

CHARITABLE TRUSTS BILL 2022

Receipt and First Reading

Bill received from the Assembly; and, on motion by **Hon Matthew Swinbourn (Parliamentary Secretary)**, read a first time.

Second Reading

HON MATTHEW SWINBOURN (East Metropolitan — Parliamentary Secretary) [2.36 pm]: I move —

That the bill be now read a second time.

The Charitable Trusts Bill 2022 repeals and replaces the Charitable Trusts Act 1962 with a new modern act. Charitable trusts are trusts for purposes rather than persons. They do not have beneficiaries but instead are intended to benefit charitable purposes. In Western Australia, many charitable trusts hold native title benefits and are intended to advance the interests of Aboriginal communities. Some of these trusts hold very substantial funds. In the absence of beneficiaries to enforce a charitable trust, the Crown has a duty as *parens patriae*—Latin for parent of the nation—to protect the charitable trust’s property. This duty is exercised by the Attorney General, representing the public interest in a charitable trust. This role is reflected in the powers and duties of the Attorney General under both the common law and, currently, the Charitable Trusts Act 1962. The Supreme Court also exercises both inherent and statutory jurisdiction in relation to charitable trusts.

The Charitable Trusts Act 1962 has not been substantially amended since its enactment 60 years ago. Charitable trusts have changed considerably over that time, both in their purposes—such as for applying native title benefits—and management. Today, the trustee of a charitable trust is less likely to be an individual volunteer and more likely to be a corporate trustee employing various people to administer a potentially complex modern trust deed, with the trust sometimes only a small part of a complicated corporate structure. This bill will modernise the law that applies to charitable trusts in this state to allow the Attorney General to better protect the property of charitable trusts as they exist today. In doing so, the bill will also implement the recommendations made in the *Report on Njamal People’s Trust*, which was tabled in this state Parliament in December 2018. That report was the culmination of an inquiry commissioned by the Attorney General of Western Australia, Hon John Quigley, MLA, in 2017 under section 20 of the current act. The report has provided the impetus for many of the changes proposed in this bill.

Over the last few years, there has been a notable increase in the number of charitable trust matters brought to the attention of the Attorney General and the Supreme Court. Many of these matters relate to charitable trusts established for the benefit of Aboriginal communities—a development that likely reflects the creation of charitable trusts under Indigenous land use agreements. Often these complaints involve entities that are also subject to the jurisdiction of other regulators, such as the Australian Charities and Not-for-profits Commission or the Office of the Registrar of Indigenous Corporations. The Attorney General works with these other regulators to seek the best outcomes for the charitable trusts involved. The Attorney General acknowledges the important roles played by other regulators in relation to charitable trusts, which will of course continue under the regime proposed by this bill.

The bill will make provision for four key matters. The first is schemes for property held for charitable purposes. The second is the investigation of charitable trusts by the Attorney General and a newly established Western Australian Charitable Trusts Commission constituted by the Ombudsman. The third is proceedings in the Supreme Court in relation to charitable trusts, including to better regulate individuals involved in the administration of charitable trusts. The fourth is to permit certain trusts to make tax deductible gifts to eligible recipients for philanthropic purposes where those recipients have a connection to government, such as public hospitals, museums and art galleries.

The bill will also preserve the charitable status of certain recreational facilities and provide protection from liability for people performing functions under the law relating to charitable trusts. No substantive changes are made to specified charitable recreational facilities under part 2 of the bill. These facilities were not necessarily considered charitable under the common law. The bill will maintain the charitable status of these facilities that exists under the current act.

Part 3 of the bill relates to schemes that allow changes to charitable trusts. The current act effectively codified the equitable doctrine of *cy-près*, which in certain circumstances allowed a trust or gift for charitable purposes that could not be given effect to, to instead be put to use for a charitable purpose that was as close as possible to the donor’s original intention. The bill will provide for either the Attorney General, for low-value schemes, or the Supreme Court to approve a scheme to amend a charitable trust in specified situations. It is expected that most schemes will relate either to problems in implementing the original purpose of the trust or gift, such as where a named recipient never existed or no longer exists, under clause 10, or where there is a need to expand, amend or modernise the powers of the trustees, under clause 12.

Some of the changes that will be made to schemes are directed to clarifying or simplifying the law and to reduce legal uncertainty and resultant legal costs. This should leave more funds available for charitable purposes. This will

include the removal of section 7(3) of the current act in relation to the equitable doctrine of lapse, which caused confusion and complications and therefore increased legal costs, yet did not change the outcome of any proposed schemes under the current act.

Under clauses 10 and 12, trustees have a duty to apply for a scheme as soon as reasonably practicable if the trust funds would otherwise not be used for a charitable purpose. These provisions aim to avoid trustees unnecessarily delaying applying for a scheme, which could result in the trust funds not being applied for charitable purposes for a substantial period of time, and the value of the trust fund being eroded over that time.

The bill will also modernise the requirements for advertising a proposed scheme. Advertising the scheme brings it to the attention of people who may have an interest in it and affords them an opportunity to make submissions opposing the scheme if they wish to do so. The current act requires advertising in the *Government Gazette* and *The West Australian*. Clause 19 will allow the court the flexibility to adopt methods that might be more likely to come to the attention of people with an interest in the scheme, which could include notice through an emailed newsletter, social media page or community newspaper. If a scheme is approved, notice of that approval must be published in the *Government Gazette*. Unlike under the current act, trustees will now be responsible for organising this.

The proposed framework for the investigation of charitable trusts in part 4 of the bill will overhaul existing section 20 of the Charitable Trusts Act 1962. Currently, the Attorney General, or an officer or any person appointed by the Attorney General, may conduct an examination or inquiry under that provision. Under clause 32 of the bill, the Western Australian Charitable Trusts Commission, constituted by the Ombudsman, will be established. A person may make a complaint about a charitable trust or a class of charitable trusts to the Attorney General or the commission. The investigators will be the commission or an authorised person acting at the direction of the Attorney General.

The bill will provide for the powers of investigators to be significantly expanded in three key respects. First, under clause 32 of the bill, investigators will be conferred with the power to issue a notice requiring a person to provide a document or other information relating to a charitable trust or concerning any person involved in the administration of a charitable trust or provide any other assistance that is reasonably necessary. This change will address a significant deficiency in the current act identified by the inquiry, being the narrow power in section 20(3) to require only the production of information, documents, answers and/or assistance from “every trustee, and every person acting or having any concern in the management and administration” of a charitable trust. As outlined in the report, that narrow power has “the potential to impede the effectiveness of an examination or inquiry” because it fails to capture persons who may have highly material information or documents. Under clause 32 of the bill, any person can be subject to a requirement to produce or assist.

The inquiry also called for an increase to the penalty for noncompliance with such a requirement. Heeding that call, clause 40 will provide for a tenfold increase in the maximum penalty for failing to comply with a requirement, bringing the total maximum penalty to \$50 000. Relatedly, a new offence of providing false or misleading information is introduced in clause 39, following a recommendation outlined in the report. That offence will also attract a maximum penalty of \$50 000. To ensure an inquiry is not impeded in obtaining the information required, and consistent with the report’s recommendation, clause 40 will expressly abrogate the privilege against self-incrimination and, in the case of a trustee, legal professional privilege, with appropriate safeguards contained in clause 36.

Secondly, under clause 33 of the bill, investigators will be equipped with the powers of a royal commission. These include the power to compel production of documents and the attendance of persons before the investigator to answer questions and be examined under oath or affirmation. This change alone addresses a series of gaps in the current framework identified by the inquiry, significant amongst them being the absence of any compulsive powers to require a person to attend and give evidence on oath or affirmation. People who are receiving information under these provisions, including investigators, are subject to a duty of confidentiality under clause 37.

Thirdly, a special power will be conferred by clause 34 on the commission, as part of its investigation, to carry out an audit of the accounts of the charitable trust under investigation or direct the trustees to arrange an audit. This new power addresses a key recommendation that will have particular significance because many of the complaints about the operation of charitable trusts relate to issues of financial management and control.

To support the array of new investigative powers conferred by the bill, clause 38, importantly, will provide a number of safeguards to persons who cooperate with investigators and voluntarily provide information. This is in recognition of the fact that, as observed in the report, the Attorney General’s ability to perform the role of guardian of charitable trusts is, to a great extent, dependent upon the provision of allegations, information and documents from members of the community. So, too, are safeguards provided in clause 54 for persons who perform a function under the bill or any other law relating to charitable trusts, such as the Attorney General and investigators.

The culmination of an investigation is a report to the Attorney General. The investigator’s report may be accompanied by a written notice that directs a relevant trustee to take reasonably necessary action in response to the findings in

the report within a specified period. There are consequences if the trustee fails to do so, including that the trustee may be liable to be removed under part 5 of the bill.

Consistent with the inquiry's recommendation, clause 42 provides that on receiving an investigator's report, the Attorney General may table the report in Parliament and/or provide it to certain persons. The bill enables the Attorney General to apply to the Supreme Court to recover the costs and expenses of an investigation from the trust property, the trustee or—only if the court is satisfied that the complaint was frivolous or vexatious—a complainant.

Part 5 of the bill addresses proceedings in relation to charitable trusts. The bill will significantly expand the Supreme Court's powers to make orders with respect to charitable trusts or the persons involved in their administration. Clause 44 will maintain the current ability for any person—not just the Attorney General or a trustee—to apply to the Supreme Court for various orders to enforce a trust. The potential orders will be expanded to include the power to order a trustee to provide a document or information to people intended to benefit from a charitable trust, under clause 44(2)(c), and to require an audit of the accounts of a charitable trust, under clause 44(2)(e). Clauses 45 and 46 will give effect to the inquiry's recommendation that the act facilitate greater regulation of persons involved in the administration of charitable trusts.

A key power of the Attorney General to respond to misconduct in a charitable trust or otherwise protect the trust's property is the power to apply to the Supreme Court to remove the trustee. However, the Attorney General does not have the power at present to regulate people, other than the trustee, who may be involved in management and administration of the trust. Clauses 45 and 46 address limitations to this power, reflecting changes to the management of charitable trusts since the 1960s. Charitable trusts today are less likely to have an individual acting as a trustee. Instead, particularly for larger trusts, there is usually a corporate trustee and several individuals involved in managing the trust funds. Removal of the trustee may not be necessary, or may not be sufficient, to remove an individual actually responsible for the misconduct or putting the trust property at risk. Clause 45 provides for the Attorney General to seek the removal of a trustee, or an order precluding the involvement of a person in the administration of a charitable trust. This allows the Attorney General to seek to protect the trust property from persons other than a trustee who may wield influence over the trust to its detriment.

Clause 46 of the bill will prohibit certain people being involved in the administration of charitable trusts, again extending beyond trustees. Disqualifications include insolvency, offences of fraud or dishonesty, or a finding by another regulator that a person should not be involved in managing a corporation. To ensure fairness to a person affected by this provision, clause 46 will allow the person to apply to the Supreme Court for leave to be involved in the administration of a charitable trust. The Supreme Court may, subject to any conditions the court considers appropriate, grant leave if it considers there are exceptional circumstances warranting the granting of leave. This clause aims to ensure high standards of those in a position to manage and administer the charitable trust, for the protection of the trust property.

Clause 47 will ensure that proceedings involving charitable trusts are brought to the attention of the Attorney General so that the Attorney General can take part if appropriate. It also provides that the Supreme Court is not bound by the rules of evidence when hearing such proceedings. In cases when the Attorney General needs to take action in relation to a charitable trust, the Attorney General may act on hearsay information or information provided anonymously. It may be difficult to find a person with direct knowledge of facts who is willing to make an affidavit for use in Supreme Court proceedings. Further, the Attorney General and any other person bringing an application in the Supreme Court may wish to rely on decisions, findings and reports of other regulatory bodies. Clause 47 addresses these concerns and gives effect to a recommendation of the inquiry.

Part 6 of the bill continues to enable the trustees of certain trusts for philanthropic purposes to make gifts to specified eligible recipients, even though the recipients are not charitable at law due to their connection to government, such as public hospitals, museums and art galleries. It addresses changes to commonwealth laws as a result of the passing of the Charities Act 2013, which caused an inconsistency with the current act in relation to these trusts.

The bill will give Western Australia the most rigorous and comprehensive charitable trusts legislation across Australia and New Zealand. It will achieve a significant expansion of the powers of those investigating charitable trusts, as well as of the Attorney General and the Supreme Court, in order to ensure that charitable trusts operate to further the interests of the charitable purposes and communities they were intended to benefit.

Pursuant to standing order 126(1), I advise that this bill is not a uniform legislation bill. It does not ratify or give effect to an intergovernmental or multilateral agreement to which the government of the state is a party; nor does this bill, by reason of its subject matter, introduce a uniform scheme or uniform laws throughout the commonwealth. I commend the bill to the house and table an explanatory memorandum.

[See paper [1346](#).]

Debate adjourned, pursuant to standing orders.

