10 October 2021 and it refers to a letter of 7 September and 3 September—“taking your Honour to was on 3 September”. It is possible it could have been from last year. I do not want to get in anywhere, because it is within the realm of possibility. It is hard to know, because there is no tone and the context of the transcript has its limitations. We do not know at this stage what it refers to in those proceedings. If someone had the court file, they could look at tab 110 to know what that was.

**The DEPUTY CHAIR:** Member, before I give the call, I have been following the clause 1 debate and I note that the parliamentary secretary has answered numerous questions on consultation. I note that the legal case that has been discussed that led to the genesis of the bill was covered in the second reading debate and the parliamentary secretary gave quite a fulsome statement today. I remind members that the clause 1 debate is to discuss the range of issues across the clauses. If it is a question about the government’s policy direction or the substance of the bill, that was dealt with in the second reading debate. With that, we are considering clause 1, and the question is that the clause stands as printed.

**Hon NICK GOIRAN:** With respect to that sequence of events, we understand that the Courts Legislation Amendment (Magistrates) Bill 2021 was developed over the course of 2021. As the parliamentary secretary indicated, the purpose of the bill is to deal with the workload management in the Children’s Court. During the course of 2021, what was the number of Children’s Court magistrates?

**Hon MATTHEW SWINBOURN:** As the member can imagine, over 2021 things fluctuated. I am advised that over 2021, there were five to six full-time magistrates sitting in the Perth Children’s Court and one part-time magistrate, which we were both made aware of. Between five and a half and six and a half magistrates were working in the Perth Children’s Court. As the member knows, outside of the CBD, magistrates will sit on Children’s Court matters in the outer metropolitan area, so I cannot give the member the figure on how many of those did that. It will depend on whether it was in the regions and those sorts of things such as the cases brought before them. But I think that the member’s question was mostly concerned about those essentially based at the offices in the Northbridge area of Perth.

**Hon NICK GOIRAN:** The parliamentary secretary said that over 2021 there were five to six full-time magistrates working in the Perth Children’s Court, but that that number fluctuated. Is that because at one point in time there were five and then the government appointed a sixth person? Can the parliamentary secretary explain why there was a change?

**Hon MATTHEW SWINBOURN:** My advice is that an appointment was made through the year and that person worked in the Children's Court. They are appointed as dual appointees and then located at the Children's Court in Perth.

**Hon NICK GOIRAN:** Is the parliamentary secretary in a position to indicate when that appointment was made?

**Hon MATTHEW SWINBOURN:** I will refer to a press release or media release—whatever we call them these days—from the Attorney General dated 15 January. It states —

Experienced criminal lawyer appointed as a magistrate.

Alana Padmanabham —

My apologies for my terrible mispronunciation of that name. It says that she will be taking up her position on 18 January 2021 and that she will be sitting in the Children's Court.

**Hon NICK GOIRAN:** On 15 January this appointment was made to the Children's Court. I take it then, going back to the parliamentary secretary's earlier point about the fluctuation in magistrate numbers of between five and six sitting in the Perth Children's Court with the one part-time magistrate, that that is an indication to say that from 1 January until—I think the parliamentary secretary might have indicated that the appointment was made on 15 January and commenced on 18 January. The point is that for two to three weeks in January 2021, the workload of the Children's Court was being undertaken by five full-time magistrates and one part-time magistrate, and from around the middle of January, for the duration of 2021, it was being undertaken by six full-time magistrates and one part-time magistrate. Is that right?

**Hon MATTHEW SWINBOURN:** I think that in one respect, the member's characterisation is correct, but I want to be clear. At the beginning of the year, we had five and a half magistrates—I am not sure it is 0.5, but I will say five and a half for the sake of ease of reference. Then we had the appointment around mid-January. I spoke about magistrates based in the Perth CBD. As the member may know, one of the magistrates is now based at Fremantle but still doing only Children's Court work. That is Magistrate Crawford, but she is included in the number that we gave—the five to six—notwithstanding that she is no longer sitting in the court in—it is not Stirling Street. What is the street that it is on?

**Hon Alannah MacTiernan:** Pier Street.

**Hon MATTHEW SWINBOURN:** Yes, Pier Street. I know it very well because it is just behind Perth Trades Hall, but I am trying to be precise.

**Hon NICK GOIRAN:** That arrangement, which now sees Magistrate Crawford, as the parliamentary secretary described it, based in Fremantle rather than Perth, is on the public record as being part of some form of litigation settlement. That is uncontroversial; it is just how this matter was resolved. But that happened in October last year, so quite a long time after this appointment was made in January of the same year. Was the appointment made in January because of the increase in workload in the Children's Court?

**Hon MATTHEW SWINBOURN:** One would think it would be a fairly straightforward answer, but I am told that the specific reasons for appointing judges and magistrates is cabinet-in-confidence. What I can say is that I am advised that there were justifiable workload issues within the Children's Court that the appointment addressed, and that under section 10(3) of the Children's Court of Western Australia Act, the Governor may appoint as many magistrates as are needed to deal with the workload of the court. In the most general terms, the appointment of a new judge or magistrate is for the purpose of addressing workload. I do not think anybody would think that magistrates of the Children's Court are sitting around drinking cups of tea or anything like that. In any event, the point I am trying to make to Hon Nick Goiran is that I cannot disclose any specific reasons that a particular judge is appointed because I am advised that those reasons are cabinet-in-confidence.

**Hon NICK GOIRAN:** Does the parliamentary secretary have any data that confirms the number of cases in the Children's Court leading up to this appointment in January 2021?

**Hon MATTHEW SWINBOURN:** I do not have any modelling available to me that would support what I said or did not say about that. There are obviously processes that go into government in that regard. It might be a line of questioning through estimates or something of that kind, but it is not something on which I have information available to me here.

**Hon NICK GOIRAN:** That is fine. I will read from that that it would be complicated or take quite a bit of time to provide that information to the chamber. I just want to be clear that the government is saying that in no way did it make the appointment in January 2021 at the request of the President of the Children's Court to the Attorney General so that a scenario could be constructed in which there would have been one surplus magistrate so that Magistrate Crawford could be moved on. However, we do not have the data to support the question about workload. I do not know whether the parliamentary secretary will have a response to that.

**Hon MATTHEW SWINBOURN:** I was going to put my mask back on; it is doing my head in!



I want to be careful in how I respond to the proposition put by Hon Nick Goiran.

**Hon Nick Goiran:** I am just making sure that the appointment that was made in January 2021 was for workload reasons, notwithstanding the fact that the data is not currently available, and not because the president asked the Attorney General to appoint another person so that Magistrate Crawford could be moved on.

**Hon MATTHEW SWINBOURN:** This is going to sound cagey, but the reasons for cabinet to appoint a judge are cabinet-in-confidence, as I said before. However, I think there was a proper purpose for appointing that magistrate, so we do not accept any suggestion to the contrary. That magistrate is doing work in the Children's Court, as is required of her, and the court needs those resources.

**Hon NICK GOIRAN:** The parliamentary secretary mentioned that Magistrate Crawford is now sitting in Fremantle. Who manages the workload for the Children's Court sitting in Fremantle and who will manage that workload after this bill is passed? Will there be a change?

**Hon MATTHEW SWINBOURN:** It is the President of the Children's Court and, no, that will not change on the passage of this bill.

**Hon NICK GOIRAN:** At the moment, we have five full-time magistrates sitting in the Perth Children's Court—it is five and a half; we will continue to refer to five and a half for the purposes of *Hansard*. Why do we not just clear that up? Are we able to indicate whether it is a 0.5 position?

**Hon MATTHEW SWINBOURN:** I cannot be more precise than that because we are not sure whether it is 0.4 or 0.5. We are not being cagey here; it is how you crunch those numbers. I am sure we could get down to it, but it is around that.

**Hon NICK GOIRAN:** We can move off that. For the purposes of our debate, we will call it half a position. What is happening at the moment is that 5.5 full-time equivalent magistrates sit in the Perth Children's Court and work exclusively on Children's Court matters, notwithstanding the fact that there is the dual commission, and one full-time magistrate, working exclusively on Children's Court matters, sits in the Fremantle court. The workload of those magistrates, whether they sit in the Fremantle Children's Court or the Perth Children's Court, is managed by the president at the moment and will still be managed by the president when this bill passes. That is what I understood the parliamentary secretary to indicate earlier.

**Hon Matthew Swinbourn:** Yes.

**Hon NICK GOIRAN:** If the purpose of this bill is to make clear that the president manages the workload and that is already the case at the moment, why do we need this bill?

**The DEPUTY CHAIR (Hon Jackie Jarvis):** Before the parliamentary secretary answers, I say to the member that I believe the need for the bill should have been discussed during the second reading debate, and I believe that it was covered. I ask the member to perhaps consider his questions. We seem to be getting bogged down in what are essentially HR matters relating to how the court is run. I accept that the bill does cover issues of workload and who manages it, but I ask Hon Nick Goiran to consider the bill before us. I will leave it to the parliamentary secretary as to whether he wishes to reply to the question.

**Hon MATTHEW SWINBOURN:** Thank you, Deputy Chair, for your guidance. I cannot add a lot more. We have set out the basis of why we want to achieve that. I think we have also made the point that it is not about resolving a particular dispute between judicial officers. During my second reading reply, I made the point that if the bill passes this house, this reform will transcend and outlive most of us. If Hon Nick Goiran were to ever become the Attorney General, I do not think he would propose to remove this reform. I do not need the member to respond; I am just putting that out there. If in the future there is ever a dispute against about the powers of the president vis-a-vis the Chief Magistrate, we will have clarified what those powers are.

**Hon NICK GOIRAN:** The government said that the purpose of this bill is to address a gap in the powers of the President of the Children's Court to manage the workload of the Children's Court. That is not my explanation; that is what the government said when it introduced this bill. Due to the questioning under clause 1, the government indicated that the workload is currently being managed by the president. After this bill passes, it will still be managed by the president, and that is why I asked at clause 1 why we need this bill. We have only just found out that everything is being managed seemingly well by the president and that that will continue to be the case after this bill passes. It does not make sense to say that the policy reason for the bill is that the management of the workload is to be conducted by the president, if that is the case pre and post this bill passing. That said, the parliamentary secretary has indicated to the chamber that there seems to be a gap in those powers, but the gap in the powers is not in relation, obviously, to the cases that are distributed to the five and half magistrates sitting in Perth or the one magistrate sitting in Fremantle. There is no gap in the powers there; that is what is happening at the moment and that will happen in the future. Is the gap that the parliamentary secretary referred to in relation to the location of the magistrates rather than the case load of the magistrates?

**Hon MATTHEW SWINBOURN:** I do not want to do an injustice to what the member said to me so I will try very carefully to cover this off. We are all aware of the dispute that resulted in Supreme Court proceedings in which a magistrate claimed, amongst other things, that the president did not have the power to issue certain directions. I do not have a copy of the cause of action—that is what I am advised. That matter went to a three-day trial. Opening submissions were made. Evidence-in-chief was obtained. No cross-examination of that evidence occurred and no final submissions were given. I do not think the respondent had an opportunity to call any of their witnesses. The issue that was the subject of that dispute remains unresolved in terms of the president's powers. As a matter of prudence, the government wants to make clear, through express provisions in this bill, that those powers are to avoid the potential for further dispute at a later date. I think that is prudent, member, given the history of this matter. I hope that the member agrees with me on that point. As is often the case with law reform, it is only when things blow up that it becomes evident that things need to be done. We have been accused—Hon Nick Goiran has accused us—of being tardy on a number of points. In this case, we are being prudent and trying to implement reform so that we do not in the future face the possibility of judges taking each other to court on this issue. I hope that covers that off.

**Hon NICK GOIRAN:** I thank the parliamentary secretary; that is a very good explanation. The question that arises is about the directions that he talked about and whether that will be put beyond doubt. There was a dispute; that is not in question. It is not controversial to say that there was a dispute about the directions and that this bill is in the Parliament, at the request of the government, putting the issue beyond doubt by telling the judiciary that these are powers of the President of the Children's Court. My question is: are we putting beyond doubt how cases will be distributed to individual magistrates, whether they are sitting in Fremantle or Perth, or the location that they sit?

**Hon MATTHEW SWINBOURN:** There is already a power under the Children's Court of Western Australia Act 1988. Section 13(5) states —

The President may direct a judge, magistrate or JP to sit at any place where the Court has a registry and may direct concurrent sittings ...

Yadda yadda yadda! I turn to clause 8, which will insert proposed section 12A. We are not conceding that the president does not have these powers.

**Hon Nick Goiran:** For the benefit of the government, I accept that that is the government's position. Your point is that you are putting it beyond doubt.

**Hon MATTHEW SWINBOURN:** Yes. I agree with the member's point.

Just to tidy this up, proposed section 12A(1) states —

The President, by directions given from time to time to a person who is a magistrate, may —

(a) specify which case or cases, or class or classes ...

I will not continue to read it because Hon Nick Goiran is much too clever and does not need me to do that. I have made reference to it and I have already read out the identical provision for the Magistrates Court to Hon Dr Brian Walker, which is what is being replicated here in proposed section 12A. The Chief Magistrate already has those express powers in relation to magistrates sitting in the magistrates' jurisdiction. The Children's Court president does not have those express statutory powers, and that is one of the things we want to make very clear going forward.

**Hon NICK GOIRAN:** Just so that I have this clear, the parliamentary secretary is saying that there is no question that the Chief Magistrate—not to be confused with the President of the Children's Court—currently has the capacity to direct the geographical location of where a magistrate sits. To the extent that there may be some question about the President of the Children's Court, it is about the geographical sitting, not case loads.

**Hon MATTHEW SWINBOURN:** I think what has caused us some confusion—at least, it has caused me some confusion—is that I do not know whether the member got the cart and the horse around the wrong way in what he said. I made the point that under the act, the President of the Children's Court already has the power to direct where people sit.

**Hon Nick Goiran:** When you say “where”, do you mean the geographical location?

**Hon MATTHEW SWINBOURN:** Yes.

**Hon Nick Goiran:** So one of the five who sit in Perth at the moment, without this bill passing, could be told by the President of the Children's Court —

**The DEPUTY CHAIR:** Parliamentary secretary, are you happy to accept interjections?

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

**Hon Nick Goiran:** This is all very friendly.

**Hon MATTHEW SWINBOURN:** Yes, the member is correct. The president has the power to direct them to sit at another place. In terms of geography, the Chief Magistrate has that power in relation to the overwhelming number

of magistrates he is responsible for, and section 25(1)(d) provides that they may “specify where, when and at what times to deal with those cases or perform those functions or duties”. Obviously, proposed section 12A deals with the other matters that are listed in section 25 as well. I respectfully ask the member whether we can get into some of these long-grass issues when we get to the clause. I understand that he is talking about intentions and things like that, and that is fair enough. But I do not want to mash up particular things, so, as I say, I respectfully ask the member.

**Hon NICK GOIRAN:** That is fair enough, parliamentary secretary; we can take that up on the relevant clause. Can the parliamentary secretary indicate to us whether any clause in this bill will impact on the tenure of any magistrate currently appointed in Western Australia?

**Hon MATTHEW SWINBOURN:** There is a simple answer to the member’s question, and we just want to be very clear about this because there are provisions in clause 12 of the bill. It will not affect anybody’s tenure in that regard. I do not think that is a statutory term, but I think we both know what it means in terms of their commission. It always gets confusing about what is being inserted, but clause 12 of the bill seeks to insert in schedule 1 of the Magistrates Court Act new clause 12(7), which states —

If, before the day ... on which the *Courts Legislation Amendment (Magistrates) Act 2021* Part 3 came into operation, a person held office both as a magistrate of the Court and as a magistrate of the Children’s Court and resigned from only one of those offices (the *first office*) —

- (a) the resignation is taken to have been a resignation from both the first office and the other office; and
- (b) the resignation from the other office is taken to take effect on the later of —
  - (i) commencement day ...

The scenario that is outlined there will not affect any magistrates. That is my advice. On the question of whether the passage of this bill will have some sort of springing effect on an existing magistrate because they had resigned a commission before the commencement date so that they could sit only in the Children’s Court and therefore they lost their commission altogether, no magistrate will be affected by that because no magistrate has resigned part of their commission or anything of that nature. I hope that answers the member’s question in a roundabout way. The first answer is: no, tenure will not be affected by this bill. The second answer is: we do not think the provisions of proposed subclause (7) will have any practical effect on anybody who is currently a magistrate.

**Hon NICK GOIRAN:** Perhaps we can take that issue up when we get to that particular clause, but with regard to tenure and the commission, the parliamentary secretary has indicated that no current magistrate will be impacted adversely. That is what we are really trying to make sure of. Before we pass any legislation, we make sure that it does not have any adverse impact on any person, without us at least giving them the right to be heard on whether there are good reasons that we should consider before we make such an adverse consequence on that individual. The parliamentary secretary is indicating that that is not the case, and we can take up the resignation scenario when we debate that later clause.

The parliamentary secretary indicated earlier that there are six and a half magistrates in Western Australia who sit exclusively on Children’s Court matters. Who decides at the moment, and who will decide after this bill passes, whether a magistrate takes only Children’s Court matters?

**Hon MATTHEW SWINBOURN:** I might have lost a little of what Hon Nick Goiran said during the passage of the short time that I was considering his question, so bear with me; I am sure that the member will bring me back if I go off track. It is exclusively the president who will deal with matters at the Children’s Court, because those resources will be allocated to the president in that regard. Of course, we have to make the distinction between what happens. Currently the decision for a magistrate sitting in Fremantle, who is dealing exclusively with Children’s Court matters, is again the president’s decision, because the president, through whatever means, will allow that to happen at the Fremantle Children’s Court. Of course, we have to remember that all magistrates in Western Australia still exercise within their jurisdiction in the outer metropolitan areas and regional areas—that is, part of their normal court lists and things like that; it is not the president. Those matters are brought before them and they are just part of their normal duties as a magistrate, if the member knows what I mean. I did a period in the Armadale Magistrates Court once—only once—and, obviously, there is a varied list out in those areas. Does that answer the member’s question?

**Hon NICK GOIRAN:** Parliamentary secretary, it partly answers the question, because I am trying to identify who, pre and post—the bill, will decide that a magistrate is going to deal only with Children’s Court matters. I understand what the parliamentary secretary said about the Broome Magistrates Court—that is, that a magistrate sitting as a general magistrate in Broome may as part of that commission take on some Children’s Court matters. I understand that point, but I think the parliamentary secretary will agree that there are some approximately six-and-a-half magistrates in Western Australia at the moment and they look only at Children’s Court matters. My question is who makes that decision and will that change pre and post—this bill?

**Hon MATTHEW SWINBOURN:** I am trying to get all this pointing in one direction, because it is not as straightforward as who has the singular power. As was evident in January 2021 when the government decided to appoint a new magistrate and give that resource to the Children's Court, the government had the power to do that particular thing in consultation and at the request of the president. The president might say, for example, "We've got a backlog of cases. We need more resources." Treasury will do the modelling, or whatever it does, and then a specific resource will be allocated, because the government will have agreed that it should go there. Currently, the Children's Court has an allocation of 6.5 FTE. They are represented by seven individuals—I will not say half an individual—who are currently Children's Court magistrates.

**Hon Nick Goiran:** By way of interjection, you are saying that the decision to appoint them specifically for that purpose of working exclusively on children's matters will be made by the government of the day when they appoint that person?

**Hon MATTHEW SWINBOURN:** Yes. Hang on. Let me just take some further advice on that.

I am just getting some clarity on this. It has been a long week, as members can imagine. Let me just make a few preliminary points. Magistrates are duly appointed. When a magistrate is duly appointed, they are not appointed to a particular court; they are appointed as a magistrate, and through that commission they can sit in the Children's Court, the Industrial Magistrates Court of Western Australia, the mining Warden's Court and, I believe, the Coroner's Court of Western Australia in those capacities. I think that was part of the reforms commenced in 2004 to create flexibility, with a group of magistrates who can move between courts. I use the example of what happened last year. The government's funding decisions on how well-funded the Children's or Magistrates Courts are, are Treasury decisions about those resources. The proposed section 11 provisions of this bill deal with the particular individuals who go into those roles. I keep saying the Children's Court magistrate but there is no such thing as a Children's Court magistrate; there is just a magistrate. There is the President of the Children's Court. The number of magistrates sitting full-time in that jurisdiction is 6.5 FTE. If the workload of that court changes, after these reforms presumably pass the Parliament, the Children's Court president will be in a position to then say to the Chief Magistrate, "I need only 5.5 FTE, not 6.5", and the president will have the discretion on which magistrate goes back, as a resource, as a general magistrate. That will not take away their capacity because they will remain duly appointed to deal with matters that arise as a consequence of the Children's Court, but they will not be one of the Perth or Fremantle Children's Court people.

I think the nature of the dispute that arose previously was about certain powers to do with that kind of thing and where that power rested. I hope I have answered the member's question. I know the member asked what it is currently and what it will be. I think the issue we have there is in terms of moving from what might have been common law powers as a head of jurisdiction to manage that—I suggest that the Children's Court president already has those powers to position magistrates without them being expressed—to having them as a statutory, expressed point of view. Therefore, it is not easy to tell the member this is how it is now and this is how it will be, because there is some dispute, as we know, about that.

I hope I have covered off on that for the member as best as I can. I am getting a little bit tired, as members can imagine, and I do not want to do a disservice to that. Maybe the member can push me for some more information.

**Hon Dr BRAD PETTITT:** I am coming from a different angle that I do not believe has been covered. I have been away from the chamber for the last hour so forgive me if it was covered then. I and other members received some correspondence from Aboriginal Family Legal Services. I got it in August last year, and I do not think we have had a response on it. The service raised a number of concerns, including on the drafting of the bill. I want to focus on the first concern raised that focuses on the statement —

1. Aboriginal children and families will be disadvantaged in care and protection and juvenile justice proceedings in the Children's Court;

The letter was backed up by some research from Dr Maria Harries, a senior honorary research fellow at the University of Western Australia's school of population and global health. The last paragraph of her lengthy letter reads —

It is our fear that the amendment if passed would jeopardize the growth of a team of judicial officers who are experienced, skilled and knowledgeable about the complex needs of vulnerable, disadvantaged and struggling families and the impact of intergenerational trauma.

She talks about the fact that 57 per cent of children in the care of the state are Aboriginal and the importance of having a team that is across these complex issues. I have looked through *Hansard* but I have not seen any reflection of this issue in the debate so far or in the parliamentary secretary's comments in reply to the second reading debate. Has there been a response to these letters from the University of Western Australia and Aboriginal Family Legal Services on the issues they have raised?

**Hon MATTHEW SWINBOURN:** The member referred to correspondence from Aboriginal Family Legal Services and some studies by the University of Western Australia, and asked whether there had been responses to either. Was the UWA reference to correspondence to the Attorney General or was that a study?

**Hon Dr BRAD PETTITT:** Sorry; I should have been clearer. It was a letter that was sent to the Attorney General on 23 July 2021.

**Hon MATTHEW SWINBOURN:** Can the member be a bit more specific about who it was from, because UWA is a large organisation?

**Hon Dr BRAD PETTITT:** I did state that. I will state that again. That was from Dr Maria Harries, who is a senior honorary research fellow at the school of population and global health at the University of Western Australia, and Dr Celine Harrison, who is an honorary research fellow from the Social Policy Practice Research Consortium, also at UWA.

**Committee interrupted, pursuant to standing orders.**

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