

COURTS LEGISLATION AMENDMENT (MAGISTRATES) BILL 2021

Committee

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

Clause 7: Section 11 inserted —

Committee was interrupted after the clause had been partly considered.

Hon MATTHEW SWINBOURN: In terms of who is the head of jurisdiction of the Industrial Magistrates Court of Western Australia, on the best advice available to us at this stage, there is no specific head of jurisdiction for the Industrial Magistrates Court, and it would therefore be the Chief Magistrate. The Chief Magistrate would have the powers available to him under section 25 to direct those magistrates exercising industrial magistrate powers in that regard.

Hon NICK GOIRAN: I am just trying to finalise who will be captured by this provision. The parliamentary secretary's response on the Industrial Magistrate Court helps—the head of jurisdiction in the absence of anything else is the Chief Magistrate. Is that also the case for any magistrate exercising jurisdiction in the Warden's Court?

Hon MATTHEW SWINBOURN: Yes, it is the Chief Magistrate. There are apparently two magistrates who exercise the Warden's Court functions. It is not a big jurisdiction.

Hon NICK GOIRAN: No. But it is bigger than the Industrial Magistrates Court —

Hon Matthew Swinbourn interjected.

Hon NICK GOIRAN: — where there is one magistrate fulfilling those functions. There are two with the Warden's Court and we have 6.5 fulfilling duties in the Children's Court. Then the last group, as I understand it, that potentially will be captured by all of this is a magistrate in the Coroner's Court of Western Australia. Does the parliamentary secretary have any information on how many of them are in place? Secondly, is it not then the head of jurisdiction in that area—that is, the State Coroner?

Hon MATTHEW SWINBOURN: The Coroner's Court, member, is somewhat different from the other areas in that there is the State Coroner, the Deputy State Coroner and currently two other coroners, one of whom is a magistrate who went to the Coroner's Court. We do not know whether that particular coroner still has a commission as a magistrate because we do not have that information available to us. For the sake of being correct, I am highlighting that. In relation to those coroners, the State Coroner has powers as the head of that jurisdiction. When magistrates are commissioned, they are automatically coroners under the Coroners Act. Section 21 of the Coroners Act provides that the Coroner can issue—I think the word is—directions to those magistrates performing the functions of a coroner with the consent of the Chief Magistrate. I think that is under section 21. In that instance it is with the consent of the Chief Magistrate. In terms of how that applies practically, obviously, within the metropolitan area, the State Coroner and the Coroner's Court deals with most matters, but magistrates sitting in regional areas, I am advised, regularly deal with coronial matters as well, so there will be circumstances in which regional magistrates exercising those powers will be subject to the directions of the coroner. Those directions have not been consented to by the Chief Magistrate.

Hon NICK GOIRAN: To the extent there is similarity in the regime, the State Coroner can provide some form of direction to a magistrate but is subject to the Chief Magistrate consenting to that, so there is a degree of similarity with the first half of clause 7 that couples together proposed section 11(2) and (3). But I take it there is a difference with respect to the second group, which is the provisions coupled as proposed section 11(4) and (5) in that under this regime in the bill, the president can, in effect, issue a direction in the sense of moving a magistrate away from that specialist jurisdiction, and the Chief Magistrate must accept that. Does that also exist in the Coroner's Court, where the State Coroner can move a magistrate from exercising some form of jurisdiction under the Coroner's Act and effectively send them back to the Chief Magistrate and the Chief Magistrate must accept that?

Hon MATTHEW SWINBOURN: In relation to coroners, there is an obvious distinction, because a number of coroners are just coroners, but with the Children's Court, all magistrates in the Children's Court are general magistrates, except for the one specialist, who is the president. There is that different element.

Hon Nick Goiran interjected.

Hon MATTHEW SWINBOURN: That is right—the part-time commissioner as well. The Chief Magistrate retains his power in relation to those coroners who are exercising coronial inquest powers, so they remain subject to the direction of the Chief Magistrate and those matters that arise under section 25 of the Magistrate's Court Act which states —

(1) The Chief Magistrate, by directions given from time to time to a person who is a magistrate, may —

...

- (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 the chief magistrate by direction from time to time may specify which class or classes of judicial functions or otherwise this person is to perform for the time being.

In relation to those regional magistrates in coronial districts, I am told that a death in the district will be notified through the administrative processes to the coroner and then the police will conduct their part of the investigation, and the matter will be listed in the Magistrates Court that sits within that district, and then that magistrate will sit as the coroner on those particular matters. Obviously, there are deaths all the time across the state, but as we know, not all of them give rise to coronial inquiries. That work could be characterised as ad hoc, so it is not the same as the Children's Court in relation to workload, listings and things of that kind. When there is a death in the coronial district that a Magistrates Court sits within, that particular magistrate will exercise those powers subject to section 21 of the Coroners Act, "Directions by State Coroner" —

- (1) With the prior approval of the Chief Magistrate of the Magistrates Court, the State Coroner may give to a coroner directions about investigations into deaths generally and the manner in which they are to be conducted.

I suspect that is things like practice directions and things of that kind. The section continues, and, importantly it states —

- (2) The State Coroner may give to a coroner directions about an investigation into a particular death, including a direction to cease to investigate that death or a direction to make such findings as are possible under section 25(1) in relation to that death by a day specified in the direction.

The coroner has specific powers to direct a magistrate sitting as a coroner on specific cases. One is the more general direction, which I suspect relates to practice directions and things of that kind.

Hon NICK GOIRAN: I thank the parliamentary secretary. As we conclude our consideration of clause 7, it seems relatively clear at this point that what is happening here is unique under Western Australian law and no other Western Australian provision constrains or obligates a head of jurisdiction because of what another head of jurisdiction has determined. If there is a case for that to be made because, allegedly, the genesis of this matter is a high profile dispute, the point that I would make is that it would be improper for it to be considered by the chamber in the absence of that person who is being constrained or obligated by the other head of jurisdiction to have a voice that is heard in the Parliament. That is what we have here. We do not have it in any other provision in Western Australia. The government is not aware of it being the case in any other Australian jurisdiction, yet it is happening in the context of a high profile dispute.

As I indicated earlier, I have no problem with the request mechanism, as set out in proposed sections 11(2) and 11(3). But, in my view, it is improper to do what is provided for in proposed sections 11(4) and 11(5), at least in the absence of the chamber being informed of what the Chief Magistrate has to say about this. If the Chief Magistrate were to provide information to the Parliament, there would be nothing particularly strange about that; members of the judiciary are quite entitled to give their views on matters, though they generally restrict themselves when it comes to policy matters. I have certainly been in many committee hearings in which judicial officers have elected not to provide a view on a policy matter. On a significant matter that directly impacts them and the way in which they manage things and now this new obligation to adhere to a notice given by another head of jurisdiction, information should be provided to the Parliament. That is not the case. It has not been provided. The government has indicated that it will not provide it. I think that is wrong but I do not think we can take it any further.

Clause put and passed.

Clause 8: Section 12A inserted —

Hon NICK GOIRAN: Clause 8 seeks to insert a new section 12A into the Children's Court of Western Australia Act 1988. We have just dealt with the provision that deals with the request process by which the President of the Children's Court can make a request to the Chief Magistrate. The request can be consented to or refused by the Chief Magistrate, with absolute discretion. We have also dealt with the provision that can see the President of the Children's Court send back or transfer a magistrate on either a part-time or full-time basis to the Chief Magistrate and that Chief Magistrate will have no say in that matter, notwithstanding the fact that it is conceded by all that the Children's Court is a specialist jurisdiction. It is no different from the Industrial Magistrates Court, the Warden's Court or the Coroner's Court. All of these particular areas are specialised jurisdictions. That is the provision in clause 7, which we just passed.

Under clause 8, we see that the president will have the power to assign duties to magistrates. To what extent does this power to assign duties differ from the power that exists at the moment for the President of the Children's Court?

Hon MATTHEW SWINBOURN: There were no express powers of this kind, hence why we are now moving to express them. The member asked how the powers in this clause differ from the powers that the President of the Children's Court currently has. The President of the Children's Court does not have any express statutory powers.

The president's powers would be those that we would consider necessary to perform the functions of his commission, having regard to common law practices of courts and those sorts of conventions. In substance, the powers of the president are, in effect, no different. What we are doing here is putting those powers beyond doubt. As we know, in Supreme Court proceedings, some of these issues are live issues between the parties in dispute. We want to put it beyond doubt what those powers are by putting them into the act. The member might well jump up and ask whether it is a codification of the existing powers of the President of the Children's Court. I cannot go as far as to say that it is a codification of those powers. There could be powers. It is beyond my contemplation that they might be "reserved" in situations that all heads of jurisdiction might have. Courts have a long storied history that goes back beyond the establishment of this colony. I am not trying to be glib but I do not want to say that it codifies all the powers within that sort of thing because that would not be accurate.

Hon NICK GOIRAN: One of the elements in this clause sees the President of the Children's Court able to give a direction to a magistrate to specify where, when and at what times to deal with those cases and perform those duties. What happens with the part-time magistrates who are undertaking Children's Court functions if that location—I am specifically thinking about where they are undertaking these functions—conflicts with where they are to undertake cases in their other part-time role under the directions of the Chief Magistrate?

Hon MATTHEW SWINBOURN: I do not think there is anything in this bill that manages the particular issue that the member raised. If, for example, a magistrate was sitting part-time in Armadale, exercising Children's Court functions, and the Chief Magistrate said, "I want you to use the other part of your time to sit in Broome", or whatever, it is to reconcile those two things. I have never been to Broome; I do not know why I keep picking Broome, but anyway! I have been to Port Hedland; I lived there when I was an infant.

In any event, we expect those two judges to reach comity on that issue, so that does not give rise to a situation in which the Chief Magistrate issues a direction that makes it impossible for a Children's Court magistrate to exercise Children's Court functions according to how they have been engaged.

Hon NICK GOIRAN: I understand that. The parliamentary secretary has answered my original question, but my follow-up question is: what is the circuit breaker there? What will occur in the event that the president issues one of these directions under proposed section 12A and the direction is in conflict with the Chief Magistrate's section 25 direction? Further to that, for the benefit of the magistrate who receives these two competing directions, what could he or she do? Obviously there will be certain common sense steps that the magistrate would take, but when push comes to shove, what are they to do? I note that proposed section 12A(4) states —

A magistrate must comply with a direction given under subsection (1).

I assume there would be a live provision under the Magistrates Court Act, so they now have this dilemma. How does the government propose that a magistrate deal with that dilemma?

Hon MATTHEW SWINBOURN: It is hard to contemplate a situation in which the two courts became so dysfunctional that they would be in the situation that the member has described. It is possible —

Hon Nick Goiran: Will you take an interjection?

Hon MATTHEW SWINBOURN: Sure.

Hon Nick Goiran: I am mindful of the fact that we've just got this Supreme Court matter. I know it wasn't two heads of jurisdiction, but effectively that was what happened.

Hon MATTHEW SWINBOURN: Yes, I appreciate that, member, but as I say, I have acknowledged that it is a possibility. It would be a possibility of a kind existing now because of the relationship between the two courts. In terms of what we are proposing in this bill, we are not addressing that to say that one has primacy over the other. I suppose what I can do is to take the member back to the provisions of what will be new section 11(3)(b). It states —

(3) If the President gives a notice under subsection (2) in relation to a dually appointed magistrate —

...

- (b) if the Chief Magistrate consents—the Chief Magistrate must, in giving any directions to the magistrate under the *Magistrates Court Act 2004* section 25, take into account that for the time being the magistrate is required to perform Children's Court functions on the basis specified in the notice.

To put that into context, once the Chief Magistrate consents, he or she is required to have regard to the consent that has been given in the way that the Chief Magistrate exercises his or her powers under section 25 of the Magistrates Court Act.

Hon NICK GOIRAN: That is interesting. Really, the implication is that a direction by the president under proposed section 12A would, at one level, have greater primacy than a direction by the Chief Magistrate under section 25 of the Magistrates Court Act 2004 because of proposed section 11(3)(b) of the Children's Court of Western Australia

Act 1988. It is not really a question, but I will just make this observation: this, once again, emphasises why the house of review should get to hear what the Chief Magistrate has to say about this, because we now potentially have a second situation in which there is some form of imposition or restriction on the Chief Magistrate that does not currently exist. Under the previous provision the President of the Children's Court could tell the Chief Magistrate, "I want to send you back this magistrate, either on a part-time or full-time basis. I am sending you back this magistrate." The Chief Magistrate must accept that notice. That is a new provision that exists because of clause 7, which we have just passed. Now we have an addition to that scenario whereby the Chief Magistrate on a second occasion is now going to be constrained by something that the other head of jurisdiction—in this case, the President of the Children's Court—has directed. If I were the Chief Magistrate, I would be very, very circumspect in this situation about consenting to anything under proposed section 11(3) unless I had probably, as an ancillary document, some form of memorandum of understanding between myself and the President of the Children's Court as to exactly how we are going to operate with the consent that has just been provided, because otherwise I can see multiple instances in which a conflict could emerge. It could potentially be a conflict that emerges through no fault of either of the two heads of jurisdiction, but because of the view of the magistrate who is affected by these notices.

I move to another provision in clause 8. At proposed section 12A(3) there is an insertion that a direction given by the president to a magistrate under proposed section 12A(1) "does not limit the functions of the magistrate." Why was it thought necessary to insert that? What are we trying to address there?

Hon MATTHEW SWINBOURN: I take the member to the Magistrates Court Act 2004. I am sure he has a copy in front of him. Section 6, titled "Magistrates: functions of", deals with the functions of magistrates when not, for want of a better word, exercising their judicial functions in the sense that they are dealing with a case before them. I am advised that proposed section 12A(3) is necessary to ensure that essentially the powers of the president under section 12A(1) will be directed to administrative matters and not to judicial matters. That is why it is necessary. That wording is in the Magistrates Court Act at section 25(2). The provision we are looking at refers back to proposed section 12A(1), but the reason is that proposed section 12A(2) deals with the particularity that is the Children's Court that we are talking about here. That has been picked up here. It is a reflection of the wording in section 25(2) and it relates to those judicial functions.

Hon NICK GOIRAN: The last thing pertinent to clause 8 relates to those categories of matters set out at proposed section 12A(1). One thing set out there is that the president will have the power to direct a magistrate about which case or cases, or class or classes of case, the person is to deal with. Proposed section 12A(2) means it can be a reference only to Children's Court cases. Is that not the case at the moment?

Hon MATTHEW SWINBOURN: I think the answer to the member's question is yes, but we have already covered off the difference here between essentially the powers of the president to administer the court, which arises under section 37(1) of the Children's Court of Western Australia Act, which states —

Subject to this Act and to the rules of court, the President is responsible for the administration of the Court, the disposition of the business of the Court and for its practice and procedure.

As I said before, proposed section 12A(1)(a) is putting beyond any doubt what those particular powers are.

Hon NICK GOIRAN: Yes, putting things beyond doubt, I understood, was proposed section 12A(1)(c); that is where, when and at what times to deal with those cases or perform those duties. I did not appreciate that it might also apply to proposed section 12A(1)(a). It is not the case that the Chief Magistrate specifies which children's cases or classes of case a Children's Court magistrate can deal with at the moment, I do not think.

Hon Matthew Swinbourn: I am sorry; are we talking about proposed section 12A or section 25 of the Magistrates Court Act?

Hon NICK GOIRAN: At the moment, I am referring to clause 8, proposed section 12A(1). There it states that the president can give a direction specifying which case or cases, or class or classes of case, the person—the magistrate—is able to deal with. My understanding is that is what is happening at the moment anyway. The President of the Children's Court, if you like, is distributing the case load amongst the Children's Court magistrates.

Hon Matthew Swinbourn: By way of interjection, yes, member.

Hon NICK GOIRAN: Yes, so proposed section 12A(1)(a) is just a statement of the existing practice. There is nothing controversial about that for any party, and I certainly have not received any advocacy that that is a point of concern. Having established that, what is the situation with proposed section 12A(1)(b), "specify which administrative duties the person is to perform for the time being"? Has that been a point of contention, or is that again existing practice, there is nothing new here, and it is therefore only 12A(1)(c) that is potentially introducing something new that might be contested? I am just trying to establish which ones are really without doubt a statement of the existing practice, and which ones have been inserted just to put it beyond doubt.

Hon MATTHEW SWINBOURN: I am advised that there is nothing particularly controversial about proposed section 12A(1)(b) in terms of existing practices in the court, and proposed section 12A(1)(c) is really to put beyond doubt the powers of the president in relation to where, when and at what times to deal with those cases or perform those duties.

Hon NICK GOIRAN: To conclude on this point, then, if I can use a very, if you like, alive albeit sensitive case, in the situation with Magistrate Crawford and President Quail, there really is no dispute by anybody, as far as I know—I am just seeking the parliamentary secretary's confirmation that he understands the same thing—that President Quail has always had, irrespective of this bill, the capacity to distribute Children's Court cases to Magistrate Crawford, and that that has been the practice for a period we now know to be less than two years. Over the course of approximately the last two years, President Quail has been directing Magistrate Crawford on which cases she will take on. There is nothing particularly controversial about that. That is consistent with the practice that would have been there with the previous Presidents of the Children's Court, whether it be then Presidents Wager or Reynolds. Similar to that, there were certain administrative duties that Magistrate Crawford was required to perform from time to time. I am assuming those administrative duties would have included the completion of some reports and the like. Whatever those administrative duties were, President Quail was, from time to time, directing Magistrate Crawford to undertake those duties. There has never really been any dispute about that.

It is the third category over which a dispute emerged. Although I hear loudly and clearly that the government's position is that, in effect, a dispute need not have occurred because the practice has been consistent with past practice and the common law understanding of the powers of the president and so on and so forth, nevertheless, for the purposes of putting it absolutely beyond doubt, proposed section 12A will now certainly say that President Quail can direct Magistrate Crawford where, when and at what times she is to deal with Children's Court cases. At the moment, of course, we understand, because it is on the public record, that the court will be based primarily in Fremantle, but I believe there are another couple of regional courts where this is undertaken. Is that a fair and accurate summary of how this clause intersects with the dispute between those two judicial officers?

Hon MATTHEW SWINBOURN: I prefaced to the member that I did not want to get caught up in the dispute between President Quail and Magistrate Crawford. The member has framed his question and asked whether it is a fair characterisation. I will not answer that directly because I think I can talk about it only in a general sense. We are trying to solve the future purposes for any dispute that might arise on these matters regarding what the president's powers are. We are putting it beyond doubt. President Quail, or any future Children's Court president, whoever that might be, will have those powers that are listed under proposed section 12A(1) for magistrates who exercise the Children's Courts jurisdiction and come within the president's ambit. I think that is as specific as I can be without relating it back to the case of Crawford and Quail, which was never finally decided. As we have indicated before, notwithstanding that it is the genesis of this matter, this legislation was not meant to resolve that dispute, whatever it is and wherever its limits rest. I do not know where the limits of that dispute rest—that is me speaking as the parliamentary secretary—and whether such things will be resolved. There are no more legal proceedings and so we need to—sorry, someone is deep sighing in the background—deal with this regarding the future purposes of the president.

Hon NICK GOIRAN: Parliamentary secretary, because of clause 8 and proposed section 12A(1)(c), once this bill passes, it will be possible—although, I will say politically crazy—for President Quail to direct Magistrate Crawford that she is to perform her duties in Esperance or Kununurra. He could do that by virtue of proposed section 12A(1)(c), without a shadow of a doubt. I appreciate that the government will say there is a strong argument that that can be done already. I take it that the government is now saying that the extent to which there was ever any dispute about that, proposed section 12A(1)(c) means that—if the parliamentary secretary wants to take the personalities out of it, that is fine—the President of the Children's Court can move a Children's Court magistrate anywhere around Western Australia with or without their consent.

Hon MATTHEW SWINBOURN: The president will have the power to give directions to a magistrate to specify where, when and at what times they are to deal with those cases or perform those duties. The president will have that power under this bill and for future purposes that will apply to all magistrates who come within the scope of this provision.

Clause put and passed.

Clause 9: Part 8 inserted —

Hon NICK GOIRAN: This is the transitional provision. Has the president given the Chief Magistrate any such notice that would be captured by this transitional provision? I appreciate that there is also a prospective period of time because a notice could be given tomorrow, for example, or at any time between now and when part 2 comes into operation. I am seeking to clarify that no such notice has been given that is applicable to new part 8 at this time.

Sitting suspended from 6.00 to 7.00 pm

Hon MATTHEW SWINBOURN: Before the break, the member inquired whether any notices have been issued.

Quorum

Hon NICK GOIRAN: Deputy chair, I draw your attention to the state of the chamber.

The DEPUTY CHAIR (Hon Dr Sally Talbot): Quorum required, ring the bells. I am sorry. I forgot to count myself—not a usual thing for me to do! Quorum present; there is no point of order.

Committee Resumed

Hon MATTHEW SWINBOURN: The member inquired before the break whether any notices had been issued under proposed section 54(3) of the Children’s Court of Western Australia Act. To clarify for the member, the transitional provisions proposed at section 54(3) will not provide for the issue of notices prior to the commencement of the act. The provisions are to clarify that the powers in proposed section 11 may be exercised by the president for dually appointed magistrates who performed functions in the Children’s Court prior to the commencement of the act. Once the act commences, the president may issue a notice under proposed section 11(2) or (4) when the circumstances in proposed section 54(2) apply. Proposed section 54(4) will effectively provide that when no previous notice has been given, the president and Chief Magistrate are deemed to have agreed to the magistrate performing functions in the Children’s Court on the basis that they have been performed prior to the commencement. This will avoid the need for the president to issue notices immediately upon the commencement of the act for every dually appointed magistrate who performs Children’s Court functions.

Clause put and passed.

Clauses 10 and 11 put and passed.

Clause 12: Schedule 1 clause 12 amended —

Hon NICK GOIRAN: Clause 12 seeks to amend the first schedule in the Magistrates Courts Act 2004 and, in particular, to insert two new subclauses in clause 12 of that first schedule. It appears that if a magistrate were to resign, purportedly from one of their appointments—I think we discussed earlier that there is a distinction between a commission and an appointment and the parliamentary secretary indicated that the Governor gives a person a commission and will then appoint them to a particular court—they will automatically be taken to have resigned from the other position. Evidently, that is not the case at the moment, otherwise there would be no need to insert these provisions into the bill. Why is this seen as necessary?

Hon MATTHEW SWINBOURN: We say it is necessary because currently there is no provision that deals with this. It would be possible for a magistrate to resign from their appointments and, therefore, be restricted in terms of where they act. The point of the whole magistrate’s scheme, as it was envisaged in 2004, was to provide for a flexible magistracy, not to provide for specific specialist magistrates who could sit in only a particular jurisdiction, whether that is the Industrial Magistrates Court, the Children’s Court, the Magistrates Court itself, the Warden’s Court or the Coroner’s Court. Effectively, this is necessary because all magistrates are now appointed to all those particular areas so that they have the maximum degree of flexibility for the purposes of the state; therefore, this is necessary to ensure that no particular magistrate frustrates that by resigning and effectively being able to sit in only that one jurisdiction.

Hon NICK GOIRAN: But does that not then fly in the face of the discussion that we had previously about the importance of the Children’s Court being a specialised jurisdiction?

Hon MATTHEW SWINBOURN: I do not think so in that regard, member, because all magistrates, except for the one who is engaged part time, are magistrates across the board. Some of the magistrates who sit full time in the Magistrates Court at the moment have come from the magistrate’s jurisdiction into the Children’s Court jurisdiction, and it is possible that they might come and sit in another jurisdiction. How that operates over time is that individual magistrates themselves, I suppose—coming back to the specialised thing—may work in the Children’s Court for a long period and find that environment difficult to stay in because of the nature of the work that they are dealing with. I am contemplating here. They could be there for 20 years and then say to the Chief Magistrate and the president, “I want to move on into another area.” The specialisation of the Children’s Court is important in terms of the mix, but people will come in and out of that over the course of their career in the judiciary.

Hon NICK GOIRAN: Parliamentary secretary, let us confirm whether, at the moment, a magistrate who resigns one of their appointments would not automatically lose their commission. If any one of the magistrates—I think we said that there are 57 general magistrates and six who are currently fulfilling duties exclusively in the Children’s Court, so that is 63 magistrates—were to tender a resignation from their appointment with the Children’s Court, they would still continue to maintain a commission as a magistrate.

Hon MATTHEW SWINBOURN: Yes.

Hon NICK GOIRAN: Clause 12 will change that so that such a resignation will trigger a complete loss of the commission. I particularly note that proposed paragraph (7), which is to be inserted into schedule 1 of the

Magistrates Court Act 2004, seeks to apply this new regime, this loss of commission, based upon a resignation of one office retrospectively. Why has it been deemed appropriate to apply this provision retrospectively? Is that an indication that somebody has already tendered a resignation from one position?

Hon MATTHEW SWINBOURN: No-one has resigned. As the state of affairs currently sit, the advice is that no-one has resigned so proposed paragraph (7) will have no practical effect unless somebody resigns between the passage of this bill and it coming into force.

Hon NICK GOIRAN: Has this clause been added to somehow protect the policy decision that has been made here from any advantage being taken by somebody between now and when the bill comes into effect?

Hon MATTHEW SWINBOURN: Yes.

Hon NICK GOIRAN: It is definitely the case, parliamentary secretary, that the government is very clear in its advice to the chamber that no magistrate in Western Australia, according to the words at page 10 of the bill, “held office both as a magistrate of the Court,”—this is, of course, a reference to the Magistrates Court—“and as a magistrate of the Children’s Court” has tendered a resignation from one of those offices; that is, no such resignation exists.

Hon MATTHEW SWINBOURN: The advice at the table is that there is definitely nobody. One of the advisers said that if somebody had resigned, he would have been advised of that and he would have no knowledge of that. I do not want to sound like I am qualifying it but I have to qualify that the best available advice is that it definitely does not affect anyone.

Hon NICK GOIRAN: The parliamentary secretary would definitely be aware of this because when we started debate on clause 1—we are now on the final clause of the Courts Legislation Amendment (Magistrates) Bill 2021—the very first question that I asked was: what is the genesis of this bill? The parliamentary secretary indicated that it was the Crawford v Quail matter. The parliamentary secretary will be aware of this because during the second reading debate, I took some time to take the house through case CIV 1037 of 2021, Catherine Patricia Crawford and His Honour Judge Hylton Quail, in the Supreme Court of Western Australia, which took place over three days, albeit the third day was really about the parties informing the court that the matter had been resolved and was essentially seeking, as I understand it, orders by consent. On the second of those days, Tuesday, 12 October 2021, proceedings began at 9.59 am. The parliamentary secretary would definitely be aware that Magistrate Crawford was represented on that day by Mr Donaldson, Senior Counsel. We had some interaction about that earlier. The parliamentary secretary may or may not be aware that His Honour Judge Hylton Quail was represented on that day by Mr Grace, QC. In the transcript of the second day, Mr Grace told Justice Allanson, who, of course, was presiding over the proceedings in the Supreme Court—this is at page 257 of the transcript that I have just identified—“She resigned.” The only reasonable conclusion that I can draw from this at this point, not having obviously the same level of information at my disposal as the parties themselves—the parliamentary secretary and I are perhaps at some form of disadvantage at this point—is that it seems to be an indication from the senior barrister representing His Honour Judge Hylton Quail that Magistrate Crawford had resigned. That is why I am seeking absolute confirmation from the government at this time that there is no doubt in the mind of the government that Magistrate Crawford has never at any stage resigned from one of her offices and will not under any circumstances fall foul of the new provision that will be inserted into the act at clause 12, which would see, if retrospectively applied, her effectively moved on from her commission because of this clause before us. That is why I am taking the extra time now to make sure we get this 100 per cent right. I acknowledge that, as he always does, the parliamentary secretary is working to the best of the information that is made available to him, but the information that was earlier provided to the chamber through the parliamentary secretary on behalf of the government was pretty clear—I did not mention Magistrate Crawford; I asked about magistrates generally—that it does not apply to any magistrate and that all the government is seeking to do is to make sure that no magistrate quickly puts in a resignation, for example, tomorrow, and avoids the clause 12 provision. But given that this information appears to have occurred on 12 October 2021, can the parliamentary secretary assist the chamber by confirming that it is government’s position that Magistrate Crawford has not tendered a resignation at any stage with respect to any office?

Hon MATTHEW SWINBOURN: I can only be clear as the advice that is given to me at the table, as Hon Nick Goiran acknowledged. Schedule 1, section 12 of the Magistrates Court Act deals with resignations and my advice is that no resignation has been perfected or otherwise from Magistrate Crawford that would mean that she would fall within the ambit of that particular provision. I cannot say what the resignation reference is in the court transcript. My advice is that no magistrate, and that would include Magistrate Crawford, would be affected by the provisions that we are debating.

Hon NICK GOIRAN: The question, of course, that then arises is: why would Mr Grace say that she resigned when he is representing President Quail, who is involved in a very high profile—I think I have referred to it previously as an unprecedented—type of dispute, which includes an allegation, as I understand it, by Magistrate Crawford that she has been bullied by Mr Quail and also allegations from Mr Quail against Magistrate Crawford of evidence tampering? That is certainly my understanding of the materials that are on the public record. It is in those circumstances

that we then have the government, the Attorney General in particular, pushing this bill through both houses of Parliament as a very high priority in the legislative calendar for 2022. This is not some kind of bill that has been tacked on at the end of the legislative agenda. No; it has been elevated to number 2 in circumstances in which the court record seems to suggest, on a prima facie basis at least, that Magistrate Crawford might be captured by this rather unique clause tacked onto the end of this bill. It seems that it is not the government's intention that Magistrate Crawford would be captured by clause 12 of the bill. I accept that without equivocation. If the parliamentary secretary tells us that it is not the government's intention for Magistrate Crawford to be captured by clause 12 because of any purported resignation that might have been issued prior to this debate, I accept that without equivocation. But just because it is not the government's intention that this occur does not mean that it is not going to happen. That is why, at some earlier stage last week—probably around exactly a week ago—I suggested to the chamber that it might be good if this matter went to the Standing Committee on Legislation so that we could get to the bottom of the various issues. Here is another classic example, because it would have been possible for the legislation committee to inquire into this matter and find out whether Magistrate Crawford has resigned; and, if not, why does President Quail's advocate in the court suggest that that might well be the case?

I do not know that I am going to be able to assist the parliamentary secretary in this matter, and it is probably not really my job either, but I will highlight for the benefit of members that it appears that the court record says one thing and the government's understanding is another; they cannot both be right. I would like to know exactly whom Mr Grace was referring to when he told Justice Allanson that she resigned. The full quote is at page 257 of the transcript. I will introduce the information by referring to what Justice Allanson was asking at the time. He says —

ALLANSON J: If I were to find that the purpose of the direction is to facilitate the administration of the court, you would say that that is not an improper purpose?

GRACE, MR: Yes.

ALLANSON J: It's just that going into the details of people's conduct can, really, lead in both directions, can it not?

GRACE, MR: Well, no, your Honour, because there was never any request made by the President directed towards the plaintiff. She resigned.

I should indicate to members that I think it is pretty uncontroversial to say that Magistrate Crawford is female, President Quail is male and when Mr Grace is speaking to Justice Allanson and says, "She resigned", it is very difficult to draw any other conclusion than that it is a reference to Magistrate Crawford, particularly given all the context. Mr Grace goes on in his ongoing submissions to Justice Allanson to say —

What was revealed by all the correspondence, including the correspondence to and from the plaintiff—sorry, the defendant to the executive government and also involving Chief Magistrate Heath, was there has to be a way of resolving the problem that exists within the Children's Court by reason of the plaintiff's presence there.

The dialogue continues. The parliamentary secretary can see, at least in the portion of this transcript that I have drawn to his attention from 12 October 2021, that it is difficult to draw any other conclusion than the fact that it is a reference to a resignation of Magistrate Crawford. That is what troubles me before we speedily pass clause 12, given that we are now going to be retrospectively applying a new mechanism that would see any magistrate captured by it holding no offices at all. It states —

If a person holds office both as a magistrate of the Court and as a magistrate of the Children's Court, and the person resigns from only one of those offices, the resignation is taken to be a resignation from both of those offices.

That is what we are about to pass. We are passing it in the context in which the government says that it does not apply to any Western Australian at this time, as no magistrate has resigned, yet it appears that the court record suggests otherwise. It is no passing matter; it is in a court record in which there was a massive dispute between a magistrate and the President of the Children's Court. It is not something that we can just gloss over. Magistrate Crawford has either resigned or she has not. If what the government says is true and Magistrate Crawford has not resigned, and I accept that without equivocation, what is Mr Grace up to—Mr Grace, QC, representing, presumably on instructions from President Quail? What is going on there? Are Mr Grace and Mr Quail 100 per cent correct and Magistrate Crawford has resigned and the government has provided, unintentionally, some misleading information to the chamber this evening? That is what we cannot seem to get to the bottom of. Has the parliamentary secretary had any further information provided to him that might assist us to resolve this dilemma; and, if not, what mechanism might be available to him at this point to put this matter beyond doubt?

Hon MATTHEW SWINBOURN: We are not in any doubt. No magistrate has resigned according to the provisions of the Magistrates Court Act such that they would be affected by proposed subclause (7). I cannot be any more emphatic in that advice. I cannot speak to what Grace, QC, was talking about in the transcript. That would have been

his submission. I doubt it was the subject of evidence. I cannot go any further on that. We have been as unequivocal as we can be on this issue. The people I am receiving advice from would know whether she had resigned, so that is the position.

Hon NICK GOIRAN: I want to conclude by thanking the parliamentary secretary for making that position abundantly clear. For anyone who reads *Hansard*, there was no equivocation. The parliamentary secretary was not trying to provide any. He was making the position very clear on behalf of the government.

It is my considered view that Magistrate Crawford certainly cannot, under any circumstances, by executive government or otherwise, at this point in time be captured by clause 12. I accept that a sequence of events might occur between now and commencement day that would capture the magistrate, or any other magistrate for that matter, with respect to clause 12. But the advice on the judiciary that the executive has provided to the chamber tonight is without equivocation. I think that as a separate matter, a bit of work needs to be done to get to the bottom of what Mr Grace was saying, but so long as the position of government is that Magistrate Crawford continues in her commission notwithstanding the passage of this bill, I think we can pass clause 12.

Clause put and passed.

Title put and passed.

Report

Bill reported, without amendment, and the report adopted.

Third Reading

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