Parliamentary Committees



Public Trustee (Advisory and Monitoring Board) Amendment Bill 2021

Report No. 15, 57th Parliament
Community Support and Services Committee
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Community Support and Services Committee

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Acknowledgements

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All web address references are current at the time of publishing.

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Abbreviations

ADA	Aged and Disability Advocacy Australia
Bill	Public Trustee (Advisory and Monitoring Board) Amendment Bill 2021
Board	Public Trustee Advisory and Monitoring Board
committee	Community Support and Services Committee
Corporations Act	*Corporations Act 2001* (Cth)
DJAG, department	Department of Justice and Attorney-General
GAA	*Guardianship and Administration Act 2000*
Guide	Commonwealth Attorney General's Department's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*
HRA	*Human Rights Act 2019*
ICCPR	International Covenant on Civil and Political Rights
LSA	*Legislative Standards Act 1992*
OPA Report	The Public Advocate, *Preserving the financial futures of vulnerable Queenslanders: A Review of the Public Trustee's fees, charges and practices*, January 2021
OQPC	Office of the Queensland Parliamentary Counsel
PJCHR	Parliamentary Joint Committee on Human Rights
PTA	*Public Trustee Act 1978*
QAI	Queensland Advocacy Incorporated
QCAT	Queensland Civil and Administrative Tribunal
QHRC	Queensland Human Rights Commission
QLS	Queensland Law Society
Together	Together branch of the Australian Services Union

Chair's foreword

This report presents a summary of the Community Support and Services Committee's examination of the Public Trustee (Advisory and Monitoring Board) Amendment Bill 2021.

The Public Trustee of Queensland provides a range of vital services to Queenslanders, including financial administration and financial attorney services for those with impaired capacity for financial decision-making. The committee thanks the Public Trustee for all the services provided to our most vulnerable Queenslanders.

In response to the Public Advocate's review of the Public Trustee, whose report was tabled in March 2021, the government has acted to establish a Public Trustee Advisory and Monitoring Board to monitor and review the performance of the Public Trustee. As stated upon its introduction by Honourable Shannon Fentiman MP, Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence, the Bill 'demonstrates the commitment of the Palaszczuk government to look after the interests of vulnerable Queenslanders by establishing the board and ensuring additional independent oversight over the Public Trustee'.

The committee's task was to consider the policy to be achieved by the legislation and the application of fundamental legislative principles – that is, to consider whether the Bill has sufficient regard to the rights and liberties of individuals, and to the institution of Parliament. The committee also examined the Bill for compatibility with human rights in accordance with the *Human Rights Act 2019*.

On behalf of the committee, I thank those individuals and organisations who made written submissions on the Bill. I also thank our Parliamentary Service staff and the Department of Justice and Attorney-General.

I commend this report to the House.

Corrine McMillan MP

Chair

Recommendations

1 Introduction

1.1 Role of the committee

The Community Support and Services Committee (committee) is a portfolio committee of the Legislative Assembly which commenced on 26 November 2020 under the *Parliament of Queensland Act 2001* and the Standing Rules and Orders of the Legislative Assembly.[1]

The committee's areas of portfolio responsibility are:

- Communities, Housing, Digital Economy and the Arts
- Seniors, Disability Services and Aboriginal and Torres Strait Islander Partnerships
- Children, Youth Justice and Multicultural Affairs.

The functions of a portfolio committee include the examination of bills and subordinate legislation in its portfolio area to consider:

- the policy to be given effect by the legislation
- the application of fundamental legislative principles
- matters arising under the *Human Rights Act 2019* (HRA)
- for subordinate legislation – its lawfulness.[2]

The Public Trustee (Advisory and Monitoring Board) Amendment Bill 2021 (Bill) was introduced into the Legislative Assembly and referred to the committee on 28 October 2021. The committee is to report to the Legislative Assembly by 21 January 2022.

1.2 Inquiry process

On 4 November 2021, the committee invited stakeholders and subscribers to make written submissions on the Bill. Ten submissions were received.

The committee received a written briefing on the Bill on 10 November 2021 prior to a public briefing on the Bill from the Department of Justice and Attorney-General (DJAG) on 15 November 2021. A transcript is published on the committee's web page (see Appendix B for a list of officials).

The committee received written advice from the department in response to matters raised in submissions.

The committee held a public hearing on 29 November 2021 (see Appendix C for a list of witnesses).

The submissions, correspondence from the department and transcripts of the briefing and hearing are available on the committee's webpage.

1.3 The Public Trustee

The Public Trustee is a socially and fiscally responsive statutory authority that helps to make decisions that enhance the dignity, rights and interests of Queenslanders.[3] The predecessor to the Public Trustee was the Public Curator of Queensland, established by the *Public Curator Act 1915*. The Public Curator came into operation on 1 January 1916[4] and was established at that time as a 'corporation sole'.[5]

1 *Parliament of Queensland Act 2001*, s 88 and Standing Order 194.

2 *Parliament of Queensland Act 2001*, s 93; and HRA, ss 39, 40, 41 and 57.

3 Public Trustee of Queensland, 'Who is the Public Trustee?', www.pt.qld.gov.au/about/about-us/.

4 *Public Curator Act 1915*, part 1.

5 *Public Curator Act 1915*, s 9(1).

In 1978, the *Public Curator Act 1915* was repealed and the *Public Trustee Act 1978* (PTA) was passed. Among other things, the PTA changed the name of the Public Curator of Queensland to the Public Trustee of Queensland.[6] Under the PTA, the Public Trustee remained a corporation sole.[7]

A corporation sole is described as:

> A corporate entity embodied in a single titular head whose personal identity changes as the office is vacated and a new appointment made. The office itself, in the form of the corporation sole, remains. The corporation sole is a special form of institution excluded from the definition of 'corporation' by the *Corporations Act 2001* (Cth) s 57A.[8]

The Public Trustee's Annual Report for 2020-21 states the Public Trustee is:

> … the Chief Executive Officer of the [Public Trustee] and provides visionary, values based leadership and management to the corporation. The role of the Public Trustee of Queensland is to guide the [Public Trustee] to deliver high quality, sustainable and reliable financial, trustee and administration services to the Queensland public in a supportive, compassionate and ethical manner.[9]

The Public Trustee is a self-funded organisation that does not receive any additional government funding.[10] The Public Trustee reports annually to the Queensland Parliament through Queensland's Attorney-General.[11]

The Public Trustee forms a central role in the guardianship system in Queensland. The guardianship system provides for a range of substitute decision-makers to make decisions on behalf of adults with impaired decision-making capacity. The Public Trustee may be appointed by the Queensland Civil and Administrative Tribunal (QCAT) under the *Guardianship and Administration Act 2000* (GAA) as an administrator and by a principal under the *Powers of Attorney Act 1978* as an attorney in an enduring power of attorney to make decisions about financial matters or legal matters in relation to property.[12]

1.3.1 Other jurisdictions

The department advised that while all Public Trustees in Australia are statutory corporations, they vary with respect to structure and governance. The department stated:

> Like Queensland, the Public Trustee of the Australian Capital Territory (ACT) and the Northern Territory (NT) are corporation soles (i.e. a corporation consisting of only one person holding a single office). In New South Wales (NSW), the Public Trustee is a 'NSW Government agency'. Similarly, in Tasmania (TAS), the Public Trustee is a 'Government Business Enterprise' – however, unlike NSW, it has a board of directors. In Western Australia (WA), the Public Trustee is a Government entity. In Victoria (VIC), the Public Trustee is state-owned company ('State Trustees'), incorporated as an unlisted company and registered with ASIC. In the relevant South Australian (SA) and Western Australian (WA) legislation, the Public Trustee is expressly a public service appointment.[13]

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6 PTA, s 7(1).

7 PTA, s 7(1).

8 Oxford Reference, Oxford Reference Search Results, corporation sole, https://www.oxfordreference.com/search?btog=chap&pageSize=20&q=corporation+sole&sort=relevance&t=ORO%3ALAW00010, accessed 1 December 2021.

9 Public Trustee of Queensland, *Annual Report 2020-21*, September 2021, p 78.

10 Public Trustee of Queensland, *Annual Report 2020-21*, September 2021, p 48.

11 Public Trustee of Queensland, 'Who is the Public Trustee?', www.pt.qld.gov.au/about/about-us/.

12 Explanatory notes, p 1.

13 DJAG, correspondence, 19 November 2021, attachment, p 1.

The department advised, with regard to other jurisdictions, there is no comparable board similar to the board proposed in the Bill, which is limited to oversight with an advisory and monitoring role rather than a governance role,[14] as described below:

> There are no comparable advisory and monitoring boards providing oversight over a Public Trustee in other Australian jurisdictions. To the extent that other jurisdictions (Tasmania and Victoria) have a Public Trustee board, it is a governance board (in Tasmania the Public Trustee is a Government Business Enterprise and in Victoria the Public Trustee is a State owned company).[15]

In terms of governance arrangements, the department further stated:

> All jurisdictions have an entity assisting the Public Trustee with respect to its investment practices, which in some cases is a board (as is the case with Queensland – the Public Trust Office Investment Board). However, the direction power of these entities varies across jurisdictions; some appear to be advisory only, while others control investment.
>
> All Public Trustees are otherwise assisted by various committees (for example an audit and risk committee), which may or may not have a statutory basis. However, the functions of these committees do not appear to have the same breadth of scope as the proposed Board.[16]

1.4 Background to the Bill

In 2020 the Public Advocate, an independent statutory entity established under the GAA,[17] commenced a review to explore concerns raised by people under administration with the Public Trustee, their families and supporters, about the level and types of Public Trustee fees and charges, and their negative effect on financial outcomes for people under administration.[18] As the review progressed, the scope was broadened to examine other activities and practices of the Public Trustee for which administration clients were charged fees, or that impacted their financial outcomes.[19] Originally published in January 2021, the Public Advocate's report, *Preserving the financial futures of vulnerable Queenslanders: A Review of the Public Trustee's fees, charges and practices* (OPA Report) was tabled in the Legislative Assembly, together with the government response, on 10 March 2021.

In 2019-20, the Public Trustee provided financial management services to 10,071 Queenslanders, including 9,316 people under an administration appointment by QCAT.[20] The OPA Report observed:

> The administration clients of the Public Trustee are some of the most vulnerable members of the Queensland community. The Public Trustee, as an agency representing the State of Queensland has been appointed to protect the person's interests and has a string of obligations that go with that responsibility, including: to act honestly and with reasonable diligence, act in accordance with the general and health principles (outlined under the *Guardianship and Administration Act*) in all decisions, and to avoid conflict transactions. These are significant responsibilities that are unique to the Public Trustee — and in relation to guardianship, to the Public Guardian — as a public agency.[21]

The OPA Report concluded:

> The Public Trustee has significant power over its administration clients. It is in a position of trust, controlling the person's money and property, making many, if not all, of the financial decisions for the person and having significant power over their lives. The administrator's role can include paying

[14] Public briefing transcript, Brisbane, 15 November 2021, p 4.

[15] DJAG, correspondence, 10 November 2021, attachment, p 1.

[16] DJAG, correspondence, 19 November 2021, attachment, p 1.

[17] Under the GAA, s 209, the Public Advocate has a statutory responsibility to undertake systems advocacy on behalf of Queensland adults with impaired decision-making capacity.

[18] OPA Report, p ix.

[19] OPA Report, p x.

[20] OPA Report, p ix.

[21] OPA Report, p ii.

> household bills, buying or selling property, running a business, entering into contracts, applying for government benefits, making business decisions, managing investments, and bringing or defending legal proceedings of a financial nature.[22]

The OPA Report made 32 recommendations relating to the Public Trustee's fees and charges, financial management, client services, legal services and administration.[23]

The government response noted that 23 recommendations from the OPA Report were primarily the responsibility of the Public Trustee to implement. Of the remaining 10 recommendations, the government accepted one recommendation (recommendation 30), supported in principle five recommendations (recommendations 3, 6, 11, 15 and 29) and committed to 'further consider' four recommendations (recommendations 24(c) (jointly with the Pubic Trustee), 26, 31 and 32).[24]

Recommendation 30 called on the Queensland Government to 'consider whether the Public Trustee and its clients would benefit from additional oversight and/or reporting mechanisms to improve the Public Trustee's performance, transparency and public accountability'.[25] The government response accepted this recommendation and stated the government was 'committed to the establishment of a Public Trustee Board, that will have an advisory and monitoring function'.[26] According to the Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence, Hon Shannon Fentiman MP:

> The government will continue to work with the Public Trustee, the Public Advocate and other experienced stakeholders for the detailed consideration of the remaining nine recommendations that are the government's responsibility.[27]

1.5 Policy objectives of the Bill

The objective of the Bill is to amend the PTA to establish the Public Trustee Advisory and Monitoring Board (Board). The Board is intended to provide additional oversight over the Public Trustee to enhance transparency and public accountability.[28]

1.6 Government Consultation on the Bill

As set out in the explanatory notes, a draft of the Bill was provided to the Public Trustee, the Public Advocate and the Public Guardian. The explanatory notes state that the Public Trustee provided overall support for the draft Bill. The Public Guardian did not comment on the draft Bill but provided support for the establishment of an advisory and monitoring board to enhance the performance of the Public Trustee.[29]

The Public Advocate provided a submission to the committee noting the proposed functions of the Board as set out in clause 4 of the Bill, as being 'consistent with the government's commitment, made upon the public release of my office's report, to establish a board with 'an advisory and monitoring function''.[30] The Public Advocate commented on the proposed composition of the Board and suggested amendments to proposed new subsection 117ZD(3) of the PTA, which speaks to the

22 OPA Report, p ix.

23 OPA Report, pp xlix-lv.

24 Government response – *Preserving the financial futures of vulnerable Queenslanders: A Review of the Public Trustee fees, charges and practices*, March 2021, p 1.

25 OPA Report, p liv.

26 Government response – *Preserving the financial futures of vulnerable Queenslanders: A Review of the Public Trustee fees, charges and practices*, March 2021, p 1.

27 Queensland Parliament, Record of Proceedings, 28 October 2021, p 3387.

28 Explanatory notes, p 1.

29 Explanatory notes, p 9.

30 Submission, p 1.

expertise of appointed Board members. For further analysis of the proposed membership of the Board refer to section 2.2.

Committee comment

The committee anticipates that the Public Advocate's suggested amendments to the Bill are addressed by the recommendations of the committee.

1.7 Should the Bill be passed?

Standing Order 132(1) requires the committee to determine whether or not to recommend that the Bill be passed.

The committee notes submissions received from stakeholders describing some of the barriers and challenges currently experienced by clients of the Public Trustee.[31] The committee recognises that the policy objectives of the Bill, to provide additional oversight and reporting mechanisms to improve the Public Trustee's performance, transparency and public accountability, will help to better protect vulnerable Queenslanders.

Recommendation 1

The committee recommends the Public Trustee (Advisory and Monitoring Board) Amendment Bill 2021 be passed.

[31] Submissions 2 and 4; Ms Cassandra Grey, PLT Student, Queensland Advocacy Incorporated, public hearing transcript, Brisbane, 29 November 2021, pp 10-11.

2 Examination of the Bill

This section discusses issues raised during the committee's examination of the Bill.

The Bill proposes to establish the Board, which will provide additional oversight over the Public Trustee to enhance transparency and public accountability.[32]

2.1 Functions and powers

The explanatory notes state that the Board will monitor the performance of the Public Trustee's functions, provide advice and make recommendations about how the performance of these functions can be improved.[33]

The Board will also have the following functions:

- to monitor and review the performance of the Public Trustee's functions
- to monitor complaints received by the Public Trustee about the performance of the Public Trustee's functions
- to monitor and review the Public Trustee's processes for managing these complaints
- to give written advice or make written recommendations to the Minister about:
  - changes to legislation, or improvements to the policies, practices, resources, services or training of the Public Trustee, to ensure the Public Trustee can effectively perform its functions;
  - improvements or enhancements to the performance of the Public Trustee's functions, to promote the interests of the Public Trustee's clients, particularly clients with impaired decision-making capacity;
- if asked by the Minister, to give written advice or make written recommendations to the Minister about matters relating to the performance of the Public Trustee's functions
- to give advice or make recommendations to the Public Trustee about matters relating to the performance of the Public Trustee's functions
- another function given to the Board under the PTA.[34]

2.1.1 Stakeholder views and department response

Carers Queensland was supportive of the establishment of an independent advisory and monitoring board for the Public Trustee, which would be 'beneficial in providing support to the population the Trustee serves as well as increasing transparency, accountability and public trust'.[35] General support was also expressed in the submission of the Queensland Human Rights Commission (QHRC): 'the additional oversight will go towards promoting and protecting the human rights of people who have interactions with the Public Trustee'.[36]

Queensland Advocacy Incorporated (QAI) expressed support for the establishment of the Board but noted the 'establishment of the Board alone is not sufficient to address the numerous issues of concern raised by the Public Advocate's report'.[37] The QAI recommended the government

[32] Explanatory notes, p 1.

[33] Explanatory notes, p 2.

[34] Explanatory notes, p 2.

[35] Submission 3, p 4.

[36] Submission 5, p 2.

[37] Submission 6, p 2.

continue 'working towards implementing the remainder of the Public Advocate's recommendations that fall within the government's remit'.[38]

The Office of the Public Advocate was supportive of the Bill to introduce a monitoring and advisory board but commented that other statutory boards have stronger governance functions than those proposed for the Board in the Bill.[39] At the public hearing, the Public Advocate, Mr John Chesterman, did note that 'the proposed functions of the Public Trustee Board are consistent with the government's commitment made upon the public release of my office's report to establish a board with an advisory and monitoring function'.[40]

The Queensland Law Society (QLS) also supported the establishment of an oversight mechanism for the Public Trustee, but stated, 'we would prefer the first oversight mechanism suggested by the former Public Advocate, being a governance board'.[41] The QLS submission stated:

> We understand that the Board contemplated under the Bill aligns with the PTQ's current corporate structure, being a corporation sole, and that the establishment of a governance board would require that the *Public Trustee Act 1978* be further amended to change the PTQ's legal structure from a corporation sole to a statutory authority. However, we consider that a stronger oversight mechanism than an advisory and monitoring board is required, given the central role that the PTQ plays in Queensland, its breadth of services, and the significant amount of funds under its management.[42]

The QLS further submitted:

> … we recommend that the Public Trustee and the people of Queensland would be better served by an amendment to the act to allow a governance board of independent directors to sit across the Public Trustee. We submit that this is the most appropriate governance structure for an organisation that has such breadth of service and with such significant funds under management.[43]

In response to submitters' views, the department advised that the Board will not have any governance or management functions, and will have no power to direct the Public Trustee. The department advised that this will maintain the Public Trustee's position as an independent statutory office and avoid a conflict with the Public Trustee's fiduciary and other obligations and duties.[44]

The department further advised:

> The purpose of the Board (to provide additional oversight over the Public Trustee) can be achieved by the proposed advisory and monitoring model, without the need to alter the Public Trustee's existing corporate framework.[45]

2.2 Membership of the Board

2.2.1 Composition of the Board

Membership of the Board would comprise permanent members; ex-officio members appointed by virtue of the office that they hold; and at least four, but no more than five, appointed Board members, appointed by the Minister for a maximum term of 3 years. Appointed Board members may be reappointed.[46]

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38 Submission 6, p 3.

39 Submission 1, p 1.

40 Public hearing transcript, Brisbane, 29 November 2021, p 2.

41 Submission 10, p 2.

42 Submission 10, p 2.

43 Public hearing transcript, Brisbane, 29 November 2021, p 15.

44 DJAG, correspondence, 10 November 2021, p 1.

45 DJAG, correspondence, 25 November 2021, attachment, p 3.

46 Explanatory notes, p 2.

The Bill proposes five permanent Board members, including:

- the chief executive (so, the Director-General of DJAG) or a senior executive of DJAG nominated by that chief executive
- the chief executive of the department in which the *Financial Accountability Act 2009* is administered, or a senior executive of that department nominated by that chief executive
- the chief executive of the department in which the *Disability Services Act 2006* is administered, or a senior executive of that department nominated by that chief executive
- the chief executive of the department mainly responsible for seniors or a senior executive of that department nominated by that chief executive
- the chief executive of the department in which the *Aboriginal Cultural Heritage Act 2003* and the *Torres Strait Islander Cultural Heritage Act 2003* are administered or a senior executive of that department nominated by that chief executive.[47]

The explanatory notes also state that where a chief executive is a permanent member for more than one department listed, the chief executive may nominate a senior executive for each department for which that chief executive may be a permanent member.[48]

The Public Trustee would not be a member of the Board. However, the Board may invite the Public Trustee to attend and observe a Board meeting for the purpose of advising or informing the Board on any matter.[49]

2.2.1.1 Stakeholder views and department response

In relation to the proposed permanent members of the Board, the Public Advocate stated:

> I note that, due to current governmental administrative arrangements, three of the five proposed permanent members of the Board (Clause 4, in the proposed new section 117ZC of the Public Trustee Act) are the chief executive, or delegate, of the Department of Seniors, Disability Services and Aboriginal and Torres Strait Islander Partnerships. That department, of course, spans multiple policy areas of relevance, including disability services, seniors and Indigenous affairs, and senior departmental representatives in each of those areas may well have much to add to the Board's operations.… I wonder whether the Board's expertise in the area of seniors, for instance, could be achieved by removing one of the permanent Board positions (in proposed section 117ZC (l)(d)) and by adding the requirement for one of the appointed Board members to have expertise in that field.[50]

The QHRC also recommended consideration be given to reducing the number of permanent Board members, in favour of more appointed members, 'given that the departments of some of the permanent members currently overlap', and 'are likely to continue to overlap'.[51]

The QLS expressed concern that the Board would not be able to operate independently with the number of permanent Board members currently proposed, noting section 117ZA(1) of the Bill proposes: '[i]n performing its functions, the board must act independently and in the public interest'.

The QLS recommended:

> … to ensure the proper performance of its required functions, the Board should be more arm's length from the Queensland Government. If permanent members who are chief executives of departments are considered necessary, then their number should be limited to no more than 2.[52]

47 Explanatory notes, pp 2-3.

48 Explanatory notes, p 3.

49 Explanatory notes, p 3.

50 Submission 1, p 1.

51 Submission 5, p 4.

52 Submission 10, p 3.

In response to submitters' comments with regard to the membership of the Board, the department advised:

> The Bill provides for a balance of ex-officio/public servant members (Permanent Board Members) and members from the community (Appointed Board Members), in that there is capacity and flexibility to have up to five of each, with a maximum membership of up to ten members.[53]

2.2.2 Skills and experience of appointed members of the Board

Appointed members of the Board would include:

- at least one person with knowledge, qualifications or skills in relation to one or more of the following: corporate governance; finance and banking; financial investment; financial services; insurance; or the management of financial funds, financial risk or trusts
- at least one person with knowledge, qualifications or skills in relation to advocacy, services and support for seniors and persons with a disability, including persons with impaired capacity
- at least one person with legal knowledge, qualifications or skills in relation to one or more of the following: commercial litigation; duties and obligations of trustees; powers of attorney; substituted decision-making for adults with impaired capacity; succession law; or the principles and rules of equity
- at least one person with knowledge, qualifications or skills in relation to human resource management and culture change management
- any other persons with the knowledge, qualifications or skills the Minister considers appropriate.[54]

The explanatory notes also state that the Minister must ensure the appointed Board members reflect the diversity of the Queensland community, and with at least one appointed Board member being an Aboriginal person or Torres Strait Islander.[55]

The Minister may appoint an appointed Board member to be the chairperson of the Board.[56]

2.2.3 Stakeholder views and department response

Aged and Disability Advocacy Australia (ADA) was supportive of the proposed composition and Board membership:

> … particularly, the obligation that members reflect the diversity spectrum of the Queensland community, inclusion of at least 1 member who is an Aboriginal or Torres Strait Islander person, as well as having regard to the lived and professional experiences of members.[57]

Stakeholders made a number of suggestions with respect to the skills and experience of the Board.

The Public Advocate suggested:

- at least one of the appointed Board members to have expertise in relation to advocacy, services and support for seniors; and
- at least one of the appointed Board members to have expertise in relation to advocacy, services and support for persons with disability, including persons with impaired decision-making ability.[58]

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53 DJAG, correspondence, 25 November 2021, attachment, p 5.

54 Explanatory notes, p 3.

55 Explanatory notes, p 3.

56 Explanatory notes, p 3.

57 Submission 9, p 2.

58 Submission 1, p 2.

The QHRC recommended that consideration be given to:

> … specifying appointed board members who are or who have expertise in:
>
> - a consumer or carer representative with lived experience
> - mental health
> - human rights.[59]

The QHRC submitted:

> Further, given that the departments of some of the permanent members currently overlap, are likely to continue to overlap, and the importance of ensuring a board that is diverse and inclusive, consideration could be given to reducing the number of permanent members, in favour of more appointed members.[60]

Ms Rebekah Leong, Principal Lawyer, QHRC, stressed the importance of Board members possessing 'lived experience', to ensure appropriate expertise, independence and representation. Ms Leong cited the Domestic and Family Violence Death Review and Advisory Board and the Queensland Veterans' Council as boards that have a mix of representation and experience.[61]

The QAI similarly called for appointed Board members to 'reflect the diversity of the Queensland community', including the appointment of 'a person with lived experience in disability who has the requisite "knowledge, qualifications or skills" in disability advocacy to be an appointed board member in the spirit of the Public Trustee's recognition and representation of the diversity of the Queensland community'.[62] Dr Emma Phillips, Deputy Chief Executive Officer and Principal Solicitor, QAI, elaborated:

> There is some really significant skills that will be needed on this board to ensure that it is not, as the concern has been raised, simply another layer of reporting requirement—that it is actually genuinely making a difference to the lives of people who are under the administration of the Public Trustee. There are many, many Queenslanders. We would certainly like to see a person with lived experience—someone who has had impaired decision-making capacity or currently has impaired decision-making capacity. We believe that, with support following the capacity guidelines, they can make a really important contribution to a board. That could be someone with intellectual disability or someone with psychosocial disability or mental illness. They can bring quite different experiences to the board.[63]

The ADA submitted that it is 'critical that *at least* one member of the board holds extensive legal and practical knowledge with respect to the relevant legislation and human rights obligations associated with supported and substitute decision-making for persons with impaired capacity', and additionally:

> … that the member/s appointed by the Minister to assist the board on matters related to the legislation, policy and programs for older persons and people with disability, advocacy for people with impaired decision-making capacity, as well as regarding issues related to succession, powers of attorney, trustee matters, and substitute decision-making, must be able to demonstrate recent practical experience in relation to assessing decision-making capacity and assisting persons with questioned or impaired capacity.[64]

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59 Submission 5, p 4.

60 Submission 5, p 4.

61 Public hearing transcript, Brisbane, 29 November 2021, p 6.

62 Submission 6, p 3.

63 Public hearing transcript, Brisbane, 29 November 2021, p 13.

64 Submission 9, p 2.

Mr Geoff Rowe, Chief Executive Officer, ADA, also attested to the importance of a Board member with lived experience, stating:

> There are people who have been placed under orders at a time when they have been unwell but have since recovered, and escaping from the system is indeed very difficult. You may well have a cohort of people within that group who have 'escaped' the system, who may be a good asset as a member of the board to give that real lived experience of what it is like to receive those services and are now deemed to have capacity.[65]

The QLS submitted that the Board would benefit from:

> … a member with knowledge, qualifications or skills in relation to neuroscience, psychiatry or cognitive psychology to ensure that there is sufficient understanding and expertise in relation to the most vulnerable clients that the PTQ services, being those people with impaired decision-making capacity under financial administration.[66]

Ms Elizabeth Shearer, President, QLS, elaborated on the submission of the QLS:

> … we think the board should be composed of people who are best equipped to achieve the functions of the board. If the board is advisory only then, yes, a more diverse group of people who have experience of the interests of the people who are the clients of the Public Trustee is appropriate.[67]

In response the department noted the issues raised by submitters concerning the membership of the Board and stated that, 'The mix of members on the Board was informed by the proposed role of the Board, which is to provide oversight over the Public Trustee'.[68] The department advised:

> With respect to the issue raised by the Public Advocate, DJAG notes that while the Bill allows for a maximum of five Permanent Board Members, this includes up to three members representing the portfolio responsibilities for DSDSATSIP. This could, under the current Administrative Arrangements, be one, two or three members, depending on whether the Chief Executive of that department nominates any senior executives as Board members. It is considered important to 'future proof' the Bill so that relevant departments are still represented in future, even if portfolio responsibilities change.[69]

The department further advised:

> As for Appointed Board Members, and the suggestions by QAI, QHRC and ADA for additional areas of expertise (being 'a person with a lived experience in disability' 'a consumer or carer with lived experience' and 'recent experience [in] relation to assessing decision-making capacity and assisting persons with decision-making capacity, including in QCAT'), DJAG notes and understands the importance of having members with this experience and expertise. However, DJAG notes that the Bill already requires the Board to have an Appointed Board Member with knowledge, qualifications or skills in relation to advocacy, services and support for seniors and persons with a disability, including persons with impaired capacity (clause 4, new section 117ZD(3)(b) PTA)), and an Appointed Board Member with legal knowledge, qualifications, or skills in relation to: commercial litigation, duties and obligations or trustees, powers of attorney, substituted decision-making for adults with impaired capacity, succession law, or the principles and rules of equity (clause 4, new section 117ZD(3)(c) PTA). It is considered that the prescribed knowledge, qualifications and skills would include knowledge and experience of the relevant areas.[70]

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65 Public hearing transcript, Brisbane, 29 November 2021, p 9.

66 Submission 10, p 3.

67 Public hearing transcript, Brisbane, 29 November 2021, p 18.

68 DJAG, correspondence, 25 November 2021, p 4.

69 DJAG, correspondence, 25 November 2021, p 5.

70 DJAG, correspondence, 25 November 2021, pp 5-6.

2.2.3.1 Committee comment

The committee notes the evidence provided by the QLS at the public hearing in regard to the balance of permanent and appointed Board members:

> … we think the proposed structure and composition of the board, as contained in the legislation, is inappropriate. We consider the dynamic of the five permanent and then four to five appointed members creates a really unfortunate dynamic in the board that meant that the appointed persons were likely to be easily sidelined in that structure … We struggle to see how the board as formulated in the legislation is an independent board with that composition.[71]

The committee also notes the concerns and suggestions of submitters in regard to enhancing the experience and representation of the membership of the Board, and in particular, the evidence of Dr Emma Phillips, Deputy Chief Executive Officer and Principal Solicitor, QAI, in support of a Board member with lived experience:

> … it is really important that people with first hand understanding can provide that insight like no-one else can. We really think that is such a valuable insight to inform the work of the board in an authentic way.[72]

Recommendation 2

The committee recommends that clause 4, new section 117ZD (Appointed Board Members), be amended to add another Appointed Board Member to the Board, with lived experience, increasing the number of Board members by one. The committee recommends that under new section 117ZD, subsection (2), the Minister must appoint at least five, but not more than six, appointed Board members, and under subsection (3)(a) in appointing the Board members, the Minister must ensure that at least one appointed Board member has lived experience with impaired decision-making capacity, either in regard to themselves or others.

2.3 Integrity and confidentiality arrangements

The Bill provides for the integrity of members of the Board:

- persons will be disqualified from becoming or continuing as members if they have a conviction (other than a spent conviction) for an indictable offence
- are an insolvent under administration under section 9 of the *Corporations Act 2001* (Cth) (Corporations Act), or are disqualified from managing a corporation under Part 2D.6 of the Corporations Act.[73]

Members' conflicts of interest must be disclosed and recorded in a register.[74]

The Bill contains the following confidentiality requirements:

> There will be a prohibition on a member disclosing personal information other than where necessary for the performance of the member's functions under the Act, and on disclosing personal information in any recommendation or advice given to the Minister.[75]

2.3.1 Stakeholder views and department response

The ADA expressed support for the inclusion of the provisions within the Bill in regard to arrangements for ex-officio members of the Board including the disqualification of a member of the Board under

[71] Ms Elizabeth Shearer, President, QLS, public hearing transcript, Brisbane, 29 November 2021, p 15.

[72] Public hearing transcript, Brisbane, 29 November 2021, p 14.

[73] Explanatory notes, p 4; Bill, cl 4, proposed new s 117ZF.

[74] Explanatory notes, p 4; Bill, cl 4, proposed new subsections 117ZS(1)-(3).

[75] Explanatory notes, p 4; Bill, cl 4, proposed new s 117ZX.

certain circumstances. The ADA also supported the disclosure obligations with respect to the appointed members, as proposed by the Bill.[76] However, the ADA noted:

> … the Bill does not impose any like obligations, or disqualification provisions, in relation to ex-officio members. We suggest that these provisions should apply to all board members and recommend amending the identified clauses of the Bill accordingly.[77]

The submission from the Together branch of the Australian Services Union (Together) questioned whether there was 'any review process for the Board appointments by the Minister'.[78] Taking a wider perspective, the ADA observed that the Bill 'does not include a process requiring an independent review of the board to determine whether it is functioning in a way that meets its intended purpose and obligations'.[79] The ADA submitted: 'We suggest that provision for an independent review should be included in the legislation, to be completed within a reasonable period after the board has been established'.[80]

In response to the ADA's comments in relation to the application of the Bill's disqualification provisions to permanent Board members, the department stated:

> DJAG considers that it is not necessary to extend the disqualifying and disclosure requirements to Permanent Board Members because, as public servants, they will already be subject to a range of integrity measures, including the operation of the *Public Services Act 2008*, the *Public Sector Ethics Act 1994*, and codes of conduct (including for example the Code of Conduct for the Queensland Public Service).[81]

In terms of proposed review processes, the department advised:

> The Bill does not contain a review process for member appointments. However, the term of an Appointed Board Member's appointment is to be decided by the Minister, and stated in the member's instrument of appointment (clause 4, new section 17ZG(l) PTA). The Minister may also terminate an Appointed Board Member's appointment if satisfied the member is incapable of satisfactorily performing the member's functions (new section 117ZJ(2) PTA).[82]

To ADA's suggestion of the inclusion of an independent review process in the Bill, the department stated:

> DJAG notes the suggestion for an independent review of the review of the Board, but notes that the Bill requires the Board to act independently and in the public interest (clause 4, new section 117ZA PTA). DJAG also notes that other comparable Queensland legislation establishing monitoring and advisory Boards (for example the *Coroners Act 2003* and the *Queensland Veterans' Council Act 2021*) does not contain this requirement.[83]

2.4 Reporting requirements, advice and recommendations

Under the provisions proposed by the Bill, the Board would be subject to reporting requirements. Pursuant to clause 5, proposed new section 141B, the Public Trustee would be required to include in its annual report under the *Financial Accountability Act 2009* information about the performance of the Board's functions and the exercise of its powers during the financial year.[84]

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76 Submission 9, p 2.

77 Submission 9, p 2.

78 Submission 8, p 1.

79 Submission 9, p 3.

80 Submission 9, p 3.

81 DJAG, correspondence, 25 November 2021, attachment, p 8.

82 DJAG, correspondence, 25 November 2021, attachment, p 7.

83 DJAG, correspondence, 25 November 2021, attachment, p 3.

84 DJAG, correspondence, 10 November 2021, attachment, p 3.

As to advice and recommendations, the Board would be permitted to give advice or make recommendations to the Minister about matters relating to the performance of the Public Trustee's functions and the Public Trustee would first have an opportunity to provide submissions, which would be required to be included with the advice or recommendations to the Minister.[85]

Clause 4 of the Bill would insert a new subsection 117Y(e) to the PTA to provide that it is a function of the Board, if asked by the Minister, to provide the Minister with advice or make written recommendations about matters relating to the performance of the Public Trustee's functions.

2.4.1 Stakeholder views and department response

The QHRC and the QLS noted that the Bill does not oblige the Minister to table or make the Board's reporting activity publicly available.[86]

The QHRC cited the OPA Report which suggested reports of the Board be provided to a parliamentary committee, and that the performance of the Board is to be contained in the Public Trustee's annual report.[87] The QHRC observed that the proposed reporting arrangements in the Bill have 'the potential to undermine the Board's effectiveness and limits its transparency and public accountability'.[88] The QHRC recommended 'the advice and recommendations of the Board go to the Parliamentary Committee, or at a minimum be published'.[89]

The QLS also recommended 'that section 117Y of the Bill be amended to provide that any advice or recommendations of the Board are provided to a Parliamentary Committee, or are made publicly available'.[90]

Together reported concern among its members for the potential for 'limited consultation on decisions and limited visibility on dissenting advice'.[91] Together stated: 'It is not clear why if the purpose is accountability and transparency, that dissenting views of the CEO or Board members are not required to be published in full, with an additional summary'.[92]

The QAI recommended a more rigorous reporting framework for the Board:

> Regular mandatory, independent reporting by the Board, in addition to the information about the performance of the Board's functions that is to be included in the Public Trustee's annual report. For example, the Board should release communiques from their meetings and should release any written recommendations or advice given to the Minister or Public Trustee regarding changes or improvements that it sees as necessary.[93]

The QAI also sought additional reporting requirements of the Public Trustee: 'The Public Trustee be legislatively required to publicly provide a written response to any advice or recommendations made by the Board'.[94]

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85 Explanatory notes, p 4; Bill, cl 4, proposed new s 117ZV.

86 Submission 5, p 4; submission 10, p 3.

87 Submission 5, p 4.

88 Submission 5, p 4.

89 Submission 5, p 4.

90 Submission 10, p 3.

91 Submission 8, p 2.

92 Submission 8, p 2.

93 Submission 6, p 2

94 Submission 6, p 2.

In response to the concerns in relation to reporting and transparency expressed by submitters, the department stated:

> Under clause 5, new section 141B PTA, the Public Trustee must include in its Annual Report information about the performance of the Board's functions and the exercise of the Board's powers during the financial year. It is expected that any recommendations or advice made by the Board in the relevant year will be included in this Annual Report, together with any submissions by the Public Trustee required to be considered by the Board. The Public Trustee will also be free to include in its Annual Report its response to any advice or recommendations made by the Board directly to the Public Trustee.[95]
>
> The requirement for the Public Trustee to include information in its Annual Report about the performance of the Board's functions and exercise of the Board's powers during the financial year (clause 5, new section 141B … PTA) will provide accountability and transparency over the exercise of the Board's functions.[96]

The department also noted two points in relation to the Board's advice and recommendations: 'the Minister may choose to table any advice given or recommendations made'; and 'the Bill does not exclude the operation of the *Right to Information Act 2009*'.[97]

2.4.1.1 Committee comment

The committee recognises the importance of the Board's independence and transparency, and while noting that clause 5 of the Bill proposes to insert a section 141B to ensure the Public Trustee must include in its annual report information about the performance of the Board and the exercise of the Board's powers during the financial year, the committee encourages increased public reporting. The committee notes the evidence of Ms Neroli Holmes, Deputy Commissioner, QHRC, who stated:

> … the board's effectiveness would be strengthened by a requirement to publish its recommendations or that it report to a parliamentary committee.[98]

Recommendation 3

The committee recommends that the Bill be amended at clause 5, new section 141B, to ensure a separate annual report of the Board of the Public Trustee be provided to the Minister and tabled in the Queensland Legislative Assembly.

2.5 Board meetings

The Bill provides for meeting arrangements, including that the Board:

- must meet at least 3 times annually
- may hold meetings, or allow members to take part in meetings by using any technology allowing reasonably contemporaneous and continuous communication
- has a quorum of at least half of the members of the Board, including 3 appointed members
- may resolve questions with a majority of votes, with the presiding member to have the casting vote where votes are equal.[99]

95 DJAG, correspondence, 25 November 2021, p 9.

96 DJAG, correspondence, 25 November 2021, p 4.

97 DJAG, correspondence, 25November 2021, p 9.

98 Public hearing transcript, Brisbane, 29 November 2021, p 6.

99 Explanatory notes, pp 3-4; Bill, cl 4, proposed new s 117ZO.

2.5.1 Stakeholder views and department response

In relation to the proposed meeting arrangements in the Bill, the QAI recommended:

Further consideration be given to increasing the frequency of Board meetings and level of resources available to the Board, given the breadth of services offered by the Public Trustee and the scale of reform that is required, as demonstrated by the Public Advocate's report.[100]In response to the QAI's comments, the department advised:

> DJAG notes the suggestion from QAI that consideration be given to increasing the frequency of Board meetings. DJAG notes that the Bill is not prescriptive as to the maximum number of Board meeting[s], but only requires, under clause 4, proposed new section 117Z0(2) PTA, that the chairperson must convene a Board meeting at least 3 times each year. The chairperson will not be limited to this number and, under new section 117Z0(1) PTA, may convene a meeting as often as is necessary for the performance of the Board's functions.[101]

[100] Submission 6, p 2.

[101] DJAG, correspondence, 25 November 2021, p 10.

3 Compliance with the *Legislative Standards Act 1992*

3.1 Fundamental legislative principles

Section 4 of the *Legislative Standards Act 1992* (LSA) states that 'fundamental legislative principles' are the 'principles relating to legislation that underlie a parliamentary democracy based on the rule of law'. The principles include that legislation has sufficient regard to:

- the rights and liberties of individuals
- the institution of Parliament.

The committee has examined the application of the fundamental legislative principles to the Bill. The committee brings the following to the attention of the Legislative Assembly.

3.1.1 Rights and liberties of individuals

Section 4(2)(a) of the LSA requires that legislation has sufficient regard to the rights and liberties of individuals.

3.1.1.1 Privacy

The right to privacy, and the disclosure of private or confidential information (including criminal history information), are relevant to a consideration of whether legislation has sufficient regard to the rights and liberties of the individual.[102]

Under the Bill, to decide if a person is disqualified from becoming or continuing as an appointed Board member, the Minister may ask the Commissioner of the police service for a written report about the criminal history of the person and a brief description of the circumstances of a conviction mentioned in the criminal history.[103]

The Bill also imposes an obligation on appointed Board members (unless they have a reasonable excuse) to immediately give notice to the Minister if they are convicted of an indictable offence during the term of their appointment.[104] The notice must include information about:

- the existence of the conviction
- when the offence was committed
- details adequate to identify the offence, and
- the sentence imposed.[105]

The Bill also imposes an obligation on appointed Board members (unless they have a reasonable excuse) to immediately give notice to the Minister if they become an insolvent under administration or are disqualified from managing a corporation under the Corporations Act.[106]

The Minister's ability to request criminal history information about a potential or continuing appointed Board member, and the obligation on an appointed Board member to disclose criminal history information and other private and confidential information during their term of appointment,

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102 Office of the Queensland Parliamentary Counsel (OQPC), *Fundamental legislative principles: The OQPC Notebook*, pp 95, 113-115, https://www.oqpc.qld.gov.au/file/Leg_Info_publications_FLPNotebook.pdf. See also LSA, s 4(2)(a).

103 Proposed new s 117ZK. Criminal history does not include spent convictions – proposed new subsection 117ZK(5).

104 Proposed new s 117ZL.

105 Proposed new subsection 117ZL(3).

106 Proposed new s 117ZI.

both impact the privacy of individuals who are seeking to become, or who already are, appointed members of the Board.

In considering similar provisions about criminal history information in previous Bills, committees have considered whether adequate safeguards are included in the Bill, such as whether:

- the criminal history can be obtained only with consent
- there are strict limits on further disclosure of that information
- the criminal history information must be destroyed when it is no longer required for the purpose for which it was obtained.[107]

Consideration has also been given in the past to the extent of information covered by the term 'criminal history', including for example, whether the term extends to 'spent' convictions.

Here, the following can be noted:

- A person's criminal history can only be obtained with their consent.[108]
- There are limits on disclosure, with the information in the notice being required to be kept confidential by a person who may have access to the information, including the Minister or a member of the Minister's staff, or an employee of the department. There is an offence for unauthorised disclosure (with a maximum penalty of 100 penalty units ($13,785)).[109]
- There is a requirement for destruction of the information as soon as practicable after the information is no longer needed.[110]
- The convictions included in a criminal history do not extend to spent convictions.[111]

The explanatory notes justify the breach of fundamental legislative principle on the basis that such information is necessary to ensure the suitability of individuals appointed to the Board and the integrity of the Board.[112]

The explanatory notes also highlight the safeguards referred to above regarding consent, the limits on disclosure, the offence for unauthorised disclosure, and the requirement that criminal history information be destroyed after it is no longer needed.[113]

However, the provisions which require an appointed Board member to immediately give notice (unless they have a reasonable excuse) to the Minister about being an insolvent under administration or disqualified from managing corporations[114], or being convicted of an indictable offence during their term of appointment[115], effectively remove any meaningful consent (in that the person will have committed an offence if notice is not provided and be disqualified from serving on the Board).

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107 See for example, Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee, Report No. 3, 56th Parliament – *Hospital Foundations Bill 2018*, March 2018, p 17 and Transport and Public Works Committee, Report No. 17, 56th Parliament – *Personalised Transport Ombudsman Bill 2019,* March 2019, p 23.

108 Proposed new subsection 117ZK(2).

109 Proposed new subsection 117ZM(2). A penalty unit is $137.85 – see the Penalties and Sentences Regulation 2015, s 3; *Penalties and Sentences Act 1992*, s 5A.

110 Proposed new subsection 117ZM(4).

111 Proposed new subsection 117ZK(5).

112 Explanatory notes, p 5.

113 Explanatory notes, p 5.

114 Proposed new s 117ZI.

115 Proposed new s 117ZL.

On the other hand, it could be argued that any person who does not want their criminal history accessed or to disclose private information relating to insolvency and disqualification from managing corporations, can decline to provide the information and withdraw their application (or vacate their position).

Though the explanatory notes do not address this issue in the context of privacy, they put forward an overall justification for these disclosure provisions, based on the need to ensure the integrity of the Board as an oversight agency:

> The obligation for appointed Board members to disclose certain matters that relate to their suitability reinforces the expectation that members are to behave ethically and legally and ensures that the Minister is aware of matters that may impact on the integrity of the Board. There is a strong public interest in ensuring that there is appropriate oversight and accountability imposed on people who seek appointment, or are appointed, to a public oversight office. Imposing such an obligation on members is reasonable.[116]

The committee notes that similar provisions regarding criminal history information and the requirement to give notice to the Minister about being an insolvent under administration or disqualified from managing corporations are common across a range of Acts, and were included in the recent Queensland Veterans' Council Bill 2021. In its report on that Bill, the committee concluded:

- the Bill contained sufficient safeguards to protect a person's private information and ensure that such information is only used for legitimate purposes, and
- on balance, the provisions had sufficient regard to the rights and liberties of individuals.[117]

3.1.1.2 Committee comment

The committee is satisfied that the Bill contains sufficient safeguards to protect a person's private information such that, having regard to the overall need to maintain the integrity of the Board, the provisions, on balance, have sufficient regard to the rights of individuals.

3.1.1.3 Penalties

The creation of new offences and penalties affects the rights and liberties of individuals.

Whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, penalties and other consequences imposed by legislation are proportionate and relevant. A penalty should be proportionate to the offence:

> In the context of supporting fundamental legislative principles, the desirable attitude should be to maximise the reasonableness, appropriateness and proportionality of the legislative provisions devised to give effect to policy.
>
> … Legislation should provide a higher penalty for an offence of greater seriousness than for a lesser offence. Penalties within legislation should be consistent with each other.[118]

The Bill introduces a number of new offences. An outline of these offences, together with the penalty amounts and justifications contained in the explanatory notes, is set out below.

Failure to disclose certain information

A person who is an appointed Board member must (unless they have a reasonable excuse) immediately give to the Minister notice of being insolvent under administration or being disqualified

[116] Explanatory notes, p 6.

[117] Community Support and Services Committee, Report No. 6, 57th Parliament – *Queensland Veterans' Council Bill* 2021, June 2021, p 32.

[118] OQPC, *Fundamental Legislative Principles: The OQPC Notebook*, p 120.

from managing a corporation under the Corporations Act. The maximum penalty is 100 penalty units ($13,785).[119]

A person who is an appointed Board member must (unless they have a reasonable excuse) immediately give to the Minister notice of being convicted of an indictable offence during the term of the person's appointment. The maximum penalty is 100 penalty units ($13,785).[120]

The explanatory notes justify the inclusion of these offences on the basis that they reinforce the expectations on Board members and go to the overall integrity of the Board:

> The obligation for appointed Board members to disclose certain matters that relate to their suitability reinforces the expectation that members are to behave ethically and legally and ensures that the Minister is aware of matters that may impact on the integrity of the Board. There is a strong public interest in ensuring that there is appropriate oversight and accountability imposed on people who seek appointment, or are appointed, to a public oversight office.[121]

The explanatory notes also highlight that similar disclosure provisions are found in other Queensland legislation, including:

> … the *Health and Wellbeing Queensland Act 2019*, the *Hospital Foundations Act 2018*, the *Jobs Queensland Act 2015* and the *Cross River Rail Delivery Authority Act 2016*, all of which impose a penalty where a person fails to disclose a conviction relating to an indictable offence. In addition, Queensland university legislation, such as *University of Queensland Act 1998* and *Queensland University of Technology Act 1998*, includes provisions that impose a penalty where a person fails to disclose a disqualification from managing corporations under the Corporations Act.[122]

While the explanatory notes do not indicate the quantum of penalties in the above examples, it could be noted that for a failure of a person to disclose or give notice of a conviction of an indictable offence, a maximum penalty of 100 penalty units applies in the following Acts:

- *University of Queensland Act 1998*
- *Queensland University of Technology Act 1998*
- *Jobs Queensland Act 2015*
- *Cross River Rail Delivery Authority Act 2016*
- *Hospital Foundations Act 2018*
- *Health and Wellbeing Act 2019*
- *Personalised Transport Ombudsman Act 2019.*

3.1.1.4 Committee comment

The committee is satisfied that the penalties imposed are consistent with similar penalty provisions in other situations where a person fails to disclose information relevant to an appointment to a Board (or similar) position and so are appropriate and proportionate in the circumstances.

3.1.1.5 Unlawful disclosure or use of criminal history information

A person who possesses criminal history information because the person is, or has been, the Minister, a Board member, or a public service employee administrating the Act, must not disclose or use

[119] Proposed new subsection 117ZI(2).

[120] Proposed new subsection 117ZL(2).

[121] Explanatory notes, p 6.

[122] Explanatory notes, p 6.

another person's criminal history other than as provided for under proposed new section 117ZM. The maximum penalty is 100 penalty units ($13,785).[123]

The explanatory notes justify this offence provision on the basis that it protects the rights of the individuals to whom the information relates:

> The offence is included in the Bill to protect the rights of the person about whom the information relates and provide an important safeguard against unlawful use or disclosure. Similar offences are included across the Queensland statute book, including section 78C of the *Ombudsman Act 2001* and section 38 of the *Hospital Foundations Act 2018*.
>
> Having regard to similar offences, appropriate deterrence, and the need to protect the rights of an individual, particularly to have their criminal history information appropriately protected from unlawful use or disclosure, the offence and penalty is considered justified.[124]

The penalty amounts for section 78C of the *Ombudsman Act 2001* and section 38 of the *Hospital Foundations Act 2018* (cited in the explanatory notes) are also 100 penalty units. Also, the Acts listed at the dot points on the preceding page (in relation to the failure to disclose certain information) contain provisions prohibiting misuse of criminal history information, with a maximum penalty of 100 penalty units.

3.1.1.6 Committee comment

The committee is satisfied that this penalty is consistent with similar penalty provisions across Queensland legislation regarding the unlawful use or disclosure of criminal history information, and therefore is appropriate and proportionate in the circumstances.

3.1.1.7 Unlawful disclosure or use of confidential information

A person who possesses personal information because the person is, or has been, a Board member or a person assisting the Board in its functions, must not disclose or use the personal information other than as provided for under proposed new section 117ZX. The maximum penalty is 200 penalty units ($27,570).[125]

The explanatory notes state this offence provision is designed to protect the rights of the individual to whom the personal information relates:

> Given the functions of the Board, it is likely to have access to sensitive personal information. This offence is included in the Bill to protect the rights of the person about whom the information relates and provide an important safeguard against the use and disclosure of a person's protected information.
>
> Similar offences are included across the Queensland statute book, such as section 88M of the *Public Service Act 2008*, section 249A of the GAA, section 228 of the *Disability Services Act 2006*, section 74A of the *Powers of Attorney Act 1998* and section 140 of the *Public Guardian Act 2014*, which provide similar protections to prevent confidential information from unauthorised disclosure.
>
> The penalty is set at a level to provide the appropriate deterrence and is consistent with similar offences in Queensland legislation.[126]

The penalty amounts for the provisions cited above are between 100 and 200 penalty units.[127]

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123 Proposed new subsection 117ZM(2).

124 Explanatory notes, p 7.

125 Proposed new subsection 117ZX(2).

126 Explanatory notes, p 7.

127 *Public Service Act 2008*, s 88M(2) – 100 penalty units; GAA, s 249A – 200 penalty units; *Disability Services Act 2006*, s 228 - 100 penalty units; *Powers of Attorney Act 1998*, s 74A – 200 penalty units, *Public Guardian Act 2014*, s 140 – 200 penalty units.

3.1.1.8 Committee comment

The committee is satisfied that this penalty is within the range of penalties in similar offence provisions across Queensland legislation regarding the unlawful use or disclosure of confidential information, and is appropriate and proportionate in the circumstances.

3.1.1.9 Other obligations

There are other provisions in the Bill that may result in a penalty for non-compliance, even though a penalty is not expressly imposed under the Bill.

This is because section 140 of the Act currently provides that, except as is expressly provided by the Act, every person who contravenes or fails to comply with any provision of the Act commits an offence against the Act and, if no penalty is expressly provided for that offence, is liable on conviction to a maximum penalty of 10 penalty units.

For example, proposed new section 117ZM(4) of the Bill provides that a person who possesses a criminal history report must ensure the report is destroyed as soon as practicable after it is no longer needed. Under the Act, non-compliance with this section would attract a penalty of 10 penalty units ($1,378.50).

According to the explanatory notes the 'obligations imposed in the Bill without a penalty are similar to existing obligations under the PTA which do not expressly impose a penalty'.[128]

3.1.1.10 Committee comment

The committee is satisfied that a penalty of 10 penalty units is appropriate and proportionate for the additional obligations imposed in the Bill.

3.1.1.11 Reversal of the onus of proof

Whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation does not reverse the onus of proof in criminal proceedings without adequate justification.[129]

As outlined earlier, the Bill imposes an obligation on appointed Board members to, unless they have a reasonable excuse, immediately give notice to the Minister if they:

- are convicted of an indictable offence[130]
- become insolvent under administration or are disqualified from managing a corporations under the Corporations Act.[131]

Failure to comply with these obligations results in a maximum penalty of 100 penalty units ($13,785).[132]

The use of 'reasonable excuse provisions' such as these can result in a breach of fundamental legislative principles. Legislation should not reverse the onus of proof in criminal matters, and it should not provide that it is the responsibility of an alleged offender in court proceedings to prove innocence:

> … for a reversal to be justified, the relevant fact must be something inherently impractical to test by alternative evidential means and the defendant would be particularly well positioned to disprove guilt.[133]

128 Explanatory notes, p 8.

129 LSA, s 4(3)(d).

130 Proposed new s 117ZL.

131 Proposed new s 117ZI.

132 Proposed new subsections 117ZI(2) and 117ZL(2).

133 OQPC, *Fundamental Legislative Principles: The OQPC Notebook*, p 36.

Generally, in criminal proceedings:

- the legal onus of proof lies with the prosecution to prove the elements of the relevant offence beyond reasonable doubt, and
- the accused person must satisfy the evidential onus of proof for any defence or excuse he or she raises and, if the accused person does satisfy the evidential onus, the prosecution then bears the onus of negativing the excuse or defence beyond reasonable doubt.[134]

Such 'reasonable excuse' provisions are discussed in some detail in the OQPC publication, *Principles of good legislation: Reversal of onus of proof*. That discussion starts with the following:

> If legislation prohibits a person from doing something 'without reasonable excuse' it would seem in many cases appropriate for the accused person to provide the necessary evidence of the reasonable excuse. While there is no Queensland case law directly on point, the Northern Territory Supreme Court has held that the onus of proving the existence of a reasonable excuse rested with the defendant on the basis that the reasonable excuse was a statutory exception that existed as a separate matter to the general prohibition… That approach is consistent with the principles used to determine whether a provision contains an exception to the offence or whether negativing the existence of the reasonable excuse is a matter to be proved by the prosecution once the excuse has been properly raised …
>
> … [It] is understood that in Queensland, 'reasonable excuse provisions' are drafted on the assumption that the *Justices Act 1886*, section 76 will apply and place both the evidential and legal onus on the defendant to raise and prove the existence of a reasonable excuse. On the other hand, … departments have often taken the view in their Explanatory Notes that a provision containing an exemption where a reasonable excuse exists is an excuse for which only the evidential onus lies with the accused.[135]

There follows some examples where departments have disagreed with the view (expressed by the former Scrutiny of Legislation Committee) that reasonable excuse provisions involve a reversal of the onus of proof.

Here, the explanatory notes state:

> The clauses are drafted on the assumption that section 76 of the *Justices Act 1886* applies to place both the evidential and legal onus on the member of the Board to prove the existence of a reasonable excuse for failing to comply with the obligation to disclose. Reversing the onus of proof in these circumstances is appropriate as the person subject to the offence is best placed to provide the relevant information that would support the reasonable excuse defence.[136]

The OQPC discussion concludes:

> It seems likely that in most cases a reasonable excuse will constitute a statutory exception to be proved by the defendant. However, in the absence of an express statement as to the allocation of the onus, the question will ultimately need to be determined by a court having regard to the established rules of statutory interpretation.[137]

Elsewhere in its discussion of the use of 'reasonable excuse' provisions, the OQPC has noted:

> Generally, for a reversal to be justified, the relevant fact must be something inherently impractical to test by alternative evidential means and the defendant would be particularly well positioned to disprove guilt.

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134 See OQPC, *Principles of good legislation: Reversal of onus of* proof, p 3, available at https://www.oqpc.qld.gov.au/file/Leg_Info_publications_FLP_Reversal_of_Onus1.pdf

135 OQPC, *Principles of good legislation: Reversal of onus of* proof, p 25.

136 Explanatory notes, p 8.

137 OQPC, *Principles of good legislation: Reversal of onus of proof*, p 26.

> For example, if legislation prohibits a person from doing something 'without reasonable excuse', it is generally appropriate for a defendant to provide the necessary evidence of the reasonable excuse if evidence of the reasonable excuse does not appear in the case for the prosecution.[138]

In considering the issue regarding similar provisions in other Bills, explanatory notes justify the reversal of the onus of proof on the basis that establishing the defence would involve matters which would be within the defendant's knowledge or on which evidence would be available to them.[139]

Here, the explanatory notes set out a similar justification:

> … the reversal of the onus is justified on the basis that the relevant fact (i.e. the change in criminal history or becoming insolvent under administration or disqualified from managing corporations) is something impractical to test by alternative evidential means and the facts giving rise to a reasonable excuse are within the particular knowledge of the defendant.[140]

In the circumstances, this justification has merit. It can reasonably be anticipated that such matters (that is, reasons why the information was not provided immediately to the Minister) would be peculiarly within the knowledge of the person, and so it is reasonable to require the person, who is holding a position of responsibility, to disclose this information.

The explanatory notes note the existence of similar reasonable excuse provisions, requiring a person to disclose certain matters, in other Queensland legislation, including:

> … the *University of Queensland Act 1998*, the *Health and Wellbeing Queensland Act 2019*, the *Hospital Foundations Act 2018*, the *Jobs Queensland Act 2015* and the *Cross River Rail Delivery Authority Act 2016*.[141]

3.1.1.12 Committee comment

The provisions in the Bill can be seen to reverse the onus of proof, in providing that a person does not commit an offence if the person has a reasonable excuse. The person bears the onus of proof to show that they had a reasonable excuse.

The committee considers that the breach of fundamental legislative principle in the provisions is sufficiently justified, given the matters to be disclosed are within the knowledge of the defendant, as well as the facts giving rise to the reasonable excuse.

3.1.1.13 Immunity from proceedings

Whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation does not confer immunity from proceeding or prosecution without adequate justification.[142]

> … persons who commits a wrong when acting without authority should not be granted immunity.
>
> …
>
> Generally a provision attempting to protect an entity from liability should not extend to liability for dishonesty or negligence. The entity should remain liable for damage caused by the dishonesty or negligence of itself, its officers and employees.
>
> …

138 See the OQPC, *Fundamental Legislative Principles: the OQPC Notebook,* p 36.

139 For a recent example, see Fisheries (Sustainable Fisheries Strategy) Amendment Bill 2018, explanatory notes, p 17.

140 Explanatory notes, p 8.

141 Explanatory notes, p 8.

142 LSA, s 4(3)(h).

> The preferred provision provides immunity for action done honestly and without negligence … if liability is removed it is usually shifted to the State.[143]

One of the fundamental principles of law is that everyone is equal before the law, and each person should therefore be fully liable for their acts or omissions. Notwithstanding that, the conferral of immunity is appropriate in certain situations.[144]

The Bill provides for immunity in two situations.

Firstly, a Board member does not incur civil liability for an act done, or omission made, honestly and without negligence.[145] The explanatory notes provide the following justifications for the breach of fundamental legislative principle that arises here:

- immunity from prosecution is appropriate if it is conferred on persons carrying out statutory functions, as is the case in this instance;
- the immunity is appropriately limited in scope, as it does not attach to acts done or omissions made which are dishonest or negligent; and
- liability for the consequences of actions done, or omissions made, is not extinguished by the Bill, but attaches to the State instead. Therefore, where persons consider themselves to have been injured by the relevant action or omission, a legal redress remains open to them.[146]

Secondly, where a person gives information to the Board under proposed new section 117ZT (under which the Board may request or receive information from the Public Trustee) the person is not liable, civilly, criminally or under an administrative process, for giving that information.[147] Further, by giving the information, the person cannot be held to have breached any code of professional etiquette or ethics, or to have departed from accepted standards of professional conduct.[148]

The explanatory notes consider this conferral of immunity is appropriate:

> A person should not be liable for proceedings where they are either merely complying with a request by the Board for information or, in the case of the Public Trustee giving information on its own initiative, where the Public Trustee believes the information will assist the Board. It is considered that there is no public interest in having action taken again such a person, or the Public Trustee, in these circumstances.[149]

Immunity clauses such as the above are quite common in legislation. They generally serve to allow public servants, officials, statutory officers and the like, to make decisions and exercise powers and functions without being unduly concerned that they may be held personally liable for acts done or omissions made in the course of carrying out their duties, providing that those actions or omissions are made honestly and without negligence or malice.

The shifting of liability to the State for actions or omissions of officials means aggrieved persons are able to make a claim against the State for loss or damage suffered as a result of actions taken by officials under the Act.

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143 OQPC, *Fundamental Legislative Principles: The OQPC Notebook*, p 64.

144 OQPC, *Fundamental Legislative Principles*: *The OQPC Notebook*, p 64; Scrutiny of Legislation Committee, *Alert Digest 1 of 1998*, p 5, para 1.25.

145 Proposed new s 117ZZ.

146 Explanatory notes, p 9.

147 Proposed new subsections 117ZY(1) and (2).

148 Proposed new subsections 117ZY(3).

149 Explanatory notes, p 9.

In recent times, similar clauses were included in the Hospital Foundations Bill 2018, Personalised Transport Ombudsman Bill 2019 and the Queensland Veterans' Council Bill 2021. In all instances, the committees reporting on the Bills were satisfied that any breaches of fundamental legislative principle were justified.

3.1.1.14 Committee comment

The committee is satisfied the breaches of fundamental legislative principle regarding immunity from proceedings are justified in the circumstances.

3.1.1.15 Administrative power

Whether legislation has sufficient regard to the rights and liberties of individuals depends on whether, for example, legislation allows the delegation of administrative power only in appropriate cases and to appropriate persons.[150]

The Bill provides that permanent members of the Board are chief executives of certain departments, or a senior executive nominated by the relevant chief executive.[151]

This may result in a breach of fundamental legislative principle, in that the position of a permanent Board member can be delegated below the level of a chief executive.

The explanatory notes provide the following justification, citing the need for flexibility and noting the safeguards in place to protect the proper functioning of the Board:

> … it is appropriate that a chief executive of a department be able to delegate their role as a Board member, to ensure flexibility in the Board performing its functions. The role can only be delegated to a senior executive officer who will be appropriately qualified to perform the role. Further safeguards include that a quorum is at least half of all Board members, including at least three appointed Board members. The Bill also provides for transparency in the operation of the Board's functions and exercise of its power, with the requirement that the annual activities of the Board are published in the Public Trustee's annual report.[152]

3.1.1.16 Committee comment

The committee is satisfied that the delegation of administrative power in these circumstances is appropriate.

3.2 Explanatory notes

Part 4 of the LSA requires that an explanatory note be circulated when a Bill is introduced into the Legislative Assembly, and sets out the information an explanatory note should contain.

Explanatory notes were tabled with the introduction of the Bill. The notes are fairly detailed and contain the information required by Part 4 and a sufficient level of background information and commentary to facilitate understanding of the Bill's aims and origins.

150 LSA, s 4(3)(c).

151 Proposed new s 117ZC.

152 Explanatory notes, p 5.

4 Compliance with the *Human Rights Act 2019*

The portfolio committee responsible for examining a Bill must consider and report to the Legislative Assembly about whether the Bill is not compatible with human rights, and consider and report to the Legislative Assembly about the statement of compatibility tabled for the Bill.[153]

A Bill is compatible with human rights if the Bill:

(a) does not limit a human right, or

(b) limits a human right only to the extent that is reasonable and demonstrably justifiable in accordance with section 13 of the HRA.[154]

The HRA protects fundamental human rights drawn from international human rights law.[155] Section 13 of the HRA provides that a human right may be subject under law only to reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

The committee has examined the Bill for human rights compatibility. The committee brings the following to the attention of the Legislative Assembly.

4.1 Human rights compatibility

The Public Trustee operates as a corporation and is governed by the PTA. The purpose of the Bill is to 'establish the board, to provide additional oversight over the Public Trustee to enhance the Public Trustee's performance, transparency and public accountability'.[156] It does this by establishing the Board, to provide advisory and monitoring oversight over the Public Trustee.[157]

This purpose is rights enhancing in nature. It aims to promote and protect the rights of vulnerable Queenslanders who may be subject to decisions made by the Public Trustee or who may need to access services provided by the Office of the Public Trustee.

The Bill follows a review undertaken by the Public Advocate and documented in the OPA report. The particular position of trust occupied by the Public Trustee has been described by the Public Advocate as follows:

> The Public Trustee has significant power over its administration clients. It is in a position of trust, controlling the person's money and property, making many, if not all, of the financial decisions for the person and having significant power over their lives. The administrator's role can include paying household bills, buying or selling property, running a business, entering into contracts, applying for government benefits, making business decisions, managing investments, and bringing or defending legal proceedings of a financial nature.
>
> The Public Trustee has significant obligations to its administration clients under the *Guardianship and Administration Act*, the *Trusts Act 1973*, and in terms of its broader 'fiduciary' duties as a trustee.[158]

153 HRA, s 39.

154 HRA, s 8.

155 The human rights protected by the HRA are set out in ss 15 to 37 of the Act. A right or freedom not included in the Act that arises or is recognised under another law must not be taken to be abrogated or limited only because the right or freedom is not included in this Act or is only partly included; HRA, s 12.

156 Statement of compatibility, p 5.

157 Explanatory notes, p 2.

158 OPA report, p ix.

As the Victorian Ombudsman has observed, this can give rise to significant power imbalances between the individual and the state:

> Whatever money or property a person has is no longer theirs to deal with, homes can be sold and personal property dispersed. The impact of this is obvious, the responsibility it places on those entrusted with their affairs equally so.[159]

The OPA report found that while that many of the Public Trustee's customers 'appear to receive a high level of service for very little or no cost', there were areas in need of improvement in terms of oversight of operations and quality of customer service.[160] The important relationship of trust described above had been reportedly undermined in the period leading up to the Public Advocate's review. As the Public Advocate explains:

> For a number of years, people under administration with the Public Trustee, their families and supporters have raised concerns with the Public Advocate about the level and types of Public Trustee fees and charges, and their negative effect on financial outcomes for people under administration. A number of them provided documents and records to the Public Advocate that allowed a limited analysis to be conducted to understand and test the validity of these concerns.[161]

Among the 32 recommendations made in the OPA report was the suggestion that the Queensland Government 'consider additional oversight and/or reporting mechanisms to improve the Public Trustee's performance, transparency and public accountability'. [162] The OPA report further explained that '[o]ne possible additional oversight mechanism could be to establish a Public Trustee board that would provide direction and oversight to the organisation'.[163]

This Bill was introduced in response to this recommendation. When introducing the Bill, the Minister stated:

> Protecting Queenslanders, especially those experiencing vulnerability, is a priority for this government, and that is why the government has moved decisively to establish the Public Trustee Advisory and Monitoring Board.[164]

Because it aims to improve the quality of services provided to vulnerable Queenslanders by the Public Trustee, the Bill has the potential to promote the rights protected in section 15 of the HRA. Section 15 of the HRA protects the right of '[r]ecognition and equality before the law'. This right includes the right to enjoy human rights without discrimination, with equal protection of the law and equal and effective protection against discrimination.[165] This right is also reflected in Article 12 of the *United Nations Convention on the Rights of Persons with Disabilities* which provides for 'equal recognition before the law' for all persons with disabilities and requires that States Parties 'take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity' and 'ensure that all measures provide for appropriate and effective

159 OPA report, p i.

160 Hon Shannon Fentiman MP, Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence, Queensland Parliament, Record of Proceedings, 28 October 2021, p 3386.

161 OPA report, p 2.

162 OPA report, recommendation 29.

163 OPA report, p xiiv..

164 Hon Shannon Fentiman MP, Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence, Queensland Parliament, Record of Proceedings, 28 October 2021, p 3386.

165 HRA, s 15(1)-(5).

safeguards to prevent abuse'.[166] This includes ensuring:

> … measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free from conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body.[167]

As the QAI has explained, Article 12 of the *United Nations Convention on the Rights of Persons with Disabilities* requires that public offices such as the Public Trustee implement supported decision-making practices to ensure that people with disability under financial administration of the Public Trustee are properly informed, consulted and involved in decision-making that affects them.[168]

The next section of this analysis considers the compatibility of particular provisions of the Bill with the human rights protected under the HRA, having regard to the rights-enhancing purposes sought to be advanced by the Bill. The human rights under the HRA that are relevant to the Bill are:

- taking part in public life (section 23, HRA)
- privacy and reputation (section 25, HRA)
- right to liberty and security of person (section 29, HRA)
- rights in criminal proceedings, in particular the right to be presumed innocent until proved guilty according to law (subsection 32(1), HRA).

4.2 Membership of the Board

Division 3 of the Bill prescribes the criteria for membership of the Board. Proposed new section 117ZC provides that the Board will have a membership comprising some *ex officio* permanent members,[169] and some members appointed by the Minister (appointed Board members). Proposed new section 117ZD provides that there must be a minimum of four appointed Board members, who must include persons with certain knowledge, qualifications or skills (refer to section 2.2.2 above).[170]

Proposed new subsection 117ZD(4) also provides that the Minister must ensure the appointed Board members reflect the diversity of the Queensland community, and at least one appointed Board member is an Aboriginal person or Torres Strait Islander.[171]

Under proposed new section 117ZF, a person is disqualified from becoming or continuing as an appointed Board member if the person has a conviction for an indictable offence, is an insolvent under

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166 *United Nations Convention on the Rights of Persons with Disabilities*, Treaty Series, vol. 2515, Dec. 2006, Article 12. See also T. Carney, 'Adult Guardianship and Other Financial Planning Mechanisms for People with Cognitive Impairment in Australia' in L. Ho and R. Lee (Eds.), *Special Needs Financial Planning: A Comparative Perspective*, CUP (2019): pp 3-29; John Chesterman, 'The future of adult safeguarding in Australia.' *Australian Journal of Social Issues* 54.4 (2019): pp 360-370; Anita Smith, 'Developments in Australian incapacity legislation.' *Precedent* 145 (2018): pp 4-8.

167 *United Nations Convention on the Rights of Persons with Disabilities*, Treaty Series, vol. 2515, Dec. 2006, Article 12, see also OPA report, p ii.

168 QAI, Submission to *Public Trustee of Queensland's Review of Fees and Charges*, August 2021, https://qai.org.au/2021/09/08/public-trustee-fees-and-charges-review/, p 5.

169 Permanent Board members will comprise: the chief executive (the Director-General of DJAG) or a senior executive of DJAG nominated by that chief executive; the chief executive of the department in which the *Financial Accountability Act 2009* is administered, or a senior executive of that department nominated by that chief executive. Explanatory notes, p 2.

170 Explanatory notes, p 2.

171 Explanatory notes, p 3.

administration, or is disqualified from managing a corporation. A person is also disqualified from becoming or continuing as an appointed Board member if the person is the Public Trustee.[172]

4.2.1 Human rights issue

The statement of compatibility explains that Division 3 of the Bill engages the right of every person in Queensland to have the opportunity, without discrimination, to participate in the conduct of public affairs protected by section 23 of the HRA.[173]

4.2.2 Analysis

4.2.2.1 Nature of the human right

Section 23 of the HRA protects the right of every person in Queensland to have the opportunity, without discrimination, to 'participate in the conduct of public affairs, directly or through freely chosen representatives'.[174] This includes the right to vote and be elected at State and local elections[175] and to the right to access the public service and public office.[176] It is this component of the right protected in section 23, namely the right to access public office, that is relevant to the clauses noted above.

The right to participate in public life has been interpreted broadly at the international level, and in other Australian jurisdictions with human rights legislation.[177] However, like all rights in the HRA, the right to access public office can be limited where it is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom, for example when a limitation on this right is necessary to address disadvantage or exclusion by a specific group[178] or where the particular functions and context of a Board or public office demand a particular set of eligibility criteria.

4.2.2.2 Nature of the purpose of the limitation

The purpose of Division 3 of the Bill is to establish a Board comprising members with appropriate skills and experience to enable the Board to achieve its functions as set out proposed new section 117Y, which include monitoring and reviewing the performance of the Public Trustee's functions and complaints processes.[179] It does this by nominating certain individuals for automatic appointment based on their position, and by prescribing eligibility and disqualifying requirements for appointed Board members.[180] This limitation is necessary to ensure that the Board can 'act independently and in the public interest and is not subject to direction by anyone, including the minister, about how to perform its functions'.[181] This is reflected in the text of proposed new section 117ZA. By imposing criteria on eligibility, the division necessarily limits individuals' right of access to a position as a Board member, and therefore a position in a public office.

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172 Explanatory notes, p 3.

173 Statement of compatibility, p 3.

174 HRA, s 23(1).

175 HRA, s 23(2)(a).

176 HRA, s 23(2)(b).

177 For example, in Slattery v Manningham CC (Human Rights) [2013] VCAT 1869, the Victorian Civil and Administrative Tribunal found that a local council's decision to prohibit a resident and ratepayer with a disability from attending any building that was council owned, occupied or managed breached the right to participate in public life as protected by the Victorian *Charter of Human Rights and Responsibilities Act 2006* (Vic).

178 *International Covenant on Civil and Political Rights*, Article 25; United Nations Human Rights Committee, *General Comment No 25* (Right to take part in public affairs) CCPR/C/21/Rev.1/Add.7.

179 Statement of compatibility, p 6.

180 Statement of compatibility, p 3.

181 Hon Shannon Fentiman MP, Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence, Queensland Parliament, Record of Proceedings, 28 October 2021, p 3386.

4.2.2.3 The relationship between the limitation and its purpose

The impact of Division 3 on the right to take part in public life protected by section 23 of the HRA is limited in scope. It does not limit any Queenslander's right to participate in representative democracy, or limit the ability of anyone to exert influence through public debate and dialogue with their representatives,[182] or their ability to hold the Public Trustee to account through the complaints process, for example. Instead, this Division is exclusively concerned with the composition of the Board that will provide oversight of the Public Trustee. Its design is such that it endeavours to include a mix of both senior public officials (with requisite knowledge of the various statutory obligations and frameworks governing the work of the Public Trustee) and appointed members with a diversity of lived experiences relevant to the work of the Public Trustee. For example, proposed new subsection 117ZD(4) requires the Minister to ensure that the appointed Board members 'reflect the diversity of the Queensland community' and at least one appointed member to be an Aboriginal person or Torres Strait Islander. In this way, the provisions aim to ameliorate any potentially exclusionary impacts of the criteria for Board membership by encouraging representation from those who may be traditionally excluded from positions of public office. As the statement of compatibility explains:

> The limitation on the right to take part in public life is therefore directly related to, and helps to achieve, the purpose.[183]

4.2.2.4 Whether there are less restrictive and reasonably available ways to achieve the purpose

Introducing legislation to establish an independent Board to provide oversight of the functions and use of powers of the Public Trustee was not the only oversight option contemplated in the OPA report:

> Another oversight mechanism that could be considered would be for the Public Trustee to report to a Parliamentary Committee, similar to the Crime and Corruption Commission and the Parliamentary Crime and Corruption Committee. In monitoring the Crime and Corruption Commission's activities, the Committee can make specific inquiries into matters pertaining to the Commission, receive complaints, review Commission guidelines and policies and make suggestions for improvements to its practices.[184]

Another possible way of achieving the policy objective is for the Public Trustee to establish the Board administratively, rather than by legislation.[185] However, a statutorily appointed Board has a number of benefits when compared to a parliamentary committee model, or when compared with an administratively appointed Board. These benefits have been outlined in the statement of compatibility and the explanatory notes, and include:

- greater oversight and accountability of the Public Trustee's activities through the appointment of independent, skilled, and appropriately experienced Board members
- protection against disclosure of confidential information and powers to obtain relevant information through the use of statutory powers and safeguards
- limited impact on the right to participate in public life through the inclusion of appointed members with a diversity of lived experience.[186]

In order to achieve these benefits of a statutory constituted Board, strict criteria must be imposed to limit Board membership. The fact that Division 3 of the Bill endeavours to include a broad range of

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182 Relevant constitutional provisions and case law were summarised by the High Court in *Unions NSW v New South Wales* [2013] HCA 58 at [17]. See also Australian Human Rights Commission Website, 'Right to Take Part in Public Affairs' para 8, https://humanrights.gov.au/our-work/rights-and-freedoms/right-take-part-public-affairs-voting-rights-and-access-public-service.

183 Statement of compatibility, p 6.

184 OPA report, p xiiv.

185 Explanatory notes, p 4.

186 Explanatory notes, p 4.

relevant skills and experiences among the relevant prescribed criteria suggests that the proposed model constitutes the least restrictive means of achieving this policy objective.

4.2.2.5 The balance between the importance of the purpose of the limitation and the importance of preserving the human right

The establishment of an independent, statutorily constituted board to provide oversight of the functions and powers of the Public Trustee has been identified as an appropriate oversight mechanism by the Public Advocate in its extensive review of the Public Trustee, documented by the OPA report. This report explains that unlike Public Trustee offices in other Australian jurisdictions, the Queensland Public Trustee is a 'self-funding agency' that does not receive a specific funding allocation or budget from the Queensland Government.[187] As the OPA report explains, this means that:

> … the Public Trustee's expenditure is unlikely to be subject to the same level of scrutiny as that of agencies seeking funds from government as part of the Budget process. The Public Trustee is also not required to seek Cabinet Budget Review Committee approval to self-fund projects involving significant expenditure, as occurs when other departments are seeking funding from government for specific projects.[188]

This makes ensuring the Public Trustee is subject to independent oversight by a body that is disconnected from the political process even more important. The use of an independent Board structure, where membership is prescribed by statute and subject to certain criteria, aligns with other oversight mechanisms employed to promote transparency among institutions that are similarly dependent upon high levels of public trust. As the OPA report observes:

> This type of structure exists in Queensland statutory commissions such as the Crime and Corruption Commission and Legal Aid Queensland. State Trustees in Victoria is also a state-owned corporation with a diverse and independent board of directors.
>
> A board provides the opportunity for board members, who could be selected on the basis of particular skills or expertise relevant to the Public Trustee's functions, to have a governance role as well as supporting senior management and guiding strategic decision-making. …. For example, State Trustees in Victoria has members with backgrounds in business, investment, superannuation, property, government, politics, disability, housing services, homelessness and community participation.[189]

The OPA report also explains that another benefit of using a statutory board model to provide oversight of the Public Trustee is that Board members:

> … bring a fresh perspective to the organisation and its day-to-day operations and can challenge the 'conventional wisdom' that may have historically informed the organisation's decisions or direction. A board also provides an alternative avenue of complaint for clients and others who are dissatisfied with the Public Trustee's decisions or actions. [190]

There is strong nexus between the provisions prescribing who can be a member of the Board and the rights-enhancing features of the Bill described above. The committee agrees with the conclusion in the statement of compatibility that any limitation on the right to take part in public life, protected by section 23 of the HRA is reasonable and justified and within the scope of section 13.[191]

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187 OPA report, p 156.

188 OPA report, p 156.

189 OPA report, p 159.

190 OPA report, p 160.

191 Statement of compatibility, p 8.

4.3 Obtaining a person's criminal history and imposing a requirement to disclose certain matters

4.3.1 Human rights issue

Proposed new Part 8A Division 4 deals with access to and disclosure of criminal history information relating to potential and appointed Board members. Proposed new section 117ZK provides that, to decide if a person is disqualified from becoming or continuing as an appointed Board member because they have a conviction, the Minister may ask the Police Commissioner for a written report about the criminal history of the person.[192] If a Board member obtains a *new* criminal conviction when serving on the Board they must also immediately notify the Minster in writing of the new conviction or face penalty.[193] The Bill also requires an appointed Board member to immediately disclose to the Minister if they become an insolvent under administration under section 9 of the Corporations Act, are disqualified from managing corporations because of part 2D.6 of the Corporations Act, or are convicted of an indictable offence during the member's appointment.[194] If the person, without a reasonable excuse, fails to comply with these obligations they can be subject to a penalty of 100 penalty units for each offence.[195]

The Bill also provides that where a Board member has a direct or indirect financial or other interest in a matter being considered, or about to be considered, at a Board meeting, and that interest could conflict with the proper performance of the member's duties about the consideration of the matter, the member will be required to disclose the nature of the interest at a Board meeting.[196] Unless the Board directs otherwise, the member must not be present when the Board considers the matter or take part in a decision of the Board about the matter. Particulars of the disclosure must be recorded in a register of interests kept for this purpose.[197]

The statement of compatibility explains that these provisions engage the right to privacy, the right to liberty and security of person and the right to fairness in criminal proceedings protected by sections 25, 29 and 32 of the HRA.

4.3.2 Analysis

4.3.2.1 *Nature of the human right*

Right to privacy

Section 25 of the HRA protects the right of a person not to have his or her 'privacy, family, home or correspondence unlawfully or arbitrarily interfered with'[198] and not to have their personal reputation unlawfully attacked.[199] This right is based on Article 17 of the International Covenant on Civil and Political Rights (ICCPR) and is broad in scope, intersecting with other rights protected in the HRA including the rights relating to families and children set out below, as well as rights to freedom of expression. The QHRC has explained that the right protects personal information and data collection as well as interference with a person's 'physical and mental integrity, including appearance, clothing and gender; sexuality and home'.[200] The right to privacy is also protected by the *Information Privacy*

192 Statement of compatibility, p 4.

193 Proposed new subsection 117ZL(2).

194 Proposed new s 117ZL.

195 Statement of compatibility, p 4.

196 Proposed new s 117ZS.

197 Statement of compatibility, p 4.

198 HRA, s 25(a).

199 HRA, s 25(b).

200 QHRC, Fact Sheet on s 25, https://www.qhrc.qld.gov.au/your-rights/human-rights-law/right-to-privacy-and-reputation.

Act 2009 and by the *Privacy Act 1988* (Cth), both of which contain detailed rules about how public and private bodies should collect, share and disclose personal information.

The right to privacy includes the right to respect for private and confidential information, and the right to control the dissemination of information about one's private life. This includes a requirement that the state does not arbitrarily interfere with a person's private and home life. The use of the term 'arbitrary' in section 25 is important. It denotes unlawful interference with privacy, but also actions which may be lawful but are 'unreasonable, unnecessary or disproportionate' in the circumstances. As the federal Parliamentary Joint Committee on Human Rights (PJCHR) has explained, '[t]o be a proportionate limitation on the right to privacy, the limitation should only be as extensive as is strictly necessary to achieve its legitimate objective and must be accompanied by appropriate safeguards.'[201] In order for a limitation not to be arbitrary, it must pursue a legitimate objective, and be rationally connected to, and a proportionate means of achieving, that objective.[202] The PJCHR has suggested that when assessing proportionality, it is important to consider matters including how the personal information might be used or shared; whether there are other, less rights restrictive, methods for achieving the same legitimate ends; the nature of the information, documents or things that may be required to be disclosed or shared; and what safeguards apply.[203]

Right to liberty and security

Proposed new Part 8A Division 4 creates the following new criminal offences: failure to immediately give written to notice to the Minister about a new conviction;[204] and unauthorised disclosure of confidential information.[205] A similar offence provision is contained in proposed new subsection 117ZI(2) for failing to immediately give written notice of insolvency or disqualification from managing a corporation. These proposed new offences attract a maximum penalty of 100 penalty units.

By creating new offences the Bill places a person at risk of imprisonment if monetary penalties are not paid, therefore potentially limiting the right to liberty and security protected by section 29 of the HRA. However, both section 29 of the HRA and Article 9 of the ICCPR on which the provision is based recognise that sometimes deprivation of liberty is justified, for example, in the enforcement of criminal laws, and where the limitation is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

Rights in criminal proceedings

The proposed new offence in section 117ZL(2) provides:

> The person must, unless the person has a reasonable excuse, immediately give written notice of the conviction to the Minister.

The proposed new offence in section 117ZI(2) is framed in a similar way.

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201 Parliament of Australia, PJCHR, Report 1 of 2020 (5 February 2020) [1.80].

202 Parliament of Australia, PJCHR, Report 1 of 2020 (5 February 2020) [1.15]. See also, *Leyla Sahin v Turkey,* European Court of Human Rights (Grand Chamber) Application No. 44774/98 (2005); *Al-Adsani v United Kingdom*, European Court of Human Rights (Grand Chamber) Application No. 35763/97 (2001) [53] - [55]; *Manoussakis and Others v Greece*, European Court of Human Rights, Application No. 18748/91 (1996) [36] - [53]. See also the reasoning applied by the High Court of Australia with respect to the proportionality test in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

203 See eg PJCHR, Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018, *Report 13 of 2018* (4 December 2018) 69-71 and 81-84; PJCHR, Identity-matching Services Bill 2018, *Report 5 of 2018* (19 June 2018) 133; PJCHR, Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018, *Report 13 of 2018* (4 December 2018), 92; and PJCHR, *Report 4 of 2018* (8 May 2018), My Health Records (National Application) Rules 2017 [F2017L01558], 43.

204 Proposed new subsection 117ZL(2).

205 Proposed new subsection 117ZM(2).

The statement of compatibility explains:

> The clauses are drafted on the assumption that section 76 of the *Justices Act 1886* applies to place both the evidential and legal onus on the Board member to prove the existence of a reasonable excuse for failing to comply with the obligation to disclose. Imposing the legal and evidential burden on Board members who fail to comply with the obligation to disclose certain matters reverses the onus of proof.[206]

This has the effect of reversing the onus of proof onto the defendant to show that he or she has a reasonable excuse for not immediately making the relevant disclosure. In this way, the Bill engages rights in criminal proceedings, and in particular a person's right to be presumed innocent until proven guilty, protected by subsection 32(1) of the HRA.

Section 32 is based on Article 14 of the ICCPR and the rights contained in section 32 are complementary to the rights contained in section 31 of the HRA, which protects the right to a fair hearing.[207] Like all rights under the HRA, the rights listed in section 32 can be limited where it is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

In the leading decision of *Salabiaku v France*,[208] European courts have recognised that the presumption of innocence is not absolute. The Strasbourg Court accepted that reversals of the onus of proof may be justified and compatible with the presumption of innocence if they are proportionate and 'confined within reasonable limits'.[209] Some of the common justifications for reversals of the onus of proof include the degree of seriousness of an offence, difficulties of proof and whether it applies to the 'gravamen' of an offence or to an incidental matter.[210] As Ong observes:

> The presumption of innocence appears in Article 14(2) of the *ICCPR*, Article 11 of the *Universal Declaration of Human Rights*, and Article 6(2) of the *ECHR*. Whenever courts and human rights committees required to apply these instruments consider a reversal of the onus of proof, they must consider whether the presumption of innocence has been contravened. European and UK jurisprudence exemplifies the results of this approach. The clearest trend to emerge from decisions of the Strasbourg court is that a reversal of the legal burden of proof is prima facie incompatible with the presumption of innocence under Article 6(2) of the *ECHR*. Similarly, the requirement to interpret legislation in a manner consistent with human rights under s 3(1) of the *Human Rights Act 1998* (UK) and the application of the test of proportionality has resulted in UK courts reading down reverse burden provisions as merely shifting the evidentiary onus. This trend has become so prominent in recent decisions that it may eventually lead to the death of legal reverse burdens in the UK.[211]

4.3.2.2 Nature of the purpose of the limitation

By setting set out a process for mandatory disclosure of criminal history information, proposed new Part 8A Division 4 limits the privacy of potential and appointed Board members. However, the limitation is narrow and subject to the following safeguards:

- The Minister may only make a request to access criminal history information relating to a potential Board member with their written consent (proposed new subsection 117ZK(2))

206 Statement of compatibility, p 6.

207 QHRC, Fact Sheet on s 32, https://www.qhrc.qld.gov.au/your-rights/human-rights-law/rights-in-criminal-proceedings.

208 (1988) 13 EHRR 379; see also *R v Lambert* [2001] UKHL 37.

209 (1988) 13 EHRR 379; see also *R v Lambert* [2001] UKHL 37.

210 (1988) 13 EHRR 379; see also *R v Lambert* [2001] UKHL 37.

211 Ong, Kuan Chung, 'Statutory Reversals of Proof: Justifying Reversals and the Impact of Human Rights' (2013) 32(2) *University of Tasmania Law Review* 247, p 263.

- The Minister, Board member or related public servant must not disclose the criminal history information to anyone else or use the information for other purposes (proposed new subsection 117ZM(2))
- Reports containing criminal history information must be destroyed as soon as practicable (proposed new subsection 11ZM(3)).

By creating offences for failing to disclose a new conviction and for misuse of criminal history information, the proposed new provisions also impact on the right to liberty and security of a person and the right to be presumed innocent, but again in only a narrow way. The proposed provisions do not impose custodial sentences. The reverse burden provision contained in proposed new section 117ZL does not give rise to a direct interference with the presumption of innocence and, as discussed below, aligns with the criteria set out in the Commonwealth's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers.*[212]

4.3.2.3 The relationship between the limitation and its purpose

The purpose of proposed new Part 8A Division 4 is to uphold and maintain the integrity of the Board. As discussed above, the Board is established to 'provide additional oversight over the Public Trustee to enhance the Public Trustee's performance, transparency and public accountability'.[213] This purpose is designed to protect the rights and interests of vulnerable Queenslanders who may have no choice but to rely upon the services or decision-making powers of the Public Trustee. As the statement of compatibility notes:

> Members of statutory bodies are in positions of trust and are responsible for the effective performance of the body. There is a strong public interest in ensuring that there is appropriate oversight and accountability imposed on people who seek appointment, or are appointed, to public office. The limitation on the right to privacy and the right to liberty and security is necessary to ensure the Minister can independently verify a person's suitability for appointment, including whether there are any matters that disqualify a person from being a member of the Board, therefore ensuring the integrity of the membership of the Board.[214]

In order to be able to fulfil its oversight functions, it is important that the Board is seen to be impartial, independent and comprising members of the highest standing and integrity. For this reason, the proposed provisions set out a process for mandatory disclosure of criminal history information. The related offence provisions, which include 'reasonable excuse' defences, are also designed to promote this rights-enhancing purpose by making sure that the Minister is made immediately aware of matters that disqualify a person from being a member. As the statement of compatibility explains:

> Given the functions of the Board, Board members, past Board members, and those who are, or who have been, involved in the administration of the Board, are likely to have access to highly sensitive personal information. The purpose of the offences in relation to using and disclosing certain information is to deter the unauthorised disclosure of sensitive personal criminal history information, as well as sensitive personal information, and to protect the privacy of the individual to whom the information relates. By

[212] Attorney General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers,* Commonwealth of Australia, 2013, https://www.ag.gov.au/legal-system/publications/guide-framing-commonwealth-offences-infringement-notices-and-enforcement-powers

[213] Statement of compatibility, p 5. The explanatory notes (at p 10) advise that there are no comparable advisory and monitoring boards providing oversight over a Public Trustee in other Australian jurisdictions. To the extent that other jurisdictions (Tasmania and Victoria) have a Public Trustee Board, it is a governance board (because in Tasmania the Public Trustee is a Government Business Enterprise and in Victoria the Public Trustee is a State Government owned company).

[214] Statement of compatibility, p 6.

> providing deterrence from unauthorised disclosure, the offence supports the right to privacy and reputation of the person whose information is protected from disclosure.[215]

4.3.2.4 Whether there are less restrictive and reasonably available ways to achieve the purpose

In order to ensure that the Minister is adequately informed of the relevant criminal history of any potential and appointed Board members it is necessary to provide the Minister with access to personal information about any potential and appointed Board members. Proposed new Part 8A Division 4 sets out a process of furnishing the Minister with this information that includes a range of safeguards to protect against unauthorised access or disclosure. These safeguards include the requirement that the Minister may make a request to access criminal history information relating to a potential Board member only *with their written consent* (proposed new subsection 117ZK(2)). Other safeguards include:

- The Minister, Board member or related public servant must not disclose the criminal history information to anyone else or use the information for other purposes (proposed new subsection 117ZM(2))
- Reports containing criminal history information must be destroyed as soon as practicable (proposed new subsection 11ZM(3)).

These safeguards ensure that there are no less restrictive and reasonably available ways for the Minister to independently verify a person's criminal history and whether the person is suitable for appointment in light of that history.[216]

While it may have been possible to frame the offences in such a way as to provide a general defence from liability (rather than an evidential and legal burden of proving a reasonable excuse), such an approach would unreasonably compromise the effectiveness of these provisions which are designed to ensure a timely flow of relevant information from appointed Board members to the Minister. The requirement for the defendant to prove the facts that are 'peculiarly within the defendant's knowledge' is also in line with the Commonwealth Attorney General's Department's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (Guide).[217] As the Guide explains:

> The fact that it is difficult for the prosecution to prove a particular matter has not traditionally been considered in itself to be a sound justification for placing the burden of proof on a defendant. If an element of the offence is difficult for the prosecution to prove, imposing a burden of proof on the defendant in respect of that element may place the defendant in a position in which he or she would also find it difficult to produce the information needed to avoid conviction. This would generally be unjust. However, where a matter is peculiarly within the defendant's knowledge and not available to the prosecution, it may be legitimate to cast the matter as a defence. [218]

The Guide goes on to explain that such a defence is also more readily justified if the matter in question is not central to the question of culpability for the offence and the offence carries a relatively low

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215 Statement of compatibility, p 6.

216 Statement of compatibility, p 7.

217 Attorney General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, Commonwealth of Australia, 2013, https://www.ag.gov.au/legal-system/publications/guide-framing-commonwealth-offences-infringement-notices-and-enforcement-powers.

218 Attorney General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, Commonwealth of Australia, 2013, https://www.ag.gov.au/legal-system/publications/guide-framing-commonwealth-offences-infringement-notices-and-enforcement-powers.

penalty.[219] This suggests that the use of the 'reasonable excuse' defences within the offences proposed in sections 117ZI(2) and 117ZL(2) is appropriate.

As the statement of compatibility explains,[220] similar provisions in relation to the disclosure of information that would disqualify a person from membership of statutory bodies are contained in the *Health and Wellbeing Queensland Act 2019* subsection 31(3), the *Hospital Foundations Act 2018* subsection 37(2), and the *Jobs Queensland Act 2015* section 20.

4.3.2.5 The balance between the importance of the purpose of the limitation and the importance of preserving the human right

As noted above, the right to privacy protected by section 25 of the HRA guards against the arbitrary, disproportionate or unreasonable interference with a person's personal life or personal information. It is a right that can be lawfully limited if necessary and proportionate to achieve another legitimate objective and if accompanied by appropriate safeguards.[221] Here, the proposed new Part 8A Division 4 advances a clear, rights-enhancing, legitimate objective. It is designed to uphold and maintain the integrity of a Board entrusted to provide oversight and improve the Public Trustee's performance, transparency and public accountability. It has been developed in response to numerous reports from members of the public raising concerns about the level and types of Public Trustee fees and charges, and their negative effect on financial outcomes for people under administration.

As the statement of compatibility notes:

> It is in the public interest that the membership of public bodies be open to scrutiny by the Minister, and that obligations are imposed on members to disclose matters that would disqualify a person from being a member.[222]

Proposed new Part 8A Division 4 also contains a range of safeguards designed to limit access to and disclosure of sensitive personal information by the Minister, Board members or related public servants, with penalties prescribed for any breach. These include the requirement that a person consent to the Minister accessing their criminal history information, and offences for non-authorised disclosure of criminal history information. These safeguards ensure that any impact on the right to privacy is limited and proportionate to the legitimate objective described above.

The new offences in proposed new subsections 117NL(2) (new convictions) and 117ZI(2) (insolvency and disqualification) include defences for circumstances in which a person has a 'reasonable excuse' for failing to comply. This ensures an appropriate balance between (a) the need to ensure a timely flow of relevant information to the Minster about the integrity and capability of the members of the Board, and (b) the need to provide Board members with the opportunity to draw attention to individual circumstances that may have made it impossible or difficult to comply with these requirements. This approach aligns with the criteria set out in the Guide, and other similar statutory oversight frameworks.[223]

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219 Attorney General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, Commonwealth of Australia, 2013, https://www.ag.gov.au/legal-system/publications/guide-framing-commonwealth-offences-infringement-notices-and-enforcement-powers.

220 Statement of compatibility, p 7.

221 Parliament of Australia, PJCHR, Report 1 of 2020 (5 February 2020) [1.80].

222 Statement of compatibility, p 8.

223 *Health and Wellbeing Queensland Act 2019*, s 31(3), *Hospital Foundations Act 2018*, s 37(2), and *Jobs Queensland Act 2015*, s 20.

4.3.2.6 Committee comment

The committee agrees with the conclusion in the statement of compatibility that any limitation on the right to privacy, liberty and security of person or the right to be presumed innocent is reasonable and justified and within the scope of HRA section 13.[224]

4.4 Statement of compatibility

Section 38 of the HRA requires that a Member who introduces a Bill in the Legislative Assembly must prepare and table a statement of the Bill's compatibility with human rights.

A statement of compatibility was tabled with the introduction of the Bill as required by section 38 of the HRA. The committee notes the statement contained a sufficient level of information to facilitate understanding of the Bill in relation to its compatibility with human rights.

[224] Statement of compatibility, p 8.

Appendix A – Submitters

Sub #	Submitter
001	Office of the Public Advocate
002	Michelle Dubois
003	Carers Queensland
004	Zorica Sankov
005	Queensland Human Rights Commission
006	Queensland Advocacy Incorporated
007	Crime and Corruption Commission
008	Together
009	Aged and Disability Advocacy
010	Queensland Law Society

Appendix B – Officials at public departmental briefing

Department of Justice and Attorney-General

- Leanne Robertson, Assistant Director-General, Strategic Policy and Legal Services
- Kim Chandler, Director, Strategic Policy and Legal Services
- Ellen Corrigan, Senior Legal Officer, Strategic Policy and Legal Services

Appendix C – Witnesses at public hearing

Office of the Public Advocate

- Dr John Chesterman, Public Advocate

Queensland Human Rights Commission

- Neroli Holmes, Deputy Commissioner
- Rebekah Leong, Principal Lawyer

Aged and Disability Advocacy

- Geoff Rowe, Chief Executive Officer

Queensland Advocacy Incorporated

- Emma Phillips, Deputy CEO / Principal Solicitor
- Sophie Wiggans, Systems Advocate
- Cassandra Grey, PLT student

Queensland Law Society

- Elizabeth Shearer, President
- Matt Dunn, General Manager – Advocacy
- Dr Brooke Thompson, Policy Solicitor

Statement of Reservation

Stephen BENNETT MP
Member for Burnett

20 January 2022

Community Support and Services Committee
Public Trustee (Advisory and Monitoring Board) Amendment Bill 2021
Statement of Reservation

The LNP wants to ensure all Queenslanders have access to a Public Trustee that is affordable, responsible, and will always act in their best interests.

We have concerns over the independence of the proposed Board, considering the Board will include the appointment of public servants who may be reticent to raise significant concerns about the operation of the Public Trustee.

The 2019 Report of the Public Advocate (OPA report) made 32 recommendations relating to the Public Trustee's fees and charges, financial management, client services, legal services and administration.

The government response noted that 23 recommendations from the OPA report were primarily the responsibility of the Public Trustee to implement. Of the 10 remaining recommendations, the government accepted one (recommendation 30), supported five in principle (recommendations 3, 6, 11, 15 and 29) and committed to "further consider" four (recommendations 24, and jointly with the Public Trustee 26, 31, and 32).

Recommendation 30 called on the government to consider additional oversight and/or reporting mechanisms to improve the Public Trustee's performance, transparency and public accountability. In response to recommendation 30, the government introduced the Bill to establish the Public Trustee Advisory and Monitoring Board (the Board).[1]

The LNP notes that many submitters to the Bill expressed concerns with the proposed provisions in the Bill.[2]

During the public hearing of 29 November 2021, Mr Stephen Bennett MP explored the proposed functions and powers of the Board with Ms Elizabeth Shearer, President, Queensland Law Society:

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1 Department of Justice and Attorney-General, correspondence, 10 November 2021, attachment, p 1.
2 Submissions 5, 6, 8, 9 and 10.

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StephenBennettMP @Bennett4Burnett

> Mr Bennett: I am struggling with the new board concept. I say that to frame my comment and question. There already exists a governance board within the Public Trustee. There is a financial risk board and there is a number of other boards with remunerated positions. I am struggling with the concept of a new monitoring and advisory board. Are there legal frameworks under which the board members have fiduciary rights to be held accountable for what boards are meant to be doing and things like the CEO's responsibilities? Is that because it is government that we do not have those arrangements, as opposed to a private sector board and operations?
>
> Ms Shearer: It is actually a bit of an anachronistic model.[3]

Mr Matt Dunn of the Queensland Law Society added:

> Mr Dunn: The implications of that [model] are that those members are advisory in their role, as are all the members. If those members have a particular concern or problem, they have no right to make the corporate—the Public Trustee—do anything. That is why we have a legislative structure which deals with this. Otherwise, there would not be a way for the board to legally enact what it is doing, because the corporation sole is the sole decision-maker and the sole actor in the particular circumstances. This is why the Law Society contends that a governance board—more like a corporate structure or a statutory authority board, where the power and the governance is not invested in a single individual but is invested in a group—is a slightly different model.[4]

In response to submitters' views, the department advised that:

> The Board is an advisory and monitoring board, rather than a governance board, and will therefore be unable to direct the Public Trustee (except to require it to give the Board information about the performance of the Public Trustee's functions).[5]

To maintain the Public Trustee's position as an independent statutory office and avoid a conflict with the Public Trustee's fiduciary and other obligation and duties, the department also advised:

> If the Board was given governing functions, and if the Public Trustee's corporate structure or responsibility for discharging duties remained unchanged, this could be problematic, for example if a direction by the Board conflicted with the Public Trustee's discharge of a duty.[6]

The government proposes to appoint people (public servants) to the proposed Board who should already be doing their jobs to assure Queensland's most vulnerable are protected, but in so doing the government is adding another layer of government bureaucracy. Without real independence or power to take action, this would appear an unnecessary layer.

There are levels of management that already exist within the Public Trustee, as Mr Stephen Bennett MP noted during the committee's public briefing on the Bill with the Department of Justice and Attorney-General on 15 November 2021:

> Mr Bennett: You have probably picked up that I have a concern about this new board. We already have an investment board which exists in the Public Trustee. We have a board of management. We have a communication committee. We have an Audit and Risk Management Committee. Some of those members are collecting $50,000 to $60,000 and they are external members to the committee. How do we see all of this coming together—

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3 Public hearing transcript, Brisbane, 29 November 2021, p 17.

4 Public hearing transcript, Brisbane, 29 November 2021, p 17.

5 Department of Justice and Attorney-General, correspondence, 25 November 2021, attachment, pp 2-3.

6 Department of Justice and Attorney-General, correspondence, 25 November 2021, attachment, p 2.

> and the remuneration of those members will be something that we will never find out about? If the role of the new board is only monitoring and reporting into an annual report and it does not have any influence, how do we anticipate that this monitoring capacity of a new board will add any value when the public may perceive that there are already so many management structures within the Public Trustee that should be taking on this role anyway? How do we see this new board offering anything of value to the Public Trustee's functions and efficiencies?
>
> Ms Chandler: I do not want to do the government's job of justifying the policy of why to adopt a board. Certainly the Public Advocate's report saw a value in a fresh pair of eyes, a fresh perspective and an additional layer of accountability and transparency. That, in the end, was a policy decision of government to decide on an advisory and monitoring board in addition, as you say, to the other accountability and management structures.[7]

The LNP also holds concerns in relation to the overall cost, and the appointment and remuneration arrangements of Board members being at the discretion of the responsible Minister. These concerns were raised by Mr Stephen Bennett MP at the committee's public briefing on 15 November 2021:

> Mr Bennett: What I am looking for is confirmation, as I alluded to before, about the anticipated cost. Is that cost to government for the new board provided in the explanatory notes?
>
> Ms Chandler: I think the explanatory notes just say that the costs of the board will be met within existing resources, so that would be met by the department. The permanent board members, the ex-officio members, will not be remunerated, but it is up to the minister as to whether the minister would, in their terms and conditions—
>
> Mr Bennett: I am sorry if I put you on the spot. Did you just say that they would not be remunerated?
>
> Ms Chandler: No. The permanent board members would not be remunerated. The ex-officio public servant members would not be paid, obviously. It is up to the minister to decide the terms and conditions of appointed board members. If they are remunerated, again that is up to the minister, but reference would probably be had to the remuneration procedures for part-time chairs and members of Queensland government bodies.
>
> Mr Bennett: In the annual report of the Public Trustee it clearly disseminates how much ex-officio members are remunerated for positions on boards that exist within the Public Trustee. For transparency, would you not expect that those remuneration fees would be made available at some point in time, or is that a matter for the government? I am not trying to put you on the spot.
>
> Mrs Robertson: That is ultimately a matter for government in that space.[8]

The Public Trustee of Queensland provides financial management services to approximately 9,300 vulnerable individuals and families. Many Queenslanders often find dealing with the Public Trustee difficult including financial management that is complex to navigate, and need assistance from the Public Trustee to understand financial administration.

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7 Public briefing transcript, Brisbane, 15 November 2021, p 7.

8 Public briefing transcript, Brisbane, 15 November 2021, p 8.

There is considerable work to be done with reforms to the operations of the Public Trustee. In March 2021, the Public Advocate tabled a report *Preserving the financial futures of vulnerable Queenslanders: A review of the Public Trustee's fees, charges and practices* in the Queensland Parliament. We all should be concerned about the Public Advocate's concerns regarding the Public Trustee's fees and charges and other practices, such as investment policies, information access and decision accountability.

The LNP would like to see faster action in bringing the other recommendations forward, to ensure Queenslanders are receiving the best representation from their Public Trustee, without being excessively charged or burdened.

Mr Stephen Bennett MP
Member for Burnett

Mr Jon Krause
Member for Scenic Rim