QUEENSLAND PARLIAMENT
COMMITTEES

Trusts Bill 2025

Justice, Integrity and Community Safety Committee

Report No. 4

58th Parliament, March 2025

Justice, Integrity and Community Safety Committee

Chair	Mr Marty Hunt MP, Member for Nicklin
Deputy Chair	Mr Peter Russo MP, Member for Toohey
Members	Mr Michael Berkman MP, Member for Maiwar
	Mr Russell Field MP, Member for Capalaba
	Ms Natalie Marr MP, Member for Thuringowa
	Mrs Melissa McMahon MP, Member for Macalister

Committee Secretariat

Telephone	07 3553 6641
Email	JICSC@parliament.qld.gov.au

All references and webpages are current at the time of publishing.

Acknowledgements

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Chair's Foreword

This report presents a summary of the Trusts Bill 2025.

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*.

The Trusts Bill 2025 is a result of work by the Queensland Law Reform Commission and engagement with stakeholders over many years. It is important legislative reform that will benefit Queenslanders, many of whom find themselves affected by trust law in situations that can be unexpected and arise quickly, including family members passing or losing the capacity to be a trustee.

The committee held a public hearing and departmental briefing in Brisbane on 3rd March 2025. The hearing and briefing centred around the changes made by the current Government to the lapsed Bill that had been introduced by the previous Government and addressed concerns from stakeholders put forward in previous hearings on the lapsed Bill.

I'm proud to be part of a Government that has made this important reform a priority and introduced this Bill early in the term after so much work has already been done.

On behalf of the committee, I thank those organisations who made written submissions on the Bill and have worked over many years to help develop the Bill. I also thank our Parliamentary Service staff and the Department of Justice who worked quickly to have this urgent report ready for the house to consider in a short timeframe.

I commend this report to the House.

Mr Marty Hunt MP

Chair

Executive Summary

On 18 February 2025, the Honourable Deborah (Deb) Frecklington MP, Attorney-General and Minister for Justice and Minister for Integrity introduced the Trusts Bill 2025 (Bill) into the Queensland Parliament. The Bill was referred to the Justice, Integrity and Community Safety Committee (the committee) by the Queensland Parliament for urgent consideration.

The primary objective of the Bill is to replace the current *Trusts Act 1973* (Trusts Act) with modernised, simplified and streamlined legislation to meet the needs of Queenslanders when dealing with all kinds of trusts.

The development of the Bill was informed by:

- findings of the Queensland Law Reform Commission's review of the Trusts Act, which concluded in December 2013
- the report of the former Housing, Big Build and Manufacturing Committee of the 57th Parliament on its inquiry into the Trusts Bill 2024 (2024 Bill), tabled on 2 August 2024.

As large portions of the lapsed 2024 Bill were mirrored in the current Bill, the committee:

- endorsed *Report No. 17, 57th Parliament – Trusts Bill 2024* of the former Housing, Big Build and Manufacturing Committee to the extent that the provisions of the 2024 Bill have not been amended in the current Bill
- limited its examination of the Bill to matters raised by the Bill's provisions which differ from those raised in the 2024 Bill and matters not considered in the former committee's inquiry regarding the 2024 Bill.

Stakeholders were invited to make written submission on the Bill. In response, the committee received and accepted 5 submissions which were published on the committee's webpage.

The committee received a written briefing on 21 February 2025 and an oral briefing on 3 March 2025 from the Department of Justice.

The committee also heard from stakeholders, at a public hearing in Brisbane on 3 March 2025.

The key issues raised during the committee's examination of the Bill related to clauses including:

- clause 13 – Ability for the court to order that a person hold property on trust where they cannot be appointed as trustee
- clause 22 – Replacement of last continuing trustee with impaired capacity
- clause 44 – Renunciation of probate does not result in disclamation as trustee of further trusts established under a will

- clauses 212 to 215 – Preservation of charitable status of ancillary funds making distributions to 'eligible recipients'.

The key issues also related to differences between the Bill and the 2024 Bill:

- omission of amendments that were in the 2024 Bill to the *United Grand Lodge of Antient Free and Accepted Masons of Queensland Trustees Act 1942* regarding the Board's ability to invest moneys
- amendment to terminology regarding the exclusion of persons as trustees, from 'bankrupt' to 'insolvent under administration'
- amendment to terminology, from 'trustee of the testamentary trust' to 'trustee of the will'.

The committee is satisfied that the Bill gives sufficient regard to the rights and liberties of individuals and the institution of Parliament as required by the *Legislative Standards Act 1992*.

Further, the committee is satisfied that the Bill is compatible with human rights as defined in the *Human Rights Act 2019*.

The committee made one recommendation, found at page vii of this report, that the Bill be passed.

Recommendations

Glossary

2024 Bill	Trusts Bill 2024 introduced on 21 May 2024 and lapsed on dissolution of the 57th Parliament
Attorney-General	The Honourable Deborah (Deb) Frecklington MP, Attorney-General and Minister for Justice and Minister for Integrity
Bill	Trusts Bill 2025
DGR	deductible gift recipient
Former Housing Committee	Housing, Big Build and Manufacturing Committee of the 57th Parliament
Grand Lodge	The United Grand Lodge of Antient Free and Accepted Masons of Queensland
Guardianship Act	*Guardianship and Administration Act 2000*
HRA	*Human Rights Act 2019*
ITA Act	*Income Tax Assessment Act 1997* (Cth)
LSA	*Legislative Standards Act 1992*
Masons Act	*United Grand Lodge of Antient Free and Accepted Masons of Queensland Trustees Act 1942*
PoA Act	*Power of Attorney Act 1998*
Public Trustee of Queensland	Public Trustee
QCAT	Queensland Civil and Administrative Tribunal
QLS	Queensland Law Society
QLRC	Queensland Law Reform Commission
STEP Queensland	The Society of Trust and Estate Practitioners Queensland Branch
Trusts Act	*Trusts Act 1973*

1. Overview of the Bill

The Trusts Bill 2025 (Bill) was introduced by the Honourable Deborah (Deb) Frecklington MP, Attorney-General and Minister for Justice and Minister for Integrity (Attorney-General) and was referred to the Justice, Integrity and Community Safety Committee (the committee) by the Legislative Assembly on 18 February 2025.

1.1. Aims of the Bill

The *Trusts Act 1973* (Trusts Act) came into effect on 19 April 1973. While the Trusts Act does not codify the law of trusts, it contains provisions regarding the operation and regulation of trusts in Queensland.[1]

The overarching purpose of the Bill is to replace the Trusts Act with modernised, simplified and streamlined legislation to meet the current needs of Queenslanders when dealing with all kinds of trusts.[2]

The objectives of the Bill are to:

- repeal provisions of the Trusts Act that are now obsolete or no longer appropriate, or that confer powers that are no longer needed in light of the new provisions in the Bill
- streamline the legislation and address existing gaps in the Trusts Act regarding the administration of trusts in Queensland
- streamline the law with respect to deciding disputes in relation to the administration of trusts, especially for matters involving lower monetary values, including *cy pres*[3] schemes.[4]

1.2. Context of the Bill

1.2.1. *Review of the Trusts Act by the Queensland Law Reform Commission*

From January 2012 to December 2013, the Queensland Law Reform Commission (QLRC) conducted a comprehensive review of the Trusts Act. This review included substantial consultation with a wide range of stakeholders and consideration of equivalent provisions in other jurisdictions.[5]

As a part of its review, in December 2012, the QLRC released a discussion paper[6] and sought submissions. The QLRC received submissions from a broad range of stakeholders including

[1] Queensland Law Reform Commission, *Report No 17 – A Review of the Trusts Act 1973*, December 2013, p 2.
[2] Trusts Bill 2025, explanatory notes, p 1.
[3] *Cy pres* applications refer to situations where the purpose of a charitable trust is incapable of being carried out (for example, because it is in favour of a charity that no longer exists) and the trust property is to be applied to another charity which has a charitable purpose as near as possible to the original charitable purpose: Trusts Bill 2025, explanatory notes, p 2.
[4] Trusts Bill 2025, explanatory notes, pp 1-2.
[5] Trusts Bill 2025, explanatory notes, p 1.
[6] Queensland Law Reform Commission, *Discussion Paper – A Review of the Trusts Act 1973 (Qld)*, December 2012.

the Bar Association of Queensland, Crown Law, Financial Services Council, the Public Trustee, Queensland Civil and Administrative Tribunal (QCAT), Queensland Law Society (QLS), QSuper and the Registrar of Titles and Registrar of Water Allocations.[7]

Following consideration of stakeholder feedback, the QLRC released its interim report in June 2013 (Interim Report).[8] The Interim Report recommended (on a preliminary basis):

- enactment of new provisions in the Trusts Act to clarify the duties of trustees and to modernise the conferral of trustees' powers
- the omission of several provisions of the Trusts Act which are obsolete or no longer appropriate in modern trusts legislation.[9]

The QLRC noted in its Interim Report that the proposed amendments to the Trusts Act are not intended to change the fundamental role of the legislation in supplementing the common law, as opposed to codifying the law of trusts in statute.[10]

In December 2013, the QLRC released its final report (Final Report) which:

- recommended the enactment of new trusts legislation to replace the Trusts Act
- enclosed a proposed bill to replace the Trusts Act with clause-by-clause commentary.[11]

1.2.2. *Previous inquiry into the Trusts Bill 2024*

On 21 May 2024, the Trusts Bill 2024 (2024 Bill) was introduced into the Queensland Parliament and referred to the former Housing, Big Build and Manufacturing Committee (former Housing Committee) of the 57th Parliament.

In respect of the former Housing Committee's inquiry into the 2024 Bill:

- 5 submissions were received from stakeholders
- a public briefing was held with the then Department of Justice and Attorney-General on 10 June 2024
- a public hearing was held with 4 of the submitters on 10 July 2024.[12]

[7] Queensland Law Reform Commission, *Interim Report – A Review of the Trusts Act 1973 (Qld*), June 2013, p 4.
[8] Queensland Law Reform Commission, *Interim Report – A Review of the Trusts Act 1973 (Qld),* June 2013.
[9] Queensland Law Reform Commission, *Interim Report – A Review of the Trusts Act 1973 (Qld),* June 2013, p 3.
[10] Queensland Law Reform Commission, *Interim Report – A Review of the Trusts Act 1973 (Qld),* June 2013, p 4.
[11] Queensland Law Reform Commission, *Report No 17 – A Review of the Trusts Act 1973*, December 2013, p 1.
[12] Housing, Big Build and Manufacturing Committee, *Report No. 17, 57th Parliament – Trusts Bill 2024,* 2 August 2024, p v.

The former Housing Committee tabled its report on 2 August 2024. A copy of the former Housing Committee's report is contained in **Appendix D**.

In its report, the former Housing Committee recommended that:

1. the 2024 Bill be passed
2. the then Department of Justice and Attorney-General considers including a definition for 'appoint' in the 2024 Bill to ensure it does not restrict who can be deemed to hold property under a remedial constructive or resulting trust.[13]

The 2024 Bill did not progress to a second reading and lapsed on 1 October 2024 on dissolution of the 57th Parliament.

The government's interim response to the report was tabled in the Legislative Assembly on 26 September 2024 by the Honourable Yvette D'Ath MP, then Attorney-General and Minister for Justice and Minister for the Prevention of Domestic and Family Violence. The interim response noted that the issues raised by the committee in its inquiry were under consideration and 'a final response to the Report will be a matter for the incoming Government to consider after the upcoming State election'.[14]

The government's final response to the report was tabled in the Legislative Assembly on 30 January 2025 by the Attorney-General. The response stated that, due to the lapsing of the 2024 Bill:

- the recommendations are not adopted
- the recommendations and issues raised in the former Housing Committee's report will be considered by the government and a bill similar to the 2024 Bill may be introduced.[15]

1.3. Committee's examination of the Bill

As foreshadowed in the government's final response, the Attorney-General subsequently introduced the Bill into the Queensland Parliament on 18 February 2025.

[13] Housing, Big Build and Manufacturing Committee, *Report No. 17, 57th Parliament – Trusts Bill 2024,* 2 August 2024, p iv.
[14] Hon Yvette D'Ath MP, correspondence, 26 September 2024.
[15] Hon Deborah (Deb) Frecklington MP, Attorney-General and Minister for Justice and Minister for Integrity, Queensland Government Response – 58th Parliament, 30 January 2025.

> *The bill [Trusts Bill 2025] I introduce today reflects the outcomes of that previous consultation, conducted by the then [D]epartment of [J]ustice and [A]ttorney-[G]eneral, and also responds to issues raised in submissions to the former committee. Importantly, the bill I introduce today will also broadly give effect to the QLRC recommendations which followed the extensive consultation process by the QLRC that I referred to earlier.*[16]
>
> ***Hon Deborah (Deb) Frecklington, Attorney-General and Minister for Justice and Minister for Integrity***
> *Introductory speech, 18 February 2025*

Given the historical development of the Bill, the committee primarily limited its examination to provisions which differ from those contained in the 2024 Bill.

Accordingly, the key issues raised during the committee's examination of the Bill[17] related to clauses including:

- clause 13 – Ability for the court to order that a person hold property on trust where they cannot be appointed as trustee
- clause 22 – Replacement of last continuing trustee with impaired capacity
- clause 44 – Renunciation of probate does not result in disclamation as trustee of further trusts established under a will
- clauses 212 to 215 – Preservation of charitable status of ancillary funds making distributions to 'eligible recipients'.

The key issues also related to differences between the Bill and the 2024 Bill:

- omission of amendments that were in the 2024 Bill to the *United Grand Lodge of Antient Free and Accepted Masons of Queensland Trustees Act 1942* regarding the Board's ability to invest moneys
- amendment to terminology regarding the exclusion of persons as trustees, from 'bankrupt' to 'insolvent under administration'
- amendment to terminology, from 'trustee of the testamentary trust' to 'trustee of the will'.

[16] Queensland Parliament, Record of Proceedings, 18 February 2025, p 61.
[17] Note that this section does not discuss all consequential, minor, or technical amendments.

Committee comment

The committee acknowledges the work of the former Housing, Big Build and Manufacturing Committee in relation to its *Report No. 17, 57th Parliament – Trusts Bill 2024,* tabled on 2 August 2024.

This committee endorses that report to the extent that the provisions of the 2024 Bill have not been amended in the current Bill considered by the committee. To that end, this report should be read in conjunction with the former committee's report which is attached at **Appendix D**.

1.3.1. *Urgency*

Under the provisions of Standing Order 137, the Legislative Assembly declared the Bill urgent and referred it to the committee for consideration with a report due by 7 March 2025.[18]

1.4. Inquiry process

During its inquiry into the Bill, the committee received and considered a variety of evidence. This included:

- 5 written submissions accepted from stakeholders
- correspondence from the Public Trustee of Queensland (Public Trustee) dated 25 February 2025
- a written briefing provided by the Department of Justice on 21 February 2025
- evidence provided by witnesses at a public hearing in Brisbane on 3 March 2025
- a public briefing provided by the Department of Justice (DoJ) in Brisbane on 3 March 2025
- all documents published by the former Housing Committee regarding its inquiry into the Trusts Bill 2024.

1.5. Legislative compliance

The committee's deliberations included assessing whether the Bill complies with the requirements for legislation as contained in the *Parliament of Queensland Act 2001*, the *Legislative Standards Act 1992* (LSA) and the *Human Rights Act 2019* (HRA).

In accordance with the scope of the committee's examination of the Bill outlined above in section 1.3, the committee's assessment of the Bill's compliance with the LSA and HRA is limited to matters raised by the Bill's provisions which differ from those raised in the 2024 Bill and not already considered in the former committee's inquiry regarding the 2024 Bill.

[18] Queensland Parliament, Record of Proceedings, 18 February 2025, p 71.

1.5.1. *Legislative Standards Act 1992*

Assessment of the Bill's compliance with the LSA identified the below issue which is analysed in Section 2 of this Report:

- the appropriateness of the delegation of legislative power in respect of the regulation-making power included in the definitions of 'eligible recipient' and 'prescribed trust' in Part 13 of the Bill.

The committee is satisfied that the explanatory notes tabled with the Bill comply with the requirements of Part 4 of the LSA. The explanatory notes contain sufficient level of information, background and commentary to facilitate understanding of the Bill's aims and origins.

1.5.2. *Human Rights Act 2019*

The committee's assessment of the Bill's compatibility with the HRA did not identify any new limitations on human rights.[19] Accordingly, the committee concluded that the Bill is compatible with human rights as defined in the HRA.

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

1.6. Should the Bill be passed?

The committee is required to determine whether or not to recommend that the Bill be passed.[20]

Recommendation 1

The committee recommends that the Bill be passed.

[19] The former Housing Committee considered potential limitations on property rights and the right to a fair hearing arising from provisions in the 2024 Bill and were satisfied that such potential limitations on human rights are demonstrably justifiable: Housing, Big Build and Manufacturing Committee, *Report No. 17, 57th Parliament – Trusts Bill 2024,* 2 August 2024, p 3.

[20] Legislative Assembly of Queensland, Standing Rules and Orders of the Legislative Assembly, standing order 132(1)(a).

2. Examination of the Bill

This section discusses key themes which were raised during the committee's examination of the Bill.

2.1. Clause 13 – Ability for the court to order that a person hold property on trust where they cannot be appointed as trustee

Clause 13(1) of the Bill outlines the categories of persons who cannot be appointed as a trustee including a child, an individual who is an insolvent under administration, a corporation that is a Chapter 5 body corporate, and a person disqualified from being appointed as trustee.

In respect of the equivalent provision in the 2024 Bill, the Society of Trust and Estate Practitioners Queensland Branch (STEP Queensland) raised concerns that the ambiguous meaning of 'appointed' may prevent a court from applying certain equitable remedies to wrongdoers:

> *For example, a wrongdoer who is a bankrupt could not be held to account by means of a remedial constructive trust. Neither could a company which is in the course of being wound up, or a person who is say 17.5 years of age who steals money and puts it in the bank.*[21]

Accordingly, the former Housing Committee recommended that consideration be given to the definition of 'appointed' for the purposes of this clause 'to ensure it does not restrict who can be deemed to hold property under a remedial constructive or resulting trust'.[22]

The Bill introduces subsection 5 to clause 13, which expressly clarifies that this does not limit the court's power to declare that a category of person noted in clause 13(1) hold property as a trustee.[23]

2.1.1. *Department advice*

The DoJ noted that the inclusion of subsection 5 in clause 13 directly responds to the concerns raised by STEP Queensland and the recommendation of the former Housing Committee.[24]

2.2. Clause 22 – Replacement of last continuing trustee with impaired capacity

Clause 22 provides the mechanism for appointment of replacement trustees where the last continuing trustee has impaired capacity.

[21] Housing, Big Build and Manufacturing Committee, *Report No. 17, 57th Parliament – Trusts Bill 2024,* 2 August 2024, p iv.
[22] Housing, Big Build and Manufacturing Committee, *Report No. 17, 57th Parliament – Trusts Bill 2024,* 2 August 2024, p 10.
[23] Trusts Bill 2025, cl 13(5).
[24] Department of Justice (DoJ), written briefing, 21 February 2025, p 3; Public briefing transcript, Brisbane, 3 March 2025, p 2.

It allows an administrator or attorney of the last continuing trustee to appoint a replacement in the following limited circumstances:

Prerequisites for the application of clause 22 (all must be satisfied)[25]	
1	The last continuing trustee of a trust is incapable of acting as trustee because the trustee has impaired capacity for administering the trust.
2	There is no appointor, or no appointor willing to act, to appoint a replacement trustee.
3	There is no other mechanism under the trust instrument to replace the trustee, or that mechanism has not taken effect within a reasonable time after the trustee became the last continuing trustee or became a person with impaired capacity.
4	The administrator or attorney for the last continuing trustee is authorised, under their appointment as administrator or attorney, to exercise power for all financial matters for the trustee.
5	There is no contrary intention in either the trust instrument or the order or instrument by which the administrator or attorney is appointed.
6	The trust is settled after commencement of the Bill.

This provision also contains the following conditions for appointment of the replacement trustee:

- One or more persons may be appointed by instrument to replace the relevant trustee with impaired capacity.[26]
- The administrator or attorney may appoint themselves as the replacement trustee.[27]
- If the relevant trustee with impaired capacity has more than one administrator or attorney, the exercise of the power to appoint a replacement trustee must be exercised jointly.[28]
- The exercise of this power of appointment is not made in the capacity of administrator or attorney for the last continuing trustee.[29]
- The *Guardianship and Administration Act 2000* (Guardianship Act) and the *Powers of Attorney Act 1998* (PoA Act) do not apply in relation to the exercise of this power of appointment.[30]

[25] Trusts Bill 2025, cls 22(1), (7); DoJ, written response to submissions, 28 February 2025, p 2.
[26] Trusts Bill 2025, cl 22(3).
[27] Trusts Bill 2025, cl 22(4).
[28] Trusts Bill 2025, cl 22(5).
[29] Trusts Bill 2025, cl 22(6)(a).
[30] Trusts Bill 2025, cl 22(6)(b).

Clause 22 of the Bill mirrors the equivalent provision in the 2024 Bill.[31] While several stakeholders raised concerns in relation to the consequences of this provision during the former Housing Committee's inquiry into the 2024 Bill, the wording of the provision was maintained.

In response to this feedback, the Attorney-General noted in her speech introducing the Bill that the *Property Law Act 2023* (set to commence on 1 August 2025) extends the maximum duration for holding property on trust from 80 years to 125 years. This increases the likelihood that a trust's last remaining trustee may become unable to administer it due to impaired capacity. She also noted that the Bill includes carefully drafted provisions which only apply in limited circumstances and are a measure of last resort, ensuring the trust can continue to be administered without the pursuance of costly court applications.[32]

Further, the Attorney-General highlighted that:

- the administrator or attorney exercising the appointment power in clause 22 will be required to do so in the best interests of the beneficiaries of the trust (as opposed to in accordance with their duties and obligations under the Guardianship Act or PoA Act), and
- the appointment power in clause 22 will only apply to trusts that are settled after the commencement of the Bill and cannot be exercised if there is a contrary intention in the trust instrument.[33]

2.2.1. *Stakeholder submissions and department advice*

i. Stakeholder submissions

The Public Advocate outlined several concerns regarding the interaction between the operation of clause 22 and the duties of administrators and attorneys under the Guardianship Act and the PoA Act.[34] These concerns included:

- the potential of a conflict arising between the duty of an administrator or attorney to act in the best interest of the incapacitated trustee and the fiduciary duty regarding the appointment of trustees in the best interest of beneficiaries of the trust
- administrators or attorneys being unaware of their responsibilities under clause 22
- who would be liable in circumstances where the decision of an administrator or attorney to appoint a replacement trustee is found to be negligent or unlawful
- limitations on the jurisdiction of the QCAT to review appointment decisions of administrators or attorneys under clause 22[35]

[31] Trusts Bill 2024, cl 22.
[32] Queensland Parliament, Record of Proceedings, 18 February 2025, p 65.
[33] Queensland Parliament, Record of Proceedings, 18 February 2025, pp 65-66.
[34] Submission 4.
[35] Submission 4, p 2.

- an attorney not being bound to comply with the conditions and wishes regarding the exercise of the appointment power outlined in an individual's enduring power of attorney document due to the express exclusion of the PoA Act[36]
- an application to the court is likely the only alternative for the appointment of a replacement trustee should the trust instrument not include such mechanism or the power proposed in clause 22 is not exercised.[37]

The Public Advocate subsequently made the following recommendation:

> *The ideal solution would be for the new trusts legislation to develop a system, including principles and a framework, specifically made to reflect the specialised nature of trusts and the appointment of trustees when a person loses capacity to act as a trustee. This proposed solution would eliminate the need to involve the Guardianship and Administration Act and the Powers of Attorney Act in the trustee appointment process.* [38]

The Public Advocate expanded on what this proposed system could include, namely 'front end' education for trust lawyers to encourage the inclusion of a mechanism in trusts instruments regarding the appointment of a replacement trustee where the last continuing trustee loses capacity. This would remove the need for the administrator or attorney to rely on clause 22 in respect of exercise of their appointment power.[39]

The Queensland Law Society (QLS) noted in its submission that power conferred on administrators and attorneys under clause 22 was discretionary in nature, which meant that where that power is not exercised, or cannot be exercised if one of the preconditions of the clause is not met, the trust will remain unprotected and without a trustee until a replacement trustee is appointed by court order.[40]

STEP Queensland also emphasised its concerns that 'the proposed amendments expose vulnerable persons and vulnerable trusts to significant risk without any court oversight'.[41]

ii. Department advice

The DoJ noted the various issues raised by the Public Advocate in respect of the relationship between duties of administrators and attorneys and their obligations to appoint a replacement trustee in accordance with clause 22 of the Bill. In particular, the DoJ highlighted that clause 22(6) of the Bill expressly excludes the application of the Guardianship Act and the PoA Act for appointment decisions made under this clause and so:

[36] Public hearing transcript, Brisbane, 3 March 2025, p 4.
[37] Public hearing transcript, Brisbane, 3 March 2025, p 3; Public Advocate, correspondence, 4 March 2025, p 1.
[38] Submission 4, p 3.
[39] Public hearing transcripts, Brisbane, 3 March 2025, pp 3-4; Public Advocate, correspondence, 4 March 2025, p 1.
[40] Submission 5, p 3.
[41] Submission 3, p 1.

- concerns regarding a potential conflict would be minimised
- when exercising the appointment power, the administrator or attorney would be obliged to act in the best interest of the beneficiaries of the trust
- if there is dispute regarding the proper discharge of this obligation, an application would need to be made to the Supreme or District Court, being the appropriate jurisdiction for a trusts matter (as opposed to personal financial matter concerning the impaired trustee where the jurisdiction of QCAT would apply)
- the Bill does not authorise a person to apply to QCAT under the Guardianship Act for the purpose of having a new trustee appointed under this clause.[42]

The DoJ also highlighted that clause 22 would only apply to trusts that are settled after commencement of the provision and so a settlor of a trust would have the opportunity to consider whether a mechanism regarding the appointment of replacement trustees ought to be provided for in the trusts instrument (as opposed to a reliance on clause 22).[43]

In response to the concerns raised by STEP Queensland regarding the risks that may be posed to vulnerable persons and trusts due to the replacement trustee mechanism, the DoJ noted:

- the limited circumstances in which the power of appointment can be exercised under clause 22
- where there is a dispute regarding an administrator's or attorney's exercise of the appointment power under clause 22, an application to the court can be made
- the inclusion of clause 22 was 'expressly recommended by the QLRC in the Interim and Final Report'.[44]

2.2.2. *Omission of provisions in the 2024 Bill vesting trust property in Public Trustee where last continuing trustee has impaired capacity*

The 2024 Bill contained provisions[45] which provided for trust property to vest in the Public Trustee in circumstances where the last continuing trustee had been declared by a court to have impaired capacity for all financial matters, or for administering the trust until a new trustee was appointed.[46]

The Public Trustee noted in its submission to the former Housing Committee that this division failed to contemplate what would occur if such a declaration of impairment was revoked –

[42] DoJ, written response to submissions, 28 February 2025, p 3.
[43] Public briefing transcript, Brisbane, 3 March 2025, p 7.
[44] DoJ, written response to submissions, 28 February 2025, pp 2-3.
[45] Part 3, division 8.
[46] Housing, Big Build and Manufacturing Committee, *Report No. 17, 57th Parliament – Trusts Bill 2024,* 2 August 2024, p 12.

noting that the incapacity of a person may only be temporary.[47] The Public Trustee also highlighted their wish not to be involved unnecessarily in the private affairs of Queenslanders.[48]

The former Housing Committee's report stated that the then Department of Justice and Attorney-General was considering the amendments proposed by the Public Trustee in relation to the operation of this division.[49]

In response to the Public Trustee's concerns, the 2025 Bill does not include equivalent provisions.[50]

2.2.2.1. Stakeholder submissions and department advice

i. Stakeholder submissions

The Public Trustee acknowledged that their concerns raised in respect of the 2024 Bill have been addressed through the removal of this division in the Bill.[51]

However, the QLS recommended:

- at first instance, the reinstatement of this division 'with an additional mechanism to revest the trust assets in the last remaining trustee if they regain capacity'
- where the division was not reinstated, 'consider putting in place other mechanisms to address the risk'.[52]

The QLS contended that inclusion of this type of mechanism would be 'protective' in instances where the power to appoint a replacement trustee in accordance with clause 22 is not exercised, leaving the trust unprotected.[53] In these situations, a beneficiary may be required to make a court application for the appointment of a replacement trustee which may cause issues for trusts which have limited funds.[54]

The Public Advocate also voiced its support for the reinstatement of this mechanism on the proviso that a mechanism is included that allows for the trust property to revest in the trustee should they regain capacity (in response to the Public Trustee's concerns).[55]

[47] Public Trustee of Queensland (Public Trustee), submission 4 (2024 Bill), p 1.
[48] Public Trustee, tabled paper (2024 Bill), 10 July 2024, p 5.
[49] Housing, Big Build and Manufacturing Committee, *Report No. 17, 57th Parliament – Trusts Bill 2024,* 2 August 2024, p 22.
[50] DoJ, written briefing, 21 February 2025, p 3.
[51] Public Trustee, correspondence, 25 February 2025.
[52] Submission 5, p 3.
[53] Submission 5, p 3.
[54] Public hearing transcript, Brisbane, 3 March 2025, p 6.
[55] Public hearing transcript, Brisbane, 3 March 2025, p 3; Public Advocate, correspondence, 4 March 2025, p 1.

ii. Department advice

In addressing the recommendation of the QLS, the DoJ cited the following remarks made by the Attorney-General on introduction of the Bill:[56]

> *... the bill I introduce today avoids a situation where property might vest in the Public Trustee during a period of temporary incapacity that would then require that the trust property be divested from the Public Trustee should that temporary incapacity end. It also avoids having to suspend the incapacitated trustee's powers during the period of incapacity or discharge the incapacitated trustee during that period. Instead, the current law will continue to apply in this situation, meaning that unless there is a mechanism in the trust instrument or some other trustee replacement power in the bill can be used such as under clause 22 of the bill—which allows an administrator or attorney for the last continuing trustee with impaired capacity to replace that trustee in limited circumstances—an application to the court will be required to replace the last continuing trustee with incapacity to administer the trust.*[57]

The DoJ noted that the original inclusion of the 'automatic' vesting provision for the Public Trustee was in the tenor of the QLRC's recommendations, that is, making 'administrative savings and court savings'. However, following receipt of feedback from the Public Trustee, it was noted that this proposed solution to protect trust property on the incapacity of the last trustee may have been more complex than retaining the status quo.[58] These potential unintended consequences were articulated by the DoJ:

> *The question was: if we had that provision in the bill and the property vested in the Public Trustee, at what point does it divest from the Public Trustee and back in that last trustee? If they have limited capacity, is that enough and how would you determine that? Do you say, 'Okay, they don't have a financial administrator for all financial matters anymore and they have some limited capacity'? Again, is that enough and do you start running into tests? How do we define if somebody has capacity, and what if capacity comes and goes? Are you vesting and divesting repeatedly? That could create some uncertainty for people dealing with the trust or with the property.*[59]

Accordingly, the current law is maintained in the Bill whereby if the last continuing trustee loses capacity and a replacement trustee cannot (or was not) appointed in accordance with the trust instrument or clause 22, a beneficiary of the trust would be required to make an application to the court for an order replacing that trustee.[60]

[56] DoJ, written response to submissions, 28 February 2025, p 4.
[57] Queensland Parliament, Record of Proceedings, 18 February 2025, p 64.
[58] Public briefing transcript, Brisbane, 3 March 2025, pp 6-7.
[59] Public briefing transcript, Brisbane, 3 March 2025, p 5.
[60] Public briefing transcript, Brisbane, 3 March 2025, p 4.

2.3. Clause 44 – Renunciation of probate does not result in disclamation as trustee of further trusts established under a will

Where an individual is executor of a deceased person's estate, they are also effectively trustee of a bare trust (being the estate) administering the estate on behalf of its beneficiaries.[61]

Accordingly, where the executor of the estate is required to obtain probate of the will and does not do so (or renounces probate of the will), section 18 of the Trusts Act provides that this action is also 'deemed to be a disclaimer of the trust contained in the will'.

To modernise this section,[62] the 2024 Bill and current Bill contained a new provision to deal with this issue. A comparison of the current Bill as against the 2024 Bill is contained in the below table (with key amendments underlined for emphasis).

Clause 49 – Trusts Bill 2024	*Clause 44 – Trusts Bill 2025*
(1) This section applies if a person who is appointed by will as both executor of the will and trustee— (a) renounces probate of the will; or (b) fails to apply for probate of the will after being properly cited or summoned to apply. (2) The renunciation or failure is taken to be a disclaimer by the person of the trust contained in the will.	(1) This section applies if— (a) a person is appointed as both executor and trustee <u>of a will</u>; and (b) the person— (i) renounces probate of the will; or (ii) fails to apply for probate of the will after being properly cited or summoned to apply. (2) The person's renunciation or failure is taken to be a disclaimer by the person of the trust <u>of the will</u>. (3) <u>To remove any doubt, it is declared that subsection (2) does not affect any express trust established under the will.</u>

The amendments made, particularly the insertion of subsection 3, responded to concerns raised by the QLS in the former Housing Committee's inquiry.[63]

[61] Queensland Law Society (QLS), public hearing transcript, 10 July 2024, p 10.
[62] In particular, to clarify which trust the executor is deemed to have disclaimed their interest in on renunciation of probate.
[63] DoJ, written briefing, 21 February 2025, p 6.

At the time, the QLS noted that while renunciation of probate should also result in renunciation of trusteeship of the bare trust, this should not impact a person's interest in further testamentary trusts created under the will.[64]

2.3.1. *Stakeholder submissions and department advice*

i. Stakeholder submissions

While the QLS acknowledged that the amendments made to clause 44 in the Bill responded to its feedback, it proposed that wording it previously recommended to the then Department of Justice and Attorney-General 'is clearer than the current drafting'. The relevant wording is extracted below with amendments noted in underline and strikethrough:[65]

QLS – Proposed amendments to Clause 49

(1) This section applies if—

(a) a person is appointed as both executor and trustee of a will; and

(b) the person—

(i) renounces probate of the will; or

(ii) fails to apply for probate of the will after being properly cited or summoned to apply.

(2) The person's renunciation or failure is taken to be a disclaimer by the person of the trust ~~of the will~~ <u>for the estate</u>.

(3) To remove any doubt, it is declared that subsection (2) ~~does not affect any express~~ <u>is not taken to be a disclaimer of any separate testamentary</u> trust established under the will<u>, unless specifically stated in the renunciation or citation</u>.

In respect of subsection 3, the QLS submitted that the inclusion of the words 'unless specifically stated' enables trustees to renounce their trusteeship of trusts established under the will at the same time as renouncement of probate to avoid the need for 2 separate documents to be produced to give effect to this intention.[66]

ii. Department advice

At the public briefing, the DoJ acknowledged the amendments to clause 44 proposed by the QLS aligned with the intent of the provision being to allow a person to simultaneously renounce probate and trusteeship of the will without disclaiming additional testamentary trusts arising from the will. It was noted that this clause was not intended to cause further

[64] Housing, Big Build and Manufacturing Committee, *Report No. 17, 57th Parliament – Trusts Bill 2024,* 2 August 2024, p 22.
[65] Submission 5, p 2.
[66] Submission 5, p 2; Public hearing transcript, Brisbane, 3 March 2025, p 5.

administrative burden and, based on the current drafting, it was the view of the DoJ that the use of one document to express the wish of the executor was not expressly prohibited.[67]

However, the DoJ advised it will consider the issues raised by the QLS and 'whether what we have in the bill now has the effect that they [QLS] said it has'.[68]

Committee comment

The committee notes that the DoJ will consider the amendments to clause 44 proposed by the QLS.

2.4. Clauses 212 to 215 – Preservation of charitable status of ancillary funds making distributions to 'eligible recipients'

In accordance with sections 108 and 109 the Trusts Act, particular trusts, including ancillary funds, can make distributions to eligible recipients. These recipients can include deductible gift recipients (DGRs) under the *Income Tax Assessment Act 1997* (Cth) (ITA Act) whether or not the DGR is a charity or otherwise established for a charitable purpose.[69]

Due to changes in the Commonwealth deductible gift recipient framework under ITA Act,[70] the Bill includes updated provisions to reflect the current federal taxation framework.

The Bill proposes to:

- allow a 'prescribed trust' to include an express power in its establishing instrument to distribute money, property or benefits to an 'eligible recipient'[71]
- empower a 'prescribed trust' to distribute money, property or benefits to an 'eligible recipient' where its establishing instrument does not include such provision.[72]

Equivalent provisions were also proposed in the 2024 Bill, albeit with different definitions of 'prescribed trust' and 'eligible recipient'.[73]

In the former Housing Committee's inquiry into the 2024 Bill, the QLS raised concerns that the definition of 'eligible recipient' may inadvertently exclude some ancillary funds from designation as a charitable trust where gifts have been made, or continue to be made, to an entity that does not fall within the definition of 'eligible recipient'.[74] It was highlighted that the

[67] Public briefing transcript, Brisbane, 3 March 2025, p 4.
[68] DoJ, written response to submissions, 28 February 2025, p 4; Public briefing transcript, Brisbane, 3 March 2025, p 4.
[69] Trust Act, s 107 (definition of 'eligible recipient').
[70] Housing, Big Build and Manufacturing Committee, *Report No. 17, 57th Parliament – Trusts Bill 2024,* 2 August 2024, p 30.
[71] Trusts Bill 2025, cl 213.
[72] Trusts Bill 2025, cl 214.
[73] Trusts Bill 2024, cls 219, 220.
[74] QLS, answers to questions on notice (Trusts Bill 2024), pp 3-4.

preservation of the charitable status of ancillary funds would be consistent with the operation of the federal legislative framework for charitable trusts.[75]

The former Housing Committee's report stated that the then Department of Justice and Attorney-General was considering the feedback from the QLS 'regarding federal and other state approaches to ancillary funds and whether amendments to the Trusts Bill 2024 are appropriate to avoid potential unintended consequences'.[76]

Following additional consultation with the QLS, the definitions of 'prescribed trust' and 'eligible recipient' proposed in the current Bill include a regulation-making power.[77] The DoJ noted its reasoning for inclusion of such powers as follows:

> *This will ensure that if certain ancillary funds can legally (i.e. without compromising their charitable status under Commonwealth legislation) make distributions to certain DGRs that are not captured by the definition of eligible recipient in the Bill, those DGRs can be prescribed and brought within scope of the provisions.* [78]

2.4.1. *Stakeholder submissions and department advice*

i. Stakeholder submissions

The QLS identified the following practical implications that may arise from the current drafting of clauses 212 to 215 of the Bill:

- In respect to the definition of 'prescribed trust' which is defined as both a trust that is 'established and maintained for charitable or philanthropic purposes' and 'is of a class prescribed by regulation', clear drafting and further consultation are required to accurately reflect the trusts intended to be captured by this definition.
- There is a risk that the regulations contemplated in the definitions 'could be stalled or may never gain the administrative support within the government of the day to make the regulation', leading to uncertainty.
- The current drafting is complex which will require trustees of particular funds (and their advisors) to carefully monitor the status of non-charitable DGRs who receive distributions to avoid adverse impacts on the tax status of the fund.[79]

At the public hearing, the QLS highlighted there are currently 34 former income tax exempt funds based in Queensland that likely to be impacted by these provisions.[80] The QLS noted

[75] Housing, Big Build and Manufacturing Committee, *Report No. 17, 57th Parliament – Trusts Bill 2024,* 2 August 2024, p 31.
[76] Housing, Big Build and Manufacturing Committee, *Report No. 17, 57th Parliament – Trusts Bill 2024,* 2 August 2024, p 32.
[77] Queensland Parliament, Record of Proceedings, 18 February 2025, p 64.
[78] DoJ, written briefing, 21 February 2025, p 4.
[79] Submission 5, pp 3-4.
[80] This is based on publicly available data from the Australian Charities and Not-for-profits Commission: Public hearing transcript, Brisbane, 3 March 2025, p 6.

that the UQ Endowment Fund and the Charitable Works Fund of the Roman Catholic Archdiocese of Brisbane were relevant examples.[81]

Based on the current version of clauses 212 to 215, the QLS noted that it was not immediately clear that the charitable status of such funds would be specifically preserved in Queensland legislation, despite being captured Commonwealth legislation.[82]

Accordingly, the QLS recommended that:

- the drafting of sections 51-53 of the *Charitable Trusts Act 2022* (WA) is adopted in the Bill to ameliorate these issues given these provisions preserve the status of such funds within the primary legislation (as opposed to via regulation),[83] or
- if the current drafting remains, guidance is provided in the explanatory notes, and further consultation is undertaken with charitable sector stakeholders regarding any regulations which prescribe the entities defined to be 'prescribed trusts' and 'eligible recipients'.[84]

ii. Department advice

In response to the concerns raised by the QLS, the DoJ noted:

- The intention of clauses 212 to 215 is to be consistent with Commonwealth legislation.
- It will give further consideration to the practical implications arising from the current drafting of clauses 212 to 215.
- There will be a 'generous lead time' prior to the commencement of these clauses to ensure professional advisors are prepared for such changes and prescribing regulations are ready to commence at the same time as the new legislation.[85]

In respect of the recommendation of the QLS that the provisions of the *Charitable Trusts Act 2022* (WA) be adopted in the Bill, the DoJ noted that the intent of the WA provisions is not immediately clear and may go beyond the scope contemplated by the Commonwealth legislation by automatically deeming a fund to be 'charitable'. As an alternative, the mechanism provided in the Bill would allow entities to be brought 'into the provisions if it is necessary' by regulation.[86]

The DoJ also noted at the public briefing that it intends to consult with key stakeholders, including the QLS, regarding the preparation of the prescribing regulations.[87]

[81] Public hearing transcript, Brisbane, 3 March 2025, p 6.
[82] Public hearing transcript, Brisbane, 3 March 2025, p 7.
[83] Submission 5, p 3; Public hearing transcript, Brisbane, 3 March 2025, p 7.
[84] Submission 5, p 4; Public hearing transcript, Brisbane, 3 March 2025, p 5.
[85] DoJ, written response to submissions, 28 February 2025, pp 4-5.
[86] Public briefing transcript, Brisbane, 3 March 2025, p 5.
[87] Public briefing transcript, Brisbane, 3 March 2025, p 6.

Committee comment

The committee notes that the DoJ intends to consider the practical concerns raised by the QLS regarding the operation of clauses 212 to 215.

Accordingly, the committee encourages further dialogue between the DoJ and relevant stakeholders to best address these issues to achieve the policy intent of the provisions in a way that is both clear and workable for those administering trusts and their advisors.

2.4.2. *Consistency with fundamental legislative principles*

As discussed above in section 2.4, the definitions relevant to clauses 212 to 215 rely on certain matters being prescribed by regulation.

For a Bill to have sufficient regard to the institution of Parliament, it must allow the delegation of legislative power only in appropriate cases and to appropriate persons.[88]

Although the explanatory notes do not address the amendments to clauses 212 to 215 in terms of their consistency with fundamental legislative principles, the following background is provided:

> *Part 13 of the Bill was not included in the QLRC's … review but is necessary because of Commonwealth legislation that came into effect in 2014 which deemed certain ancillary funds to be charitable. The provisions in part 13 of the Bill are informed by recent amendments to the* Charitable Trusts Act 2022 *(WA).* [89]

Further, the DoJ noted the inclusion of the regulation-making power was to:

> *… ensure that if certain ancillary funds can legally (i.e. without compromising their charitable status under Commonwealth legislation) make distributions to certain DGRs that are not captured by the definition of eligible recipient in the Bill, those DGRs can be prescribed and brought within scope of the provisions.* [90]

As noted above, the DoJ intends to undertake further consultation with key stakeholders to develop the prescribing regulations.[91]

Committee comment

In light of the evidence provided by the DoJ regarding its intention to consult with key stakeholders regarding the preparation of the prescribing provisions, and the limited scope of their application, the committee is satisfied that the proposed definitions are appropriate and have sufficient regard to the institution of Parliament, such that they are consistent with fundamental legislative principles.

[88] LSA, s 4(4)(a).
[89] Trusts Bill 2025, explanatory notes, p 24.
[90] DoJ, written briefing, 21 February 2025, p 4.
[91] Public briefing transcript, Brisbane, 3 March 2025, p 6.

2.5. Omission of amendments in the 2024 Bill to the *United Grand Lodge of Antient Free and Accepted Masons of Queensland Trustees Act 1942* regarding ability to invest moneys

The 2024 Bill contained amendments to the *United Grand Lodge of Antient Free and Accepted Masons of Queensland Trustees Act 1942* (Masons Act) which allowed the Board of Benevolence (Board) to invest moneys held on trust in accordance with powers and authorisation conferred by the new Trusts Act.[92]

The United Grand Lodge of Antient Free and Accepted Masons of Queensland (Grand Lodge) submitted that the amendment proposed in the 2024 Bill did not contemplate the internal requirement for the Board to obtain Grand Lodge approval prior to making such investments. As a result, this amendment would have the unintended consequence of conferring a level of independence on the Board to make investments which went beyond that provided in the constitutional arrangements of the Board and the Grand Lodge.[93]

The former Housing Committee noted in its report that the then Department of Justice and Attorney-General was considering the impact of such amendments in light of the submitter's comments.[94]

Accordingly, the Bill does not contain the relevant amendments to the Masons Act in response to the concerns raised.[95]

2.5.1. *Stakeholder submission*

In its submission, the Grand Lodge advised approvingly that their concerns raised in respect of the 2024 Bill have been addressed in the preparation of the Bill.[96]

2.6. Amendment to terminology in 2024 Bill regarding exclusion of persons as trustees, from 'bankrupt' to 'insolvent under administration'

As noted above in section 2.1, clause 13(1) of the Bill provides that 'an individual who is insolvent under administration' cannot be appointed as a trustee of a trust.[97]

A similar provision was also included in the 2024 Bill. It proposed to exclude 'an individual who is a bankrupt, or is taking advantage of the laws of bankruptcy as a debtor, under the *Bankruptcy Act 1966* (Cwlth) or a similar law of a foreign jurisdiction' from appointment as a trustee.[98]

[92] Trusts Bill 2024, cls 346-347; Housing, Big Build and Manufacturing Committee, *Report No. 17, 57th Parliament – Trusts Bill 2024,* 2 August 2024, p 37.
[93] Submission 2 (2024 Bill), p 1.
[94] Trusts Bill 2024, cls 346-347; Housing, Big Build and Manufacturing Committee, *Report No. 17, 57th Parliament – Trusts Bill 2024,* 2 August 2024, p 38.
[95] DoJ, written briefing, 21 February 2025, p 3.
[96] Submission 2.
[97] Trusts Bill 2025, cl 13(1)(b).
[98] Trusts Bill 2024, cl 13(1)(b).

This change in the terminology from 'bankrupt' to 'insolvent under administration' is also reflected in clauses 20,[99] 23,[100] 102[101] and 228[102] of the Bill.

2.6.1. *Department advice*

In respect of this change in terminology, the DoJ noted that this was a 'minor and technical' amendment to improve readability and consistency:

> *For example, the lapsed Bill used the phrase 'a bankrupt or is taking advantage of the laws of bankruptcy as a debtor under the* Bankruptcy Act 1966 *(Cwlth) of a similar law of a foreign jurisdiction'. In the Bill, the phrase 'an insolvent under administration' is used instead, which is a defined term under the* Acts Interpretation Act 1954 *defined by reference to the* Corporations Act 2001 *(Cth) and means the same thing.*[103]

2.7. Amendment to terminology in the 2024 Bill, from 'trustee of the testamentary trust' to 'trustee of the will'

Clause 45 of the Bill provides for the circumstances where a grantee under letters of administration will be taken to be trustee of the will.

A similar provision was also included in the 2024 Bill in respect of circumstances where a grantee under letters of administration would be taken to be trustee of the testamentary trust.[104]

This change in terminology from 'trustee of the testamentary trust' to 'trustee of the will' is also reflected in clauses 44[105] and 239[106] of the Bill.

The change appears to revert to the terminology used in the equivalent provision contained in the current Trusts Act which notes that the person who obtains the grant of letters of administration 'shall … be deemed to be appointed trustee of the will in the place of the person who was appointed by the will' (emphasis added).[107]

[99] Appointment of trustees – replacement of trustee in particular circumstances: Trusts Bill 2025, cl 20.
[100] Appointment of trustees – replacement of last continuing trustee who is insolvent under administration: Trusts Bill 2025, cl 23.
[101] Revocation by delegate: Trusts Bill 2025, cl 102.
[102] Appointment of trustees – replacement of last continuing trustee with impaired capacity or who is insolvent under administration: Trusts Bill 2025, cl 228.
[103] Department of Justice, written briefing, 21 February 2025, p 4.
[104] Trusts Bill 2024, cl 50.
[105] Disclaimer of trust of will on renunciation of probate or failure to apply: Trusts Bill 2025, cl 44.
[106] When grantee under letters of administration taken to be trustee of will: Trusts Bill 2025, cl 239.
[107] Trusts Act, s 18(2).

Appendix A – Submitters

Sub No.	Name / Organisation
1	Ann Marshall
2	The United Grand Lodge of Antient Free and Accepted Masons of Queensland
3	Society of Trusts and Estate Practitioners (STEP) Queensland Branch
4	The Public Advocate
5	Queensland Law Society

Appendix B – Public Briefing, 3 March 2025

Department of Justice

Leanne Robertson	Assistant Director-General, Strategic Policy and Legislation, Justice Policy and Reform
Leighton Kraa	Director, Strategic Policy and Legislation, Justice Policy and Reform
Riccardo Rivera	Principal Legal Officer, Policy and Legislation, Justice Policy and Reform

Appendix C – Witnesses at Public Hearing, 3 March 2025

Queensland Law Society

Wendy Devine	Manager, Legal Policy
Angela Cornford-Scott	Chair, QLS Succession Law Committee
Jessica Lipsett	QLS Not for Profit Law Committee

The Public Advocate

Dr John Chesterman	Public Advocate
Yuu Matsuyama	Senior Legal Officer

Appendix D – Housing, Big Build and Manufacturing Committee, Report No. 17, 57th Parliament – Trusts Bill 2024

Parliamentary Committees



Trusts Bill 2024

Report No. 17, 57th Parliament
Housing, Big Build and Manufacturing Committee
August 2024

Housing, Big Build and Manufacturing Committee

Chair	Mr Chris Whiting MP, Member for Bancroft
Deputy Chair	Mr Jim McDonald MP, Member for Lockyer
Members	Mr Don Brown MP, Member for Capalaba
	Mr Michael Hart MP, Member for Burleigh
	Mr Robbie Katter MP, Member for Traeger
	Mr Tom Smith MP, Member for Bundaberg

Committee Secretariat	
Telephone	+61 7 3553 6662
Email	hbbmc@parliament.qld.gov.au
Technical Scrutiny Secretariat	+61 7 3553 6601
Committee webpage	www.parliament.qld.gov.au/hbbmc

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

Contents

Chair's foreword

This report presents a summary of the Housing, Big Build and Manufacturing Committee's examination of the Trusts Bill 2024.

The Bill aims to replace the *Trusts Act 1973* with new, modernised and simplified trusts legislation. It is based on the draft Bill prepared by the Queensland Law Reform Commission and incorporates feedback from targeted stakeholders.

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*.

The committee has recommended that the Bill be passed. The committee has also made one recommendation that the Department of Justice and Attorney-General consider including a definition for 'appoint' in the Bill to ensure that it does not restrict who can be deemed to hold property under a remedial constructive or resulting trust.

On behalf of the committee, I thank those individuals and organisations who made written submissions on the Bill and attended the public hearing. I also thank our Parliamentary Service staff and the secretariat.

The committee would also like to acknowledge the many years of detailed analysis and development by the stakeholders who were responsible for the drafting and creation of the Bill, including the Queensland Law Reform Commission, the Department of Justice and Attorney-General and key non-government stakeholders, along with peak bodies in the trust and legal industry.

I commend this report to the House.

Chris Whiting MP

Chair

Recommendations

Executive summary

On 21 May 2024, Hon Yvette D'Ath MP, Attorney-General and Minister for Justice and Minister for the Prevention of Domestic and Family Violence, introduced the Trusts Bill 2024 (the Bill) into the Queensland Parliament. The Bill was referred to the Housing, Big Build and Manufacturing Committee for detailed consideration.

The Bill aims to replace the *Trusts Act 1973* (the Act) with new, modernised and simplified trusts legislation, and introduce new or substantially changed provisions which streamline the legislation to meet modern needs and address existing gaps in the Act. The Bill is drafted broadly in accordance with the recommendations of the Queensland Law Reform Commission in its review of the Act.

The committee received 5 submissions on the Bill. A public briefing was held on 10 June 2024 with representatives from the Department of Justice and Attorney-General, and a public hearing was held on 10 July 2024 in Brisbane.

The key issues raised during the committee's examination of the Bill included:

- definitions of 'trust' and 'appointed'
- appointment of additional trustees
- the Bill's alignment with current legislation
- trustees with impaired capacity
- trustees who regain capacity
- the minimum trustee requirement
- obligation on trustees to keep accounts and other records
- the amendment of an Act by subordinate legislation.

The committee also identified and considered issues of fundamental legislative principle in the Bill and is satisfied that sufficient regard has been given to the rights and liberties of individuals and the institution of Parliament.

Having considered the compatibility of the Bill with human rights, including issues raised by submitters, and the justifications provided in the statement of compatibility, the committee is also satisfied that the Bill is compatible with human rights in accordance with the *Human Rights Act 2019.*

The committee makes 2 recommendations: that the Bill be passed by the Legislative Assembly, and that the Department of Justice and Attorney-General considers including a definition for 'appoint' in the Trusts Bill 2024 to ensure it does not restrict who can be deemed to hold property under a remedial constructive or resulting trust.

1 Introduction

1.1 Policy objectives of the Bill

On 21 May 2024, Hon Yvette D'Ath MP, Attorney-General and Minister for Justice and Minister for the Prevention of Domestic and Family Violence, introduced the Trusts Bill 2024 (the Bill) into the Queensland Parliament. The Bill was referred to the Housing, Big Build and Manufacturing Committee for detailed consideration.

The Bill aims to replace the *Trusts Act 1973* (the Act) with new, modernised and simplified trusts legislation, and introduce new or substantially changed provisions which streamline the legislation to meet modern needs and address existing gaps in the Act.[1] The Bill is drafted broadly in accordance with the recommendations of the Queensland Law Reform Commission (QLRC) in its review of the Act.[2]

The objectives of the Bill are to:

- repeal provisions of the Act that are now obsolete or no longer appropriate in modern trusts legislation, or that confer powers that are no longer needed in light of the new provisions of the Bill.
- streamline the legislation, meet modern needs and address existing gaps in the Act including:
    - to state trustees' management powers and minimum or core duties
    - grant new powers to trustees to delegate
    - modernise the capital amount which may be applied for maintenance, education or advancement of a beneficiary by a trustee
    - simplify the administration of trusts by granting a power of appointment to the administrator or attorney of the last continuing trustee with impaired capacity
    - grant power to the Attorney-General to consider and determine certain cy pres[3] applications
    - confer additional statutory powers on courts to address existing gaps.
- streamline the law with respect to deciding disputes in relation to the administration of trusts, especially for matters involving lower monetary values, including cy pres schemes.[4]

1.2 Queensland Law Reform Commission Review

From January 2012 to December 2013, the QLRC conducted a full review of the Act which included publication of a Discussion Paper, an Interim Report with recommendations and a final report - *A review of the Trusts Act 1973* - Report No. 71[5] (Final Report) with a draft Bill.

1 Explanatory notes, p 1.

2 Explanatory notes, p 1.

3 'cy pres' means 'as near as possible' – under the *Trusts Act 1973* the Supreme Court of Queensland has the power to make orders to vary the provision of a charitable trust where the original purposes of the trust: have been fulfilled; can no longer be carried out; or cannot be carried out according to the directions given and in the spirit of the trust. Thynne & Macartney, *What is a cy pres order?*

4 Explanatory notes, pp 1-2.

5 QLRC, *A review of the Trusts Act 1973* (Report No. 71 December 2013).

The QLRC's review:

- examined whether the Act provided an adequate, effective and comprehensive framework for the regulation of trusts (including charitable trusts) in Queensland
- identified opportunities for the Act to be modernised, simplified, clarified or updated
- ascertained whether any other relevant state legislation pertaining to the law of trusts should be amended for consistency with, or as a consequence of, any recommended amendments to the Act
- recommended streamlining the law with respect to deciding disputes in relation to the terms of the administration of trusts, including the appropriate court or tribunal which is to have jurisdiction over less complex matters and disputes involving lower monetary values.[6]

The explanatory notes to the Bill state that the QLRC's review involved a comprehensive and independent review of the Act, considered equivalent provisions in other jurisdictions, and undertook substantial consultation with a wide range of stakeholders who were generally supportive of the QLRC's recommendations.[7]

1.3 Legislative scrutiny

Committee deliberations included assessing whether the Bill complies with the Parliament's requirements for legislation as contained in the *Parliament of Queensland Act 2001*, *Legislative Standards Act 1992* (LSA) and the *Human Rights Act 2019* (HRA).

1.3.1 *Legislative Standards Act 1992*

Fundamental legislative principles (FLPs) require that legislation has sufficient regard to the rights and liberties of individuals and the institution of Parliament.[8]

The committee's assessment of the Bill's compliance with the LSA included consideration of FLPs which are the principles relating to legislation that underlie a parliamentary democracy based on the rule of law.

The committee considered the following FLPs:

- Rights and liberties of individuals
    - The Bill proposes a range of transitional and validation provisions that have retrospective, potentially adverse, application.
- Sufficient regard to the institution of Parliament
    - The Bill raises issues relating to amendment of an Act only by another Act.

Relevant considerations of FLPs are discussed throughout this report.

6 Explanatory notes, p 1.

7 Explanatory notes, p 1.

8 LSA, s 4(2).

Committee comment

The committee is satisfied that the Bill has sufficient regard to the rights and liberties of individuals and the institution of Parliament.

Part 4 of the *Legislative Standards Act 1992* 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.

The committee is satisfied that the explanatory notes tabled with the Bill 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.

1.3.2 *Human Rights Act 2019*

A law is compatible with human rights if it does not limit a human right or limits a human right only to the extent that is reasonable and demonstrably justifiable.[9]

The committee's assessment of the Bill's compatibility with the HRA considered the potential issues and limitation on human rights:

- Property rights (HRA s 24(1)(2))
- Fair hearing (HRA s 31(1))

Any potential limitation of property rights under the Bill appears to be for the purpose of protecting the rights of others and in meeting community expectations regarding the operation of the law of trusts in contemporary society.

Any potential limitation on rights to a fair hearing in civil proceedings would appear to be for the purpose of the protection of the rights of others and increasing efficiency and reducing costs related to the administration of trusts in Queensland. Any such limitation would also therefore appear to be consistent with a free and democratic society based on human dignity, equality and freedom.

Committee comment

The committee is satisfied that any potential limitations on human rights proposed by the Bill are demonstrably justified.

A statement of compatibility was tabled with the introduction of the Bill as required by section 38 of the *Human Rights Act 2019*. The committee considered the statement of compatibility contained a sufficient level of information to facilitate understanding of the Bill in relation to its compatibility with human rights.

1.4 Should the Bill be passed?

The committee is required to determine whether or not to recommend that the Bill be passed.

Recommendation 1

The committee recommends the Trusts Bill 2024 be passed.

[9] *Human Rights Act 2019*, s 8.

2 Examination of the Bill

This section discusses key issues raised during the committee's examination of the Bill. It does not discuss all consequential, minor or technical amendments.

2.1 Background

The *Trusts Act 1973* (the Act) does not codify the law of trusts but rather supplements the efficient administration of trusts. It confers powers on trustees that might be lacking under the trust instrument, provides for replacement of the trustees where not otherwise provided for or able to give effect to under the trust instrument, and ensures that the court has appropriate wide powers to supervise the administration of trusts.[10]

The Act governs many aspects of trusts law including:

- providing mechanisms for the appointment and removal of trustees and the vesting of property when trustees are appointed or removed without the need for a court order
- providing trustees with power to invest trust assets
- providing trustees with general powers to administer the trust
- providing certain powers for trustees to distribute or accumulate income and capital of a trust including for maintenance, education and advancement
- providing protections and indemnities for trustees
- granting powers to the court to ensure the efficient administration of trusts
- granting the court the power to order a scheme that applies property of a charitable trust cy pres
- granting power to deal with gifts made by prescribed trusts for philanthropic purposes.[11]

The Act commenced in 1973 and, aside from significant changes to investment powers that were introduced by the *Trusts (Investments) Amendment Act 1999*, it has not been substantially amended since its commencement.[12]

The Department of Justice and Attorney-General (the department) stated that the Bill aims to replace the Act with modern legislation, drafted in accordance with contemporary drafting practice and using plain English to simplify, streamline and modernise Queensland's trust legislation. The department advised that the Bill reflects modern societal standards and provides for the cost-effective and efficient administration of trusts in Queensland.[13]

2.1.1 Consultation and implementation

The department consulted with key government and non-government stakeholders across a range of sectors that either have direct involvement with, or an interest in, trusts law in Queensland. The department stated that targeted stakeholder consultation was also undertaken with peak bodies in the trust and legal industry; public consultation was then undertaken on an exposure draft bill. The results of this consultation were considered in settling the provisions of this Bill.[14]

10 DJAG, briefing paper, p 1.

11 DJAG, briefing paper, p 1.

12 DJAG, briefing paper, p 1.

13 DJAG, briefing paper, p 1.

14 Explanatory notes, p 36.

The department stated that if the Bill is passed, it will continue to work with these stakeholders to prepare for implementation of the Bill.[15]

The Bill, if passed, will commence on proclamation so that there will be a sufficient lead in time for consultation with, education of, and preparation activities by, affected legal, financial, and trusts sector parties.[16]

2.1.2 Summary of key changes

The department indicated that the Bill largely retains, and re-enacts in modern drafting and plain English, many of the existing provisions in the Act, continuing the application of well-known and settled trusts law provisions. The Bill reflects some incremental and minor changes for clarity or to address areas of uncertainty in the existing law. In several areas, the Bill builds upon existing legal requirements but includes changed obligations to modernise practices and provide for greater administrative efficiency for trusts.[17]

The Bill repeals outdated or unnecessary provisions in the Act. For example, it removes references to abolished or outdated concepts including:

- settled land trustees
- rentcharge
- estate duty/succession duty
- concepts involving old system land
- provision for distributions to a minor on marriage
- entailed interests.[18]

Some provisions in the Act have become unnecessary because of provisions contained in the Bill or advances in law generally, including:

- providing for special declarations by local governments when dealing with trust land (as this level of specificity is no longer required given the provisions in the *Land Title Act 1994*)
- providing protections for trustees dealing with persons acting under a power of attorney (given the provisions of the *Powers of Attorney Act 1998*)
- amending the specific additional management and administrative powers which may be granted to trustees by the court, given the broader general powers given to trustees to deal with trust property under the Bill.[19]

The following sections provide an outline of the Bill and the proposed significant changes to the current Act.

2.2 Part 1 – Preliminary (Clauses 1-12)

Part 1 provides for the application of the Bill including in relation to other legislation and confirms that it binds all persons, to the extent the legislative power of the Parliament permits.[20]

15 DJAG, briefing paper, p 10.

16 DJAG, briefing paper, p 10.

17 DJAG, briefing paper, p 2.

18 DJAG, briefing paper, p 2.

19 DJAG, briefing paper, p 2.

20 DJAG, briefing paper, p 2.

The Bill will apply to a trust whether created before, or partly before and partly after, the commencement of the Bill (that is, all trusts), except to the extent the Bill or another Act provides otherwise.[21]

The provisions in the Bill will apply despite a contrary intention in any trust instrument, except to the extent the Bill provides otherwise. The Bill does not prevent a settlor conferring on a trustee any powers additional to or greater than those conferred under the Bill, but these must be exercised in the same way, and with the same consequences, as a power conferred under the Bill, subject to an express contrary intention in the trust instrument.[22]

A dictionary of defined words is set out in Schedule 1 of the Bill. Words such as trust, trustee, statutory trustee, trust property, capacity, impaired capacity and charitable are also defined under Clauses 6 to 11 of the co. The definition of statutory trustee in the Bill is modernised to remove the reference to persons who have the powers of a trustee under the repealed *Settled Land Act 1886*, as this is no longer necessary. Clause 12 of the Bill confirms what a reference to a trustee lending or investing trust funds on the security of property includes.[23]

This part otherwise re-enacts, in modern language, sections 1, 4, 5, 5A and 103 of the Act.[24]

2.2.1 Definition of the word 'charitable' (Clause 11)

The department stated that in line with the QRLC's recommendations, the Bill adopts the same position on the definition of 'charitable' as under the current Act so that the definition mirrors the common law. This definition reflects the Supreme Court's inherent jurisdiction in relation to charitable trusts and the Attorney-General's inherent common law jurisdiction to oversee charitable trusts. It also reflects the Supreme Court's inherent jurisdiction to alter the original purpose of a charitable trust in certain circumstances, such as where the original purposes are no longer capable of being affected. Under the Bill (clause 11), the definition of 'charitable' determines the scope of the power of the court and the Attorney-General to enable the property of a charitable trust to be applied cy pres for another charitable purpose.[25]

The department noted that, during consultation, some stakeholders suggested the definition of 'charitable' in the Bill should adopt the definition of 'charity' in the *Commonwealth Charities Act 2013* to provide greater uniformity and simplify the administration of charities. However, the Commonwealth definition of 'charitable' is broader than the common law definition of 'charitable' which is adopted in the current Trusts Act and the Bill. The Commonwealth definition includes trusts for the provision of social or public welfare, including childcare services, repairing assets after a disaster independently of the relief of individual distress, and advancing the security or safety of Australia. This broader definition of 'charitable' in the *Commonwealth Charities Act 2013* reflects the Commonwealth's purpose to promote philanthropic gifting through taxation concessions.[26]

The department acknowledged that Queensland legislation, as well as that of other states and territories, adopts a variety of definitions of 'charity' and 'charitable', depending on the purposes of the legislation. They considered that an amendment to the Trusts Bill only, would not ensure uniformity or simplify the administration of charitable trusts. Further, the department noted that extending the definition of 'charitable' in the Bill would extend the jurisdiction of the court and the Attorney-General in relation to cy pres applications for charitable trusts to trusts that are non-charitable trusts at common law.

21 DJAG, briefing paper, p 2.

22 DJAG, briefing paper, p 2.

23 DJAG, briefing paper, p 2.

24 DJAG, briefing paper, p 2.

25 DJAG, public briefing transcript, p 2.

26 DJAG, public briefing transcript, p 2.

The department noted that there was no evidence presented during consultation on the Bill reflecting any need for the cy pres jurisdiction to apply to non-charitable trusts.[27]

2.2.2 Stakeholder views – Definitions of 'trust' and 'charitable' (Clauses 6(a) and 11(4))

The Society of Trust and Estate Practitioners – Queensland branch (STEP Queensland) expressed concern that the meaning of 'trust' in clause 6(a), without any reservation, could lead to confusion in relation to the imposition of positive duties on trustees. STEP Queensland suggested that Clause 6(a) is unnecessary and could be deleted to avoid such confusion.[28]

STEP Queensland also identified clause 11(4) – the meaning of 'charitable' – as another area where attempting to restate the law in statutory form may cause confusion or difficulty.[29]

STEP Queensland noted that a trust for the relief of poverty is presumed to satisfy this requirement of public benefit, and imposing a statutory requirement that such a gift 'must be for the public benefit' may upset this presumption. STEP Queensland suggested that this subclause either be deleted or the requirement be qualified providing a statutory presumption in favour of a gift for the relief of poverty being for the public benefit.[30]

2.2.2.1 Department response

The department responded that the definition of 'trust' in the Bill reflects the existing definition of 'trust' in section 5 of the *Trusts Act 1973* which includes 'implied, resulting, bare and constructive trusts'. The definition also reflects the approach recommended in the QLRC Final Report[31]. The department considered that removing the reference to a constructive trust would significantly alter the current law.[32]

In relation to the meaning of 'charitable', and further to the statement in 2.2.1, the department noted the requirement that a charitable purpose be for the public benefit is long standing in common law and reflects the current law as noted at paragraph 13.6 of the QLRC's Interim Report[33]. Further, the adoption of the public benefit requirement to all categories of charitable purposes, including the relief of poverty, reflects the position which has been adopted in defining charitable purposes both in the United Kingdom (see *Charities Act 2011* (UK), section 2)) and New Zealand (see *The Charities Act 2005* (NZ), section 5(1)) which define charitable purposes to include 'every charitable purpose, whether it relates to the relief of poverty, the advancement of education or religion, or any other matter beneficial to the community' (which means that the preceding grounds accordingly have a benefit to the community). Therefore, the department considered that the provision, as currently drafted, is in line with the current legal position in Queensland and other relevant jurisdictions and consistent with the approach recommended in the QLRC Final Report.[34]

2.3 Part 2 – Restrictions on appointment of trustees and related matters (Clauses 13-16)

Part 2 provides:

- who may not be appointed as trustee of a trust

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27 DJAG, public briefing transcript, p 2.

28 STEP Queensland, submission 3, p 1.

29 STEP Queensland, submission 3, p 1.

30 STEP Queensland, submission 3, p 1.

31 QLRC, *A review of the Trusts Act 1973* (Report No. 71 December 2013).

32 DJAG responses to submissions, p 4.

33 QLRC, *A review of the Trusts Act 1973 (Qld)* – Interim Report WP No 71 June 2013).

34 DJAG, responses to submissions, pp 4-5.

- limits the maximum number of trustees of certain trusts to 4 persons except where an increased number of trustees has been approved by the court
- that local governments are permitted to be a trustee of a trust.[35]

This part adopts new provisions preventing the following from being appointed as trustees of a trust:

- children
- persons who are bankrupt, or taking advantage of the laws of bankruptcy as a debtor under the *Bankruptcy Act 1966* (Cth) or a similar law of a foreign jurisdiction
- a corporation that is a Chapter 5 body corporate under section 9 of the *Corporations Act 2001* (Cth), which includes companies that are in liquidation or under external administration
- a person who is disqualified from being appointed as a trustee of the trust by a court under clause 173 of the Bill.[36]

This part otherwise re-enacts, in modern language, current sections 11 and 116 of the Act.[37]

2.3.1 Maximum number of trustees

As stated at 2.3, the Act currently restricts the number of trustees of a trust to not more than 4 trustees, except for charitable trusts or where the Attorney-General approves more than 4 trustees (clause 14). The QLRC recommended that this provision be retained, but rather than the Attorney-General approving more than 4 trustees, this power be passed to the court.[38]

The QLRC's rationale was that this approval process would involve private trusts rather than charitable trusts and, accordingly, these trusts were not within the inherent jurisdiction of the Attorney-General who has oversight of the administration of charitable trusts. The QLRC also noted that the current Act includes provision for the Attorney-General to approve more than 4 trustees for superannuation funds which may require up to 6 individual trustees.[39]

The department acknowledged that the Bill has been drafted to retain the limit on the maximum number of trustees to 4, but it introduces a new exclusion so that the limit does not apply to charitable trusts or trusts that are, or are intended to be, self-managed superannuation funds. They stated this approach is in line with the QLRC's recommendation and allows private trusts to apply for the appointment of not more than 4 trustees where appropriate. However, it ensures that an application is subject to the court's determination given that the circumstances, where more than 4 trustees are sought, are typically complex and may increase trust disputes or create inefficiencies in the administration of the trust itself.[40]

2.3.2 Conditional appointment of minors as trustees

Section 12 of the current *Trusts Act 1973* provides that a trustee who is a minor can be removed as a trustee but does not prevent a minor from being appointed as a trustee. Under the current Act, while minors are not prevented from being appointed as trustees, they are able to be removed as trustees. The QLRC recommended that a minor should only be able to be appointed as a trustee conditional on their attaining the age of majority. The department stated that this conditional appointment approach was supported by

35 DJAG, briefing paper, p 2.

36 DJAG, briefing paper, p 3.

37 DJAG, briefing paper, p 3.

38 DJAG, public briefing transcript, p 2.

39 DJAG, public briefing transcript, p 3.

40 DJAG, public briefing transcript, p 3.

some stakeholders. However, they explained that a conditional appointment has many practical issues, including:

- uncertainty as to how a conditional appointment would interact with any power of appointment under the trust instrument or the Bill and which would take precedence
- uncertainty and inefficiency for trust administration where there was a delay in the minor's acceptance or awareness of their appointment as a trustee
- uncertainty as to when and how a trust property would vest in the minor after they achieved their majority and/or accepted their appointment as trustee.[41]

The department explained that given these practical issues may impact on the efficient administration of trusts and lead to uncertainty as to the validity of the appointment of a trustee, the Bill instead adopts the position which is present in New South Wales and the Australian Capital Territory legislation that a minor may not be appointed as a trustee (clause 13). The department considered that this position would provide certainty and administrative efficiency for trusts.[42]

2.3.3 Justification for disallowing a child from being appointed as a trustee (Clause 13(1)(a))

Section 12 of the current Act also uses the term 'infant', which is not defined in the current Act, but has a general meaning of a person who has not attained the age of majority and is a minor.[43]

Being a minor is considered a legal incapacity. For example, a contract entered into by a minor may be unenforceable or voidable, and limitation periods for some rights of action that accrued when the person was a child do not commence until the person turns 18 (and is no longer under an incapacity at law).[44]

The QLRC considered the issue of whether being a minor should prevent a person from being appointed as a trustee. The QLRC Final Report recommended that an appointment of a minor should be void unless the trust instrument provides that the appointment is to take effect on the minor attaining their majority, whether before or after the creation of the trust (i.e. a conditional appointment). Despite this recommendation from the QLRC, the Bill provides, at clause 13, that a child cannot be appointed as a trustee.[45]

The department stated that during the drafting of the Bill, practical difficulties were identified in relation to a conditional appointment of a child as trustee, including uncertainty as to the interaction with power of appointment provisions in relation to the minimum and maximum number of trustees. Accordingly, the position in the Bill was adopted to avoid creating uncertainty in the administration of trusts. The position in the Bill is based on the approach in the Australian Capital Territory, section 7A(1) of the *Trustee Act 1925* (ACT) which provides that the appointment of a child as trustee is void.[46]

2.3.4 Stakeholder views – Persons who cannot be appointed as trustees (Clause 13)

STEP Queensland considered clause 13 raises a question about the definition of 'trust' (clause 6). STEP Queensland stated that if the word 'appointed' only means that a person is constituted as a trustee, then clause 13 would prevent the application of certain equitable remedies to certain wrongdoers. For example, a wrongdoer who is bankrupt could not be held to account by means of a remedial constructive trust. Neither could a company that is in the course of being wound up, or a person who is 17.5 years of age who steals money and puts it in the bank. STEP Queensland suggested that

41 DJAG, public briefing transcript, p 2.

42 DJAG, public briefing transcript, p 2.

43 DJAG, public hearing – further issues, p 4.

44 DJAG, public hearing – further issues, p 4.

45 DJAG, public hearing – further issues, p 4.

46 DJAG, public hearing – further issues, p 4.

whether or not the definition of 'trust' is amended, this clause should define 'appoint' in relation to a trustee as an express appointment.[47]

2.3.4.1 Department response

The department responded that requirements in clause 13 are intended to apply to specific appointment of a trustee, not where a constructive or resulting trust takes effect if a party is deemed to hold property on trust. However, the department will consider whether this clause should be clarified to ensure that it does not restrict who can be deemed to hold property under a remedial constructive or resulting trust.[48]

Recommendation 2

The committee recommends the Department of Justice and Attorney-General considers including a definition for 'appoint' in the Trusts Bill 2024 to ensure it does not restrict who can be deemed to hold property under a remedial constructive or resulting trust.

2.3.5 Stakeholder views – Court approval of more than 4 trustees for particular trusts (Clause 15)

The Queensland Law Society (QLS) suggested implementing a concurrent jurisdictional power in clause 15 to both the Attorney-General and the Supreme Court for the appointment of additional trustees. In their view, this would save costs in straightforward matters as it would avoid the necessity of an application to court, which would attract additional costs in facilitating the application to court and resources of the court to hear such applications. QLS considered this would reserve the court's resources for more complex applications.[49]

2.3.5.1 Department response

The department stated that limiting the power so that only the court may approve more than 4 trustees is consistent with the approach recommended in the QLRC Final Report. The department noted this power was originally included in the current *Trusts Act 1973* to allow approval of more than 4 trustees for superannuation funds, but it is no longer required as self-managed superannuation funds have been excluded from the operation of this clause.[50]

The department clarified that trusts which will be subject to this clause are private trusts, rather than charitable trusts, and while the Attorney-General has a duty as protector of charitable trusts, no such duty applies to private trusts. Accordingly, the Attorney-General has no specific duty to oversee the administration of private trusts.[51]

Further, according to the department, appointing more than 4 trustees may lead to increased complexity and risks of dispute in relation to the administration of the trust. Therefore, it is appropriate that a court use its wide discretion to consider this proposed appointment of more than 4 trustees, and the potential risks that flow from that for the administration of the trust, in light of the individual circumstances of that particular trust, before approving any appointment.[52]

47 STEP Queensland, submission 3, p 2.

48 DJAG, responses to submissions, p 5.

49 QLS, submission 5, pp 1-2.

50 DJAG, responses to submissions, pp 7-8.

51 DJAG, responses to submissions, p 8.

52 DJAG, response to submissions, p 8.

2.4 Part 3 – Appointment, discharge and removal of trustee and devolution of trusts (Clauses 17-50)

Part 3 sets out when trustees may be replaced, removed, or appointed to the trust and how the trust property devolves on replacement, removal or appointment of the trustees.[53]

Clause 17 of the Bill clarifies section 12(9) of the Act to make it clear that Part 3 applies to a personal representative of a deceased person's estate only where the personal representative is acting as trustee in relation to that estate and has either completed the administration of all, or a part of that estate, and holds all, or that part of that estate, in the capacity of trustee only.[54]

Clause 20 of the Bill modernises the circumstances in which a trustee may be replaced (which are currently listed in section 12 of the Act) by:

- omitting the ability to replace a trustee who is a child—as a child can no longer be appointed as a trustee under the Bill
- omitting the circumstance where a person remains out of Queensland for more than 1 year without having properly delegated the execution of the trust—as this is no longer required in a modern society with reliable electronic communication.[55]

Clause 20 also includes a new power to remove a trustee who is bankrupt or taking advantage of the laws of bankruptcy as a debtor. This part of the Bill gives specific powers to appoint a new trustee to certain persons where the last continuing trustee:

- dies—in which case a new trustee may be appointed by the deceased trustee's personal representative (clause 21)
- becomes a person with impaired capacity for administering the trust—in which case the trustee's attorney or administrator for all financial matters may replace the existing trustee (who has impaired capacity) with a new trustee (clause 22)
- becomes bankrupt or is taking advantage of the laws of bankruptcy as a debtor—in which case the bankrupt trustee may replace themselves with a new trustee (clause 23).[56]

The above powers of appointment only apply where there is:

- no appointor for the trust, or no appointor willing and able to act to replace the trustee; or
- a mechanism in the trust instrument for appointment of a replacement trustee and such an appointment has not taken effect within a reasonable period of time.[57]

Clause 31 of the Bill provides a new safeguard by requiring the person who replaces, removes or discharges the trustee under this part of the Bill, and who is aware that the trustee has delegated a matter, to give notice to any delegate of the trustee of that trustee's replacement, removal or discharge so the delegate is aware that they are no longer appointed.[58]

53 DJAG, briefing paper, p 3.

54 DJAG, briefing paper, p 3.

55 DJAG, briefing paper, p 3.

56 DJAG, briefing paper, p 3.

57 DJAG, briefing paper, p 3.

58 DJAG, briefing paper, p 3.

Clause 40(4) of the Bill clarifies section 16(8) of the Act by confirming that the powers vested in the public trustee on the death of the last trustee does not limit any power the public trustee has, not only under section 61 of the *Public Trustee Act 1978*, but also under section 62 of that Act.[59]

Part 3, division 8 of the Bill vests the trust property in the public trustee when the last continuing trustee of the trust is determined to be a person with impaired capacity for administering the trust or for all financial matters until a new trustee is appointed. This new provision is an extension of section 16 of the Act[60] which vests the trust property in the public trustee when the last continuing trustee dies until a new trustee is appointed.[61]

Section 17 of the Act dealing with the devolution of mortgage estates on death is no longer necessary and has not been included in the Bill given section 45 of the *Succession Act 1981* which vests all property of the deceased person on their death to their executor, or if there is no executor, or no executor willing and able to act, the public trustee.[62]

This part otherwise re-enacts, in modern language, the current provisions of part 2 of the Act, other than clauses 11 and 19 of the Act.[63]

2.4.1 Stakeholder views – Appointment of trustees – replacement of trustee in particular circumstances (Clause 20(1)(f))

QLS agreed with bankruptcy nullifying an existing appointment under clause 20(1)(f); however, QLS suggested bankruptcy be a prohibition only for the duration of the bankruptcy.[64]

2.4.1.1 Department response

The department stated that the power to remove a bankrupt trustee is discretionary and does not happen automatically. This provision is included in the Bill to allow for a trustee that may impact on the administrative efficiency of the trust to be removed in appropriate circumstances. The intent is to protect the trust property and the efficient administration of the trust for the benefit of the trust's purpose (if charitable) or its beneficiaries.[65]

The department reiterated that providing for an automatic reappointment of a bankrupt trustee on their exit from bankruptcy would create uncertainty and inefficiency in the administration of the trust and may also create uncertainty in how other provisions of the Bill apply (including minimum trustee requirements, and appointment and removal provisions).[66]

Further, the department noted that the trust instrument may deal with any reappointment of a bankrupt trustee, depending on the individual circumstances of the trust, without the need for legislative intervention in this space.[67]

2.4.2 Stakeholder views (Public Advocate) – Appointment of trustees – replacement of last continuing trustee with impaired capacity (Clause 22)

The Public Advocate, Dr Chesterman, considered a number of issues that could arise from clause 22. Dr Chesterman stated that the Bill attempts to use existing substitute decision-making frameworks to

59 DJAG, briefing paper, p 3.

60 Trusts Bill 2024, Part 3, division 7

61 DJAG, briefing paper, p 4.

62 DJAG, briefing paper, p 4.

63 DJAG, briefing paper, p 4.

64 QLS, submission 5, p 4.

65 QLS, submission 5, p 9.

66 QLS, submission 5, p 9.

67 QLS, submission 5, p 9.

appoint trustees in the *Trusts Act 1973*, despite a number of fundamental compatibility problems. He maintained that the Bill does not resolve the incompatibilities in its current form.[68]

Dr Chesterman suggested that neither the *Guardianship and Administration Act 2000* nor the *Powers of Attorney Act 1998* were designed to deal with the complex issues associated with trusts and the appointment of trustees. He expressed that the articulated objectives and principles underlying these two Acts create tensions with the *Trusts Act 1973*. For example, the appointment of a trustee is a power of a fiduciary nature, to be exercised for the benefit or in the best interests of the beneficiaries.[69] Dr Chesterman asserted that this contrasts with the principles found in the *Guardianship and Administration Act 2000* (s 11B) and the *Powers of Attorney Act 1998* (s 6C), which are focused on the adult and their general wishes and preferences.[70]

Dr Chesterman also describes what he believes are additional issues and difficulties created through the conflicts between the Bill and existing legislation, including:

- a current attorney, who may not fully comprehend the issues surrounding trusts would under the Bill be expected to appoint trustees.
- the recourse available to a person if a decision is made by an administrator or attorney to appoint a new trustee who makes negligent or reckless decisions.
- the exclusion of the *Guardianship and Administration Act 2000* and the *Powers of Attorney Act 1998* removes safeguards related to financial decision-making for a person with impaired decision-making ability.
- concern regarding whether an application can be made to have an administrator appointed under the *Guardianship and Administration Act 2000* for the purposes of having a new trustee appointed as per Clause 22 of the Bill. If the administrator is not bound by the *Guardianship and Administration Act 2000*, Dr Chesterman queried what factors would the Queensland Civil and Administrative Tribunal (QCAT) need to consider when making such an appointment.
- clause 22 of the Bill allows for the appointment of a new trustee by an administrator if the administrator has an appointment for all financial matters. This is not currently compatible with administrator appointments made under the *Guardianship and Administration Act 2000* where QCAT is only to make financial administrator appointments when particular financial decisions need to be made.
- when a person accepts their appointment under an enduring power of attorney, they sign an acceptance stating they will make decisions in accordance with the *Guardianship and Administration Act 2000* and the *Powers of Attorney Act 1998*. The Bill adds a decision-making duty to the role of the administrator that is not included in the provisions of the principal Acts under which appointments are made and to which the attorney did not agree.[71]

Dr Chesterman suggested the solution would be for the new trusts legislation to develop a system, including principles and a framework, specifically made to reflect the specialised nature of trusts and the appointment of trustees when a person loses capacity to act as a trustee. This proposed solution would eliminate the need to involve the *Guardianship and Administration Act 2000* and the *Powers of Attorney Act 1998* in the trustee appointment process.[72]

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68 Public Advocate, submission 1, p 1.

69 QLRC, *A Review of the Trusts Act 1973* (No. 71, December 2013), p 30.

70 Public Advocate, submission 1, p 2.

71 Public Advocate, submission 1, pp 2-3.

72 Public Advocate, submission 1, p 3.

Dr Chesterman added that clause 100 provides an example of how to manage issues regarding trusts and impaired capacity, with the creation of a specific delegation under the Bill that does not rely upon existing substitute decision-making laws. He suggested that the new Trusts Act should include provision on how trustees with impaired capacity are dealt with and clause 22 should be amended accordingly.[73]

2.4.2.1 Department response

The department noted there are very limited circumstances in which an administrator or an attorney for a person will have a power to appoint a trustee to replace the last continuing trustee with impaired capacity. The following conditions must be met:

- the trustee must be the last continuing trustee
- the trustee must have impaired capacity (see clause 10)
- there must be an administrator or attorney appointed for all financial matters for the trustee.
- the power of attorney or order appointing the administrator must not contain a contrary intention (which would not allow the administrator or attorney to appoint a new trustee)
- the trust instrument must not contain a contrary intention (which would not allow the administrator or attorney to appoint a new trustee)
- there must be no appointor for the trust who can appoint a new trustee, or none that is able and willing to act (see clause 18) (note: 'appointors' are the office holders of trusts who commonly have the ability to appoint and remove trustees)
- if there is another mechanism available under the trust to appoint a trustee, then an appointment needs to not have been made within a reasonable time using that mechanism (note: a reasonable time will depend on the urgency with which the trust administration needs to be dealt with)
- the trust must be created after the commencement of the Bill (clause 233) (note: this is an important limitation because the new power only applies to trusts created after the commencement of the Bill, and therefore settlors can have regard to this change and exclude the new power if they wish to under the trust instrument or power of attorney document).[74]

The department stated that if the above conditions are satisfied, the administrator or attorney would have the power to appoint a new trustee for the trust. However, the administrator or attorney has discretion and is not required to exercise the power. If the administrator or attorney considers that they are conflicted from using the power, then there are other (albeit more expensive) mechanisms that can be used to appoint a trustee, such as applying to the court.[75]

The department clarified that the new power is provided as a measure of last resort to ensure the trust can be administered if there is no appointor, or no appointor willing to act, or no other mechanism under the trust deed to replace the last continuing trustee with impaired capacity.[76]

The department noted that the Public Advocate has submitted that an administrator or attorney appointing a new trustee for the trustee with impaired capacity in the circumstances above could potentially create conflict between the administrator or attorney's duties under the *Guardianship and*

[73] Public Advocate, submission 1, p 3.

[74] DJAG, response to submissions, pp 1-2.

[75] DJAG, response to submissions, p 2.

[76] DJAG, response to submissions, p 2.

Administration Act 2000 and the *Powers of Attorney Act 1998* and that attorney's or administrator's fiduciary duty when executing the power of appointment.[77]

The department considered these conflicts will not arise given the Bill explicitly provides that:

1. while the administrator or attorney may exercise the power of appointment, this is not made in the capacity of the administrator or attorney for the last continuing trustee (i.e. they are not acting in their role as administrator or attorney in exercising the power of appointment) – see clause 22(6)(a)
2. the *Guardianship and Administration Act 2000* and the *Powers of Attorney Act 1998* do not apply in relation to the exercise of the power of appointment – see clause 22(6)(b).[78]

Accordingly, the department stated that like a personal representative exercising a power of appointment under clause 21 of the Bill, the administrator or attorney is bound by their fiduciary duty to act in the interests of the beneficiaries of the trust, not their duties as administrator or attorney under the *Guardianship and Administration Act 2000* and the *Powers of Attorney Act 1998*.[79]

The department acknowledged that recourse in relation to any breach of those fiduciary duties is to the court, not QCAT, as it relates to a trust matter, not a personal financial matter of the last continuing trustee with impaired capacity. [80]

The department noted this adopts the QLRC's recommended approach to give an attorney or administrator of the last continuing trustee with impaired capacity the power to replace that trustee.[81]

Further, as noted above, the department clarified that the power given to the administrator or attorney is discretionary. If a power arises under clause 22 of the Bill, there is no obligation under the Bill for the administrator or attorney to exercise the power of appointment. Whether the administrator or attorney chooses to exercise the power will be a matter for their consideration.[82]

The department explained that in relation to the Public Advocate's query about whether someone can apply to have an administrator appointed for the sole purpose of using the power in clause 22 of the Bill to appoint a new trustee, the Bill does not authorise a person to apply to have an administrator appointed under the *Guardianship and Administration Act 2000* for the purpose of having a new trustee appointed in accordance with clause 22. As set out above, clause 22 only applies in limited circumstances.[83]

The department acknowledged the Public Advocate's suggestion that clause 100 provides an example of how to manage issues regarding trusts and impaired capacity. The department noted however that clause 106 provides that a delegation (under clause 100) made by a trustee ends if the trustee loses capacity to administer the trust. Indicating the best option for a settlor of a new trust (after the commencement of the Bill) to address the issue of incapacity in the last trustee is to make a provision in the trust instrument to provide for this circumstance.[84]

77 DJAG, response to submissions, p 2.

78 DJAG, response to submissions, p 2.

79 DJAG, response to submissions, p 3.

80 DJAG, response to submissions, p 3.

81 DJAG, response to submissions, p 3.

82 DJAG, response to submissions, p 3.

83 DJAG, response to submissions, p 3.

84 DJAG, response to submissions, p 3.

The department stated that if the trust instrument does not provide for replacement of a trustee with impaired capacity, the Bill provides options to deal with a trustee with impaired capacity:[85]

- Clause 20 of the Bill allows a trustee who has impaired capacity to administer the trust to be replaced by the appointor of the trust, or if there is no appointor of the trust, or no appointor who is able and willing to act as an appointor, the continuing trustee (or trustees, if more than one) of the trust [86]
- Clause 22 of the Bill provides that, where the last continuing trustee has impaired capacity, as a last resort (that is, where there is no appointor, or no appointor willing and able to act, or, if there is a mechanism under the trust instrument to replace the trustee, this has not been used within a reasonable time), the attorney or administrator appointed for all financial matters for that last continuing trustee may exercise a power of appointment to replace the last continuing trustee with impaired capacity.[87]

2.4.3 Stakeholder views (STEP Queensland) – Appointment of trustees – replacement of last continuing trustee with impaired capacity (Clause 22)

STEP Queensland also provided feedback on clause 22, stating the court should have final oversight in this case, rather than having a default provision which could produce arbitrary and possibly harmful results. STEP Queensland stated there is a real risk that, even with the best of intentions, an attorney or administrator would make an appointment which was irrelevant to the trust. They considered the power in this clause might be exercised quickly and without proper consideration or advice simply because the attorney or administrator is aware of the power existing.[88]

STEP Queensland identified what they considered to be an evidentiary issue regarding whether the last continuing trustee does in fact have impaired capacity, as nothing in clause 22 provides for how this is to be determined. In addition, STEP Queensland sought clarification on the reasons for excluding the entirety of the *Guardianship and Administration Act 2000* and the *Powers of Attorney Act 1998*, commenting that the reasons provided were opaque and raised potential concerns. STEP Queensland expressed that where the last continuing trustee may have impaired capacity, any appointment of a replacement trustee should be made by the court.[89]

2.4.3.1 Department response

The department responded that clause 22, which provides a power of appointment to an administrator or attorney of the last continuing trustee with impaired capacity, has been adopted based on the QLRC's recommended approach.[90]

The department stated that the clause represents an extension of the existing power for the personal representative of the last continuing trustee who has died to replace that trustee. This is a long-standing power and does not require the personal representative to have any knowledge of, or relationship with, the trust, before exercising the power of appointment where the last trustee has died. Similarly, there is no requirement for an attorney or administrator to have knowledge, or a relationship with the trust, before exercising the power of appointment to replace the trustee with impaired capacity. [91]

85 DJAG, response to submissions, p 3.

86 DJAG, response to submissions, pp 3-4.

87 DJAG, response to submissions, p 4.

88 STEP Queensland, submission 3, pp 2-3.

89 STEP Queensland, submission 3, pp 2-3.

90 DJAG, response to submissions, p 5.

91 DJAG, response to submissions, p 5.

The department clarified that an attorney or administrator, and a personal representative, have a duty in exercising the power of appointment to act in the interests of the beneficiaries of the trust. If they breach this duty, there is a right for interested parties, including the beneficiaries of the trust, to apply to the court for a review of this decision and any appropriate remedy. As with a personal representative, the conduct of the attorney or administrator in exercising the power of appointment will be subject to the court's oversight.[92]

The department acknowledged that power can only be exercised if the last continuing trustee has impaired capacity, and the other conditions of the clause are satisfied (as noted above in the response to the Public Advocate's submission). Further, also noted above, the power only applies to new trusts settled after the commencement of the Bill and can be excluded by the trust instrument.[93]

The department explained that the clause mirrors the power to replace a trustee with impaired capacity under clause 20, which allows an appointor or a remaining trustee to replace the trustee without any specific court or tribunal determination that the trustee does not have capacity. Similarly, where clause 22 applies, the administrator or attorney may replace a trustee without a specific court or tribunal determination. However, in both cases (i.e. under clauses 20 and 22), if there is dispute about whether the last continuing trustee has impaired capacity, then this exercise of power will, again, be subject to the review of the court.[94]

The department explained that an attorney or administrator's exercise of the power of appointment to replace the trustee with impaired capacity is not done by the attorney or administrator in their role as attorney or administrator and, accordingly, is not subject to the provisions of the *Guardianship and Administration Act 2000* and the *Powers of Attorney Act 1998*. This includes all the duties and obligations on attorneys or administrators under these provisions. Instead, the attorney or administrator, in exercising the power of appointment, is subject to their fiduciary duty to exercise the power in the interests of the beneficiary of the trust. Their role is as appointor of the trust and, accordingly, is subject to the duties which attach that role in the trust.[95]

Therefore, the department noted that as set out in relation to the response to the Public Advocate, this power is provided as a measure of last resort to ensure the trust can be administered if there is no appointor, or no appointor willing to act, or no other mechanism under the trust deed to replace the last continuing trustee with impaired capacity.[96]

2.4.4 Stakeholder views (QLS) – Appointment of trustees – replacement of last continuing trustee with impaired capacity (Clause 22(1)(d))

QLS suggested removing the word 'all' from 'all financial matters for the trustee' because some of a trustee's financial responsibilities may be split between different financial attorneys.[97]

2.4.4.1 Department response

The department noted that the submission is in line with the approach recommended by the QLRC; however, this was not the position adopted in the Bill. The position in the Bill is that the power under clause 22 will only apply to those administrators or attorneys appointed for all financial matters, which reflects the practical way in which these appointments operate.[98]

92 DJAG, response to submissions, pp 5-6.

93 DJAG, response to submissions, p 6.

94 DJAG, response to submissions, p 6.

95 DJAG, response to submissions, p 6.

96 DJAG, response to submissions, p 6.

97 QLS, submission 5, p 4.

98 DJAG, response to submissions, p 9.

In practice, the department explained, the Public Trustee may only be appointed as an administrator for a limited financial matter, such as a legal matter, while another person, often a family member of the person with impaired capacity, is appointed as administrator for all (other) financial matters. Therefore, in these circumstances, it would not be appropriate for the family member to be required to exercise this power of appointment jointly with the Public Trustee, given the Public Trustee's limited appointment. Instead, the person appointed for all financial matters should be able to exercise the power of appointment independently.[99]

Similarly, the department responded, that in practice a person may be appointed as administrator for a limited financial matter, such as day to day transactions on a bank account, while another person, often an independent third party, such as the Public Trustee, is appointed for all (other) financial matters and will control what funds are paid into that bank account. In these circumstances, it would not be appropriate for someone who is only trusted with a limited appointment for a limited matter to be given the power of appointment jointly with someone who is trusted and appointed to act for all (other) financial matters.[100]

Accordingly, the department stated the position taken in the Bill is that only the attorney or administrator who is appointed for all financial matters is given the power of appointment under clause 22.[101]

2.4.5 Stakeholder views – Meaning of 'minimum trustee requirements' (Clause 27)

QLS considered that the 'minimum trustee requirements' in clause 27 should be amended to one trustee who is an individual, rather than 2 individuals, unless otherwise required by the instrument. In their experience, many difficulties can arise when one of 2 individuals die, or in cases of family trusts, where 2 married trustees subsequently divorce and one of them wishes to resign as trustee. If a minimum of 2 individual trustees is required, the resigning trustee will not be discharged from the trust until a replacement trustee is appointed. Whereas, if a minimum of one trustee is required, the trustee who resigns can be immediately discharged from the trust and the remaining trustee can continue to act on their own.[102]

In its response to questions taken on notice, QLS advised they had reviewed similar provisions to clause 27 of the Bill in other Australian states and territories and found that none of these jurisdictions permits going down to one individual trustee unless only one individual trustee was originally appointed.[103]

QLS confirmed that trusts legislation in force in these jurisdictions was originally enacted between 1893 (*Trustee Act 1893* (NT)) and 1962 (*Trustees Act 1962* (WA)) and does not appear to have been modernised as is proposed in Queensland under the Bill. Therefore, in their view, the legislation in these jurisdictions may not be an appropriate benchmark for the development of modernised legislation in Queensland. Therefore, QLS's view remains that clause 27 should be amended to allow a sole individual trustee.[104]

QLS explained that under circumstances where a couple established a trust for the benefit of their children but later divorced or one of them died, a sole parent who wishes to continue the trust will have to appoint a second trustee or a corporate trustee unless the trust deed expressly allows only one trustee. They may not wish to have another person involved in their financial affairs or may not

99 DJAG, response to submissions, pp 9-10.

100 DJAG, response to submissions, p 10.

101 DJAG, response to submissions, p 10.

102 QLS, submission 5, p 2.

103 QLS, answers to questions on notice, p 1.

104 QLS, answers to questions on notice, p 1.

want the extra cost and administrative burden of operating a company as trustee and would prefer to administer the trust in their own name.[105]

Additionally, QLS responded to the department's suggestion that a trust instrument can be varied to allow one individual trustee: the terms of the trust instrument might not allow a change to the number of trustees. Further, even if this was allowed under the trust instrument, animosity between a couple who have separated or the death of one of them could render it impossible to make these changes.[106]

QLS also clarified that clauses 21 to 23 of the Bill contain mechanisms for replacement of a last remaining trustee who has died, has impaired capacity or is bankrupt. These mechanisms can be implemented if the trust instrument does not make provision for the sole trustee's replacement in these circumstances. Therefore, in QLS's view, it is not necessary to have a second trustee for this purpose.[107]

2.4.5.1 Department response

The department responded to QLS's concerns that the Bill reflects the long-standing position under the *Trusts Act 1973*. The QLRC's review recommended that the current minimum requirements be retained: 2 individuals (or a corporate trustee) unless the trust instrument permitted only one trustee who is an individual or only one individual trustee was originally appointed under the trust instrument.[108]

The department stated that this position reflects the longstanding rationale in trusts law of having 2 individual trustees so that, if one dies or has impaired capacity to manage the trust, there is a trustee left to continue to administer the trust and, where required, appoint a new trustee. Further, this requirement can be varied by the trust instrument so can be reduced to only one individual trustee if desired by the settlor.[109]

In response to QLS's points raised in their answer to questions taken on notice, the department stated that, in its *A Review of the Trusts Act 1973: Interim Report (WP No 71)* June 2013 (Interim Report)[110], the QLRC noted that the current *Trusts Act 1973* does not impose a minimum number of trustees to be appointed on the creation of a trust, but that section 12(2)(c) and section 14 stipulate a minimum number and type of trustees who must remain to administer the trust in order for the discharge of the outgoing or retiring trustee to be effective (see Interim Report at paragraph 3.234-3.235).[111]

The department confirmed that the QLRC recommended that the current minimum requirements be retained, stating that it 'considers that the new legislation should continue to require, for the discharge of a trustee, that there will remain at least two individuals to act as trustees' (see paragraph 3.274), subject to an exception where: only one trustee was originally appointed; and where the trust instrument provides otherwise. The QLRC stated that both exceptions recognise a settlor's role in choosing the most appropriate structure for a trust.[112]

The department noted the QLRC also recommended that if a trust is created with a single trustee and an additional trustee is appointed, one of the 2 trustees should be able to retire even though there will

105 QLS, answers to questions on notice, p 2.

106 QLS, answers to questions on notice, p 2.

107 QLS, answers to questions on notice, p 2.

108 DJAG, response to submissions, p 10.

109 DJAG, response to submissions, p 10.

110 QLRC, A Review of the *Trusts Act 1973* (Qld) (Interim Report). https://www.qlrc.qld.gov.au/_data/assets/pdf_file/0004/372955/WP71.pdf

111 DJAG, response to QLS Questions on Notice, p 1.

112 DJAG, response to QLS Questions on Notice, p 1.

be only one trustee remaining (something that is not possible under section 14 of the current *Trusts Act 1973*) (see paragraph 3.280). These QLRC recommendations have been reflected in the Bill.[113]

The department clarified that there is no prohibition in the Bill on setting up a trust with a single trustee. If a trustee is replaced, part 3, division 3 of the Bill sets out the minimum trustee requirements to be satisfied for the replaced trustee to be discharged. In the case of a trust that has a single trustee, on appointment of a new trustee, the replaced trustee can be discharged when replaced by a single trustee if:

- the new trustee is a corporation; or
- the new trustee is a natural person (an individual) and only one trustee was originally appointed for the trust; or
- the new trustee is a natural person (an individual) and the trust instrument allows the trust to have only one trustee.

The department also noted the QLS comments stated that no other jurisdiction permits a single individual trustee, unless only one individual trustee was originally appointed, or the trust instrument otherwise allows for a single trustee.[114]

2.4.6 Stakeholder views – Vesting of trust property in new trustee (Clauses 44-48)

The Public Trustee stated Part 3, division 8 is not clear as to what is to occur should the person with impaired capacity regain capacity to act as trustee. This division has been based on the provision relating to the death of the last continuing trustee.[115]

The Public Trustee noted the significant difference in practical terms is that whereas death cannot be reversed, a finding of incapacity can be revoked. Clause 45(3) provides that the trust property remains vested in the Public Trustee 'until it is divested from the public trustee under section 47'; however, clause 47 makes no provision for the trust property to revert to the person with impaired capacity upon that person regaining control of their affairs. The Public Trustee suggested the inclusion of another subclause in clause 47 to allow for the seamless divestment of the trust property from the Public Trustee and the vesting of the trust property back to the last continuing trustee who has regained capacity.[116]

2.4.6.1 Department response

The department explained that this division is only intended to operate if the last continuing trustee remains a trustee of a trust and either has:

- an administrator appointed for all financial matters; or
- been determined by a relevant court or tribunal to have impaired capacity for all financial matters or for administering the trust.

The department noted this submission and responded that consideration will be given to explicitly providing that if the last continuing trustee regains capacity, prior to being replaced by a new trustee under clause 47, then the last continuing trustee will remain as trustee on their regaining capacity and the trust property will no longer be vested in the public trustee.

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113 DJAG, response to QLS Questions on Notice, p 1.

114 DJAG, response to QLS Questions on Notice, p 1.

115 Public Trustee, submission 4, p 1.

116 Public Trustee, submission 4, pp 1-2.

2.4.6.2 Public Trustee supplementary submission

In relation to the new provisions in Part 3 Division 8 regarding the incapacity of the trustee, the Public Trustee stated that they would prefer to not be involved unnecessarily in the private affairs of Queenslanders.[117]

On that basis the Public Trustee favours a solution that does not involve the legislative removal of the trustee upon the finding of an incapacity of the trustee in the circumstances set out in clause 44, as this will likely always require a document to be prepared to reappoint the original trustee if they regain capacity. Further, if there is the legislative removal of the trustee upon the finding of an incapacity, there is no longer any trustee to 'replace' as envisaged by the Bill.[118]

The Public Trustee's concerns could be addressed if:

- on the appointment of an administrator for all financial matters or the making of the decision outlined in clause 44 (to be called 'the period of incapacity') the last continuing trustee's powers as trustee were suspended during the period of the incapacity. In this way, the Public Trustee would not be required to act jointly with the trustee with impaired capacity.
- an additional trigger is inserted for the divestment of the trust property from the Public Trustee if neither event in clause 47(1)(a) or (b) has occurred,[119] but instead the period of incapacity has ended.
- an additional provision is inserted in clause 47(2)(b)[120] to allow for the trust property to devolve to and revest in the last continuing trustee when the period of incapacity has ended. In this way, upon the trustee with impaired capacity regaining capacity, not only will they continue to be the trustee in name but also the trust property will again be vested in the trustee.
- the changes to clause 47(1) and (2) will only apply if there has been no appointment of a replacement trustee during the period of incapacity.
- for consistency with clauses 28 and 171(5), which refer to the replaced and removed trustee being discharged from trustee, the addition of the words 'and division 8' after 'division 2' in clause 28(1)(a) would allow the last continuing trustee who has impaired capacity and has been replaced by the Public Trustee pursuant to Part 3, Division 8, to also be discharged from the trust.[121]

The Public Trustee believes these amendments would avoid the need for the Public Trustee to apply to court for directions when such scenarios as those outlined above arise. In the usual course, such a court application would be at the cost of the trust.[122]

2.4.6.3 Department response

The department notes the supplementary submission and will consider the issues raised.[123]

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117 Public Trustee, tabled paper, 10 July 2024, p 5.

118 Public Trustee, tabled paper, 10 July 2024, p 5.

119 (1)(a) a new trustee is appointed to replace the last continuing trustee; and (b) for an appointment made other than by the public trustee – the new trustee gives the public trustee written notice of the appointment.

120 (2)(b) devolves to and vests in the new trustee in the same way, and subject to the same provisions, as trust property vests in a post-change trustee under division5.

121 Public Trustee, tabled paper, 10 July 2024, p 6.

122 Public Trustee, tabled paper, 10 July 2024, p 6.

123 DJAG, Public hearing – further issues, p 6.

Committee comment

The committee notes that the Department of Justice and Attorney-General will consider the amendments put forward by the Public Trustee regarding Part 3, division 8 of the Trusts Bill 2024, and encourages the department to progress any changes or amendments appropriate to this matter.

2.4.7 Stakeholder views – Disclaimer of testamentary trust on renunciation of probate (Clause 49)

QLS suggested clause 49(1) be amended to clarify that the clause applies where the person is appointed as trustee because of their appointment as executor. QLS considered the words 'renounces probate of the Will' in clause 49(1)(a) should be replaced with 'renounces trusteeship of the testamentary trust'. This is because the current phrasing could lead to the automatic consequence of all testamentary trusts being disclaimed, whereas their phrasing excludes those trusts that are not intended to be disclaimed. QLS recommended amending clause 49(1) to include situations where there is a court order removing the executor, but it is silent about any outcome in relation to the trusts.[124]

QLS expanded on its views in answers to questions taken on notice, recognising that the issue dealt with by clause 49 is a technical one. The starting point is that all estates are in effect bare trusts and therefore a renunciation of probate should also be a renunciation of the associated bare estate trust. However, many will go on to create further testamentary trusts that are established at the conclusion of the estate administration and upon the bare estate trust ending. The QLC submission on clause 49 sought to ensure that the renunciation of probate (and corresponding bare estate trust) is kept separate from later testamentary trusts that a Will might establish. As they are separate trusts, a renunciation of probate should not automatically result in a renunciation of those later, separate trusts.[125]

QLS acknowledged that in addition to the circumstances referred to in clause 49 of renunciation of probate and a failure to apply for probate, the Supreme Court routinely makes orders for appointment of a person other than the person named in a Will as an executor. For this reason, QLS suggested clause 49 could also apply in circumstances where a court order has been made.[126]

2.4.7.1 Department response

The department responded that clause 49 of the Bill reflects the provisions of the current *Trusts Act 1973,* is in accordance with the approach recommended by the QLRC and is in keeping with current legislative drafting style. The department also considers that the drafting of the clause currently provides for the same outcome as suggested by QLS.[127]

The department stated that an amendment as suggested would be a change to the current law as no court order is currently required under the *Trusts Act 1973*, and it is unclear why a reference to a court order would be required. The Bill reflects the current provisions of the *Trusts Act 1973* and is in accordance with the approach recommended by the QLRC.[128]

The department also stated that it is not intended that clause 49 will revoke any separate appointment of the person who is executor as trustee of a testamentary trust under the Will, except where their appointment as trustee is due to their appointment as executor and trustee of the Will.[129]

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124 QLS, submission 5, p 4.

125 QLS, response to questions on notice, p 4.

126 QLS, response to questions on notice, p 4.

127 DJAG, response to submissions, p 11.

128 DJAG, response to submissions, p 11.

129 DJAG, response to QLS, Questions on Notice, p 2.

While the department does not consider that clause 49 will impact on any later testamentary trusts that a Will might establish, the department advised that it would consider QLS's comments to ensure that Clause 49 operates as intended.[130]

On the inclusion of a reference to a court order in clause 49, the department advised that the QLRC, in both its Interim and Final Reports, considered whether section 18 of the current *Trusts Act 1973* should apply in situations where an executor has been 'passed over', i.e. named as an executor and trustee by Will but relieved by the court of the opportunity to act before probate has been granted to them.[131]

In the Interim Report, the QLRC stated:

> …the Commission considers that it is appropriate that section 18 of the *Trusts Act 1973* (Qld) does not have the automatic effect that a person who is named as the executor and trustee of a will is deemed to have disclaimed the trust merely because the person is passed over as executor. In those cases where it is appropriate for the person to be removed as both an executor and a trustee, an application can be made for the person's removal as trustee, concurrently with the probate proceedings. The new legislation should, therefore, include a provision to the effect of section 18 in its current terms (paragraph 3.396).

This position was reiterated in the Final Report (see paragraph 2.188) and is reflected in the drafting of clause 49 of the Bill.

Committee comment

The committee notes that the Department of Justice and Attorney-General will consider the concerns raised by Queensland Law Society to ensure that clause 49 operates as intended and again encourages the department to progress changes or amendments that address this issue.

2.5 Part 4 – Custodian trustees (Clauses 51-62)

Part 4 clarifies the liability of the custodian trustee and any managing trustees of the trust by ensuring that, subject to an express contrary intention in the trust instrument, the managing trustees are liable for:

- any acts or omissions by the custodian trustee that the managing trustees direct
- any acts or omissions of the managing trustees
- any costs for bringing or defending proceedings brought in the name of the custodian trustees as the managing trustees direct.[132]

Clause 62 of the Bill also clarifies that nothing in this part limits the right of the managing trustees, or the custodian trustee, to be indemnified out of the trust property in relation to liabilities incurred in the proper administration of the trust.[133]

This part otherwise re-enacts, in modern language, the current provisions in section 19 of the Act.[134]

130 DJAG, response to QLS, Questions on Notice, p 3.

131 DJAG, response to QLS, Questions on Notice, p 3.

132 DJAG, briefing paper, p 4.

133 DJAG, briefing paper, p 4.

134 DJAG, briefing paper, p 4.

2.5.1 Stakeholder views – Function of custodian trustee (Clause 55)

STEP Queensland recommended clause 55 should clarify that a custodian trustee may insure and defend trust property.[135]

2.5.1.1 Department response

The department stated that the proposed additional obligation would be a substantial departure from the existing law as provided under section 19 of the *Trusts Act 1973* which is adopted in the Bill. Under the Bill, the management of the trust property, and the exercise of all powers and discretions under the trust, remain vested in the managing trustees rather than the custodian trustee. While the custodian trustee may have an obligation to defend proceedings in relation to trust property, this is only when instructed to do so by direction from the managing trustees.[136]

The department clarified clause 55 of the Bill provides that in performing the custodian trustee's functions as directed by the managing trustees, the custodian trustee must perform all acts, and execute all documents as the managing trustees, by instrument, direct. Whether the managing trustees direct the custodian trustee to insure and defend trust property is properly a matter for the managing trustees.[137]

2.6 Part 5 – Trustees' duties (Clauses 63-70)

Part 5 provides for new statutory duties on the trustee as follows:

- in administering a trust, to exercise the care, diligence and skill that a prudent person would exercise in managing the affairs of other persons. A more onerous duty will apply to professional trustees or those who have, or hold themselves out as having, special knowledge or experience relevant to administering trusts or trusts of a particular type.
- to act honestly and in good faith to administer the trust to further the purposes for a charitable trust, or to benefit the beneficiaries of the trust for all other trusts.
- to keep separate and accurate accounts and records for each trust, keep these records for a minimum of 3 years after the termination of the trust, and on a beneficiary's reasonable request, allow inspection of or on payment of the trustee's reasonable costs, provide a copy of, these accounts to the beneficiary.[138]

While these are new statutory obligations, and there are no equivalent provisions in the Act, these duties are based on duties that exist under common law.[139]

2.6.1 Stakeholder views (STEP Queensland) – Duty to act honestly and in good faith (Clause 68(b)), Duty to keep accounts and other records (Clause 69(1)) and Duty to make accounts available for inspection and to provide copies (Clause 70)

STEP Queensland considered that clause 68(b) does not capture the needed flexibility for the modern trust and should be omitted as the general law is well understood and provides ample protection.[140]

STEP Queensland stated that clause 69(1) is imposing an obligation on trustees to keep accounts and other records that will be impossible to meet. They suggested that it should be possible for a trustee to obtain acquittal from any obligation to beneficiaries to keep records by providing a copy of the accounts and records to the principal class of beneficiaries then remaining upon termination of the

135 STEP Queensland, submission 3, p 3.

136 DJAG, response to submissions, pp 6-7.

137 DJAG, Public hearing – further issues, p 5.

138 DJAG, briefing paper, p 4.

139 DJAG, briefing paper, p 4.

140 STEP Queensland, submission 3, pp 3-4.

trust. STEP Queensland also stated that if a trustee has provided beneficiaries with records in, say, PDF format on a hard drive, it should be unnecessary to require the trustees to then hold records for a further 3 years, incurring storage costs, where the trust has come to an end.[141]

STEP Queensland also suggested a more nuanced approach is required for clause 70 – Duty to make accounts available for inspection and to provide copies, recognising that there may be various reasons why it is not reasonable to make accounts available for inspection and to provide copies; for example, information may be commercial and in confidence or potentially harmful. They proposed that examples where it is not reasonable to request information could be provided.[142]

2.6.1.1 Department response

The department noted in relation to clause 68(b), under general statutory interpretation principles, the beneficiaries of the trust will be determined at the relevant time when the duty applies. Accordingly, if there are changes to the beneficiaries over time, the duty will be based on the beneficiaries of the trust at the time of the trustee's actions. This duty is reflected in common law and adopted the approach that was recommended in the QLRC Final Report.[143]

Further, the department responded that at common law, the duty to keep accounts and other records (clause 69), is an open-ended obligation on trustees to hold trust records. The QLRC recommended that this common law duty be adopted in the Bill. The period of 3 years after termination of the trust is a minimum period and does not override other obligations or duties on trustees to retain records for longer period. Additionally, the trustee is given a right to be relieved from personal liability (clause 160) or to be indemnified by the beneficiary (clause 161) where appropriate. This allows the court to consider the balance of obligations and rights that apply.[144]

The department clarified that the duty to make accounts available for inspection and to provide copies (clause 70) relates to the trust accounts only, not to all the trust records. Accordingly, commercial contracts or other commercially confidential information would not be available, as a right, under this duty. Further, the clause explicitly provides that the duty does not apply if the request is unreasonable in the circumstances (clause 70(2)), which will require the court to consider the person making the request and the nature of the information sought. This may require the court to consider the more nuanced factors identified in the submission, at the court's discretion, to ascertain whether the request is reasonable.[145]

2.6.2 Stakeholder views (QLS) – Duty to keep accounts and other records (Clause 69) and Duty to make accounts available for inspection and to provide copies (Clause 70)

QLS welcomed the statutory identification of the common law requirement to keep accounts in clause 69. However, QLS considered an opportunity had been missed to provide an expansive requirement for accounts with specificity of items that should be included. This would provide greater clarity to the rights and responsibilities of the parties. They stated that it is important to ensure that any changes do not alter the common law, so that beneficiaries do not seek to misuse the legislation to obtain more information than the information to which they are currently entitled (clause 70).[146]

2.6.2.1 Department response

The department reiterated, as above, that the duty to keep accounts is a general duty which is reflective of the common law, and this approach was recommended by the QLRC. The Bill is not

141 STEP Queensland, submission 3, p 4.

142 STEP Queensland, submission 3, p 4.

143 DJAG, response to submissions, p 7.

144 DJAG, response to submissions, p 7.

145 DJAG, response to submissions, p 7.

146 QLS, submission 5, p 2.

intended to codify or impinge on the extensive common law in this area where courts have qualified and clarified the duty to keep accounts depending on the relevant circumstances of the trust. This duty does not limit or alter the existing common law rights. This is reflected in clause 63 of the Bill which sets out the trustee's duties (including their duties in relation to accounts and records) and provides that the part does not limit any other duty to which a trustee is subject, whether under the Act or otherwise.[147] Accordingly, the department stated that this provision does not limit any rights beneficiaries have as a result of duties on trustees under any law, including common law.

Similarly, clause 70(3) confirms that the duty to make accounts available to beneficiaries does not limit any right of a beneficiary to obtain other information from the trustee, or to apply to the court for an order that the trustee provide other information.[148]

Therefore, the department considered the Bill reflects the general common law duty on a trustee and does not limit or alter existing rights.[149]

2.7 Part 6 – Investments (Clauses 71-86)

Part 6 provides:

- power for trustees to invest trust property
- the duty placed on trustees in exercising the power to invest trust property
- the trustees' liability when exercising the power to invest trust property.[150]

Clause 73 imposes a new duty on a trustee who is not a professional investor but who holds themselves out as having special knowledge or experience in investing money for other persons to exercise the care, diligence and skill that a prudent person having that special knowledge or experience would exercise in managing the affairs of other persons, subject to a contrary intention in the trust instrument.[151]

The general duty on trustees, when exercising the power of investment under section 22(1)(b) of the Act to exercise the care, diligence and skill a prudent person of business would exercise in managing the affairs of another person is no longer required given the general statutory duties on trustees in the Bill (see part 5 above – section 2.6).[152]

The power of a trustee in relation to securities in section 25 of the Act has been omitted from the Bill because the Bill contains broad powers to deal with trust property.[153]

Clause 80 of the Bill clarifies the power given in section 28 of the Act so that the trustee:

- has express power to construct a residence for a beneficiary to live in
- clarifies that the power to enter into an agreement or arrangement to secure a right to use a residence for the beneficiary to live in includes the right to enter into a residence contract under the *Retirement Villages Act 1999* and clarifies that the trustee's power to retain the residence after the beneficiary has stopping living in the residence does not limit the operation of the *Retirement Villages Act 1999* or any other Act.

147 DJAG, response to submissions, p 12.

148 DJAG, response to submissions, p 12.

149 DJAG, response to submissions, p 12.

150 DJAG, briefing paper, p 4.

151 DJAG, briefing paper, p 4.

152 DJAG, briefing paper, p 4.

153 DJAG, briefing paper, p 4.

- removes the requirement for a residence only to be retained if it would 'not unfairly prejudice the interests of the other beneficiaries' as this is no longer necessary. The Act and subclause 3 of the Bill require that the residence to be retained, purchased or secured may only be made available to the beneficiary, and on conditions imposed, that are 'consistent with the extent of the beneficiary's interest under the trust' which provides an adequate safeguard.
- clarifies that the trust instrument cannot forbid the exercise of, or otherwise limit, the trustee's powers under this clause.[154]

Clause 81 of the Bill grants a new power to the trustee to authorise another person to exercise the trustee's investment power.[155]

Clause 85 of the Bill requires the court to consider the amount of the trust funds invested in the exercise of the investment power in addition to the factors in section 30B of the Act which are included in the Bill. The factors in clause 85 are relevant to the court's deliberations when considering a proceeding against a trustee for breach of trust in relation to the exercise of an investment power.[156]

This part otherwise re-enacts, in modern language, the current provisions of part 6 of the Act, other than section 27 which forms part of Part 7 of the Bill referred to below.[157]

2.7.1 Stakeholder views – Power to provide residence for beneficiary to live in (Clause 80)

STEP Queensland proposed that clause 80 should be excludable in the trust instrument as it imposes a distracting discretionary power on the trustee of a commercially based trust, such as a unit trust where there are paid subscriptions for units. Such a trustee would not have a discretion imposed on the trustee, which might be exercised theoretically to provide a residence for one of the unit holders.[158]

2.7.1.1 Department response

The department stated that currently, section 28(2) of the *Trusts Act 1973* provides the trustee with the discretion to provide a residence for a beneficiary to live in, despite the terms of the trust instrument. This position is adopted in the Bill and reflects the approach that was recommended in the QLRC Final Report. However, this discretion of the trustee to provide a residence for a beneficiary is tempered with the obligation that the power to provide the residence, or any condition imposed on it, must be consistent with the extent of the beneficiary's interest under the trust. Accordingly, the proposed residence must not exceed the beneficiary's interest under the trust. To make this power subject to the terms of the trust instrument would be a substantial change to the existing law.[159]

2.8 Part 7 – General powers of trustees (Clauses 87-127)

Part 7, division 1 of the Bill grants the trustee a new general power to deal with trust property like an absolute owner of the trust property, unless this power is expressly excluded or modified in the trust instrument. The Bill also prevents the trust instrument from modifying or excluding certain minimum powers to deal with trust property including the power to sell, lease, mortgage and insure trust property, thereby ensuring that the trustee has sufficient general powers necessary to administer the trust property effectively. These broad powers to deal with trust property render many of the specific

154 DJAG, briefing paper, p 4.

155 DJAG, briefing paper, p 5.

156 DJAG, briefing paper, p 5.

157 DJAG, briefing paper, p 5.

158 STEP Queensland, submission 3, pp 4-5.

159 DJAG, response to submissions, p 8.

powers given to trustees under the Act obsolete. Accordingly, these specific powers have been omitted from the Bill.[160]

Stakeholders did not comment on clauses 87 to 127 during the committee's inquiry.

2.8.1 Trustee's power to delegate

The current act allows a trustee to delegate their role as a trustee where they are out of or about to be out of the state, or who are or may be about to become temporarily incapable of performing all their duties due to physical infirmity (clause 100). The QLRC's recommendations propose an extension of the power to delegate to include where a trustee was temporarily incapable of performing all their duties due to impaired mental capacity.[161]

The department advised that stakeholder views on this recommendation were mixed because there are significant issues with a trustee being able to delegate their trust powers during a period of temporary impaired mental capacity. A trustee is liable for their delegate's actions, so when a trustee is mentally incapable, they cannot supervise their delegate's actions.[162]

Further, the department stated that unlike attorneys and administrators who are appointed to make decisions for persons with impaired mental capacity and who are subject to statutory safeguards, duties, obligations and financial accountability under the *Powers of Attorney Act 1998* and the *Guardianship and Administration Act 2000,* there are no statutory safeguards to protect the trustee from their liability arising from a breach of duty by their delegate.[163]

The department acknowledged that there are also other mechanisms under the Bill to appoint a new trustee where the trustee has impaired mental capacity to administer the trust. For those reasons, the Bill does not permit delegation when the trustee has impaired mental capacity and provides that a delegation made by the trustee will end if the trustee has impaired mental capacity during the term of the delegation (clause 106).[164]

Stakeholders did not comment on clauses 87 to 127 during the committee's inquiry.

2.9 Part 8 – Maintenance, education and advancement (Clauses 128-139)

Part 8 deals with the distribution of trust property including income and capital to beneficiaries for their maintenance, education and advancement. The Bill removes the reference to settlement on marriage or holding accumulations for minors until marriage that is in the Act as this is no longer required.[165]

Stakeholders did not comment on clauses 128 to 139 during the committee's inquiry.

2.10 Part 9 – Indemnities and protection of trustees and other persons (Clauses 140-162)

Part 9 deals with the indemnities and protections provided to trustees and other persons. Stakeholders did not comment on clauses 128 to 139 during the committee's inquiry.

2.11 Part 10 – Remuneration of trustees (Clauses 163-166)

Part 10 of the Bill provides the court with powers in relation to ordering or reviewing remuneration of trustees. Stakeholders did not comment on clauses 163-166 during the committee's inquiry.

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160 DJAG, briefing paper, p 5.

161 DJAG, public briefing transcript, p 3.

162 DJAG, public briefing transcript, p 3.

163 DJAG, public briefing transcript, p 3.

164 DJAG, public briefing transcript, p 3.

165 DJAG, briefing paper, p 6.

2.12 Part 11 – Court powers (Clauses 167-199)

Part 11 sets out the powers given to courts under the Bill including powers to make vesting orders, appoint and remove officeholders of the trust including trustees, and to make other orders in relation to trust property or other property.[166]

Stakeholders did not raise concerns regarding clauses 167 to 199 during the committee's inquiry.

2.13 Part 12 – Charitable trusts (Clauses 200-217)

In certain circumstances where the original purposes of the charitable trust are not able to give given effect to, part 12 provides power for the court to apply charitable trust property under a 'cy pres' scheme for another charitable purpose that is as close as possible to the original purpose of the charitable trust.[167]

Clause 205 modernises section 105 of the Act, and the circumstances in which the purposes of a charitable trust may be changed to allow the trust property to be applied cy pres, by providing that the relevant circumstances to be considered include not only the spirit of the trust, but also the prevailing social and economic conditions at the time.[168]

Part 12, Division 3 of the Bill are new provisions which provide the Attorney-General with the power to approve cy pres schemes for charitable trusts where the trust property that is the subject of the cy pres scheme does not exceed the District Court's monetary limit (which is currently $750,000).[169]

This part otherwise re-enacts, in modern language, the current provisions in part 8 of the Act, other than section 103 of the Act which is dealt with in part 1 of the Act.[170]

2.13.1 Stakeholder views – Trustee may apply to Attorney-General to approve scheme (Clause 208(1)(b)) and Deciding application (Clause 211(4))

QLS identified that clause 208(1) enables application to the Attorney-General for approval of a scheme to change the purposes of a trust only if the purposes of the trust have not previously been changed by the court. QLS recommended this eligibility requirement be removed, and that smaller charities which have obtained cy pres orders in the past should not be denied the opportunity to access the more affordable Attorney-General option, provided they meet the criteria.[171]

QLS noted that clause 211(4) confers a discretion on the Attorney-General to refuse to approve the scheme if the Attorney-General considers it more appropriate that the application be dealt with by the court. QLS considered this clause provides a level of protection for the public interest in contentious matters, while ensuring that smaller charities can still access the Attorney-General process in appropriate cases.[172]

QLS also suggested that the provisions in Part 12 Division 3 be reviewed in 5 years, reflecting that the legislative approach for cy pres applications has recently been updated in the United Kingdom and in Alberta Canada, with the approach in both these jurisdictions slightly more liberal.[173]

166 DJAG, briefing paper, p 8.

167 DJAG, briefing paper, p 8.

168 DJAG, briefing paper, p 8.

169 DJAG, briefing paper, p 8.

170 DJAG, briefing paper, p 8.

171 QLS, submission 5, p 3.

172 QLS, submission 5, p 3.

173 QLS, submission 5, p 3.

2.13.1.1 Department response

The department clarified that where a cy pres scheme has previously been ordered by a court, the court will have familiarity with, and jurisdiction in relation to, the matter. Therefore, notwithstanding the value of the charitable trust, it is appropriate that the matter return to be considered by the court.[174] Otherwise, the suggested amendment may allow reconsideration of proposed cy pres schemes by the Attorney-General which have already been considered and determined by the court.[175] [176]

The department clarified that any future assessment of reform is a matter for government.[177]

2.14 Part 13 – Gifts by particular trustees for philanthropic purposes (Clauses 218-221)

Part 13 provides when the trustee of a prescribed trust has the power to provide money, property or benefits to or for an eligible recipient or to establish an eligible recipient. This modernised and updated part replaces Part 9 of the Act, which reflects recent changes to Commonwealth taxation legislation, which removed the requirement for a declaration to be made by the trustee before an entity could be an eligible recipient.[178]

2.14.1 Stakeholder views – Gifts by particular trustees for philanthropic purposes (Clauses 218-221)

QLS welcomed the inclusion of Part 13 as it addresses issues arising due to changes in the Commonwealth deductible gift recipient framework under the *Income Tax Assessment Act 1997* (Cth). However, QLS recommended that these amendments be retrospective to ensure that the amendments adequately address any breaches which might have inadvertently occurred since the introduction of the *Charities Act 2013* (Cth). QLS stated that retrospective effect will also mean ancillary funds and charitable trusts do not need to take any additional administrative steps to enjoy the benefit of these new provisions.[179]

In QLS's response to questions on notice, the QLS sought to clarify the issue they believe remains unaddressed and would be resolved by including a provision equivalent to section 53 of Western Australia's *Charitable Trusts Act 2022* (WA).[180]

QLS stated Part 13 as it is currently drafted deals with the ability for ancillary funds to distribute to 'eligible recipients', being deductible gift recipients (DGRs) which are registered charities or would be a charity but for its connection to government. Section 307 (Part 17: Transition and validation provisions) addresses the exercise of 'prescribed powers' under the existing *Trusts Act 1973* (Qld) and validates the exercise of those powers where anomalies have existed (i.e. the trustee has not made an appropriate declaration or does not have the express power to distribute to all 'eligible entities' established by its trust deed). However, QLS identified 2 issues with this:

- The validation provision in section 307 only applies to the period ending immediately before the commencement of the section (i.e. the date the Bill takes effect as law).

174 Trusts Bill 2024, Clause 208(1)(b).

175 Trusts Bill 2024, Clause 211(4).

176 DJAG, responses to submissions, p 14.

177 DJAG, responses to submissions, p 14.

178 DJAG, briefing paper, p 8.

179 QLS, submission 5, p 4.

180 QLS, answers to questions on notice, p 3.

- The definition of 'eligible entities' under the existing Trusts Act (Part 9, section 107) is broader than the current Bill and includes all DGRs – including those which are not charities, regardless of their connection to government.[181]

In QLS's view, an equivalent provision to the section 53 of the *Charitable Trusts Act 2022* (WA) is required to preserve the status quo for certain ancillary funds. Without this, the effect would be that certain ancillary funds which have either made a declaration or have an express power to distribute to all DGRs in their trust deeds pursuant to Part 9 of the existing *Trusts Act 1973* (Qld) will no longer be able to act in accordance with that power.

With reference to Part 13 of the proposed Bill, if these ancillary funds continued to distribute to DGRs which are not charities (regardless of connection to government) as permitted by their trust deed or a declaration made under Part 13 of the existing Act, there is nothing in the Bill which preserves the status of these ancillary funds as charitable trusts under Queensland law.[182]

QLS noted that the *Charities (Consequential Amendments and Transitional Provisions) Act 2013* (Cth) has preserved the status of these ancillary funds at a federal level, which in turn entitles them to continued registration as a charity under the *Charities Act 2013* (Cth) and *Income Tax Assessment Act 1997* (Cth). As such, preserving the status of these ancillary funds under Queensland law would be consistent with the approach taken by the Federal legislature in relation to this issue.[183]

QLS considered the continued recognition of these ancillary funds as charitable trusts under Queensland law is to the benefit of the State, as it will preserve the express jurisdiction of the Court and powers of the Attorney-General in respect of charitable trusts under the Bill.[184]

2.14.1.1 Department response

The department stated that the Bill, in specific circumstances, validates actions taken or attempted by trustees of a prescribed trust before the Bill's commencement, even if those actions did not comply with the requirements of the current *Trusts Act 1973*.[185]

The department noted that clause 307 of the Bill provides that these provisions apply retrospectively, as clause 307 specifies that any exercise or purported exercise of the former prescribed power under section 110 of the *Trusts Act 1973* during the relevant period is taken to be valid despite a failure of the trustee to comply with requirements for declarations or limitations under section 109 of the *Trusts Act 1973*.[186]

In response to QLS's suggestion that the Bill be amended to include a provision equivalent to section 53 of the *Charitable Trusts Act 2022* (WA), the department advised that it would consider the issues raised.[187]

181 QLS, answers to questions on notice, p 3.

182 Section 221 preserves the status of an ancillary fund as a charitable trust only where a prescribed power under Part 13 is exercised – however, 'Prescribed power' refers only to the distribution to an 'eligible recipient' as defined by section 218, which does not include non-charitable DGRs.

183 QLS, response to questions on notice, p 4.

184 QLS, response to questions on notice, p 4.

185 DJAG, response to submissions, p 14.

186 DJAG, response to submissions, p 14.

187 DJAG, response to questions on notice, p 2.

Committee comment

The committee notes that the Department of Justice and Attorney-General will consider the Queensland Law Society's supplementary remarks on Part 13 of the Bill regarding federal and other state approaches to ancillary funds and whether amendments to the Trusts Bill 2024 are appropriate to avoid potential unintended consequences.

2.15 Part 14 – Statutory trustees (Clauses 222 and 223)

Part 14 provides for the powers, rights, duties and obligations given to statutory trustees under the Bill. This part re-enacts, in modern language, the provisions in sections 6(1)(b), 7 and 31(3) of the Act.[188]

2.16 Part 15 – Miscellaneous (Clauses 224 and 225)

The Bill provides the Governor in Council with power to make regulations under the Bill and for the chief executive to approve forms under the Bill.[189]

2.17 Part 16 – Repeal (Clause 226)

Part 16 repeals the Act.[190]

2.18 Part 17 –Transitional and validation provisions (Clauses 227-311)

Part 17 provides for transitional and validation matters, including:

- the saving of any current certificate given by the Minister approving more than 4 trustees under section 11(3)(b) of the Act
- the saving of the current provisions relating to persons deemed to be a statutory trustee under the repealed *Settled Land Act 1886* under section 6(1)(a) of the Act
- the validation of the exercise of a former prescribed power in favour of an ancillary fund for philanthropic purposes under section 110(1)(b) of the Act, which did not comply with the requirements under that section
- a range of transitional provisions to clarify whether a provision will apply to a court proceeding and a trust instrument that was commenced or created before the commencement of the Bill
- a transitional regulation-making power for two years from the date of commencement.[191]

2.18.1 Fundamental legislative principles – Rights and liberties of individuals (Clauses 232, 238, 253, 254, 255 and 257)

To have sufficient regard for the rights and liberties of individuals, legislation should not adversely affect rights and liberties, or impose obligations, retrospectively.[192] Strong argument is required to justify an adverse effect on rights and liberties, or imposition of obligations, retrospectively.[193]

The Bill raises issues relating to retrospectivity in regard to the following clauses:

- Clause 232 – Appointment of trustees - replacement of trustees in particular circumstances happening or starting before commencement

188 DJAG, briefing paper, p 8.

189 DJAG, briefing paper, p 9.

190 DJAG, briefing paper, p 9.

191 DJAG, briefing paper, p 9.

192 LSA, s 4(3)(g).

193 Office of the Queensland Parliamentary Counsel (OQPC), '*Fundamental legislative principles: the OQPC Notebook*' (Notebook), p 55.

In relation to the retrospective application of the Bill's proposed replacement of trustees' provisions,[194] the explanatory notes state that the Bill may retrospectively impact trustee's rights as they may be replaced as trustee. However, the Bill 'protects the rights of those interested in the trust property to ensure that the trust is able to be effectively administered for the benefit of the beneficiaries of the trust'.[195] The Bill also allows a child who was appointed a trustee prior to commencement to be replaced.[196]

The Bill's proposed amendments may adversely affect rights and liberties of a trustee, including a child trustee, by providing for the trustee's replacement. However, a replacement trustee may only be appointed by the specified persons, must be by instrument, and only where one of the specified circumstances exist.

For some of these circumstances, the retrospective effect of the Bill will not be adverse, such as where the trustee has died or declares their wish to be discharged. However, some of the proposed circumstances may result in an adverse outcome for a trustee who wishes to continue in that capacity. For example, where a trustee is replaced for being unfit to act or incapable of acting, becoming bankrupt or being disqualified from managing corporations.

Committee comment

The committee determines that the proper and effective management of the trust justifies the retrospective, and potentially adverse, effect of the provisions.

- Clause 238 – Removal and discharge of trustees in particular circumstances happening or starting before commencement

In relation to the retrospective application of the Bill's proposed removal and discharge of trustees provisions,[197] the explanatory notes acknowledge that the Bill's provisions retrospectively impact on the trustee's rights as they apply irrespective of when the specified circumstances happen, and 'the grounds on which the trustee may be removed under clause 20 differ to those under the Act'.[198]

Section 12 of the Act contains the existing provisions for appointing new trustees. Clause 20 shares considerable similarities with the circumstances for replacement but does include some distinctions. Namely, the Act appears to require that only a court may appoint a new trustee where an existing trustee becomes bankrupt,[199] where the Bill provides that an appointer or, in the absence of an appointer, a continuing trustee, may remove a bankrupt trustee.[200] The Bill also provides that, under the specified circumstances, a trustee disqualified from managing corporations under the *Corporations Act 2001* (Cth) may be replaced,[201] whereas an equivalent provision does not appear to exist in the Act.

194 Bill, cls 20 and 232.

195 Explanatory notes, p 30.

196 Explanatory notes, p 30. Existing s 12 of the Act includes an infant, as opposed to a child. Bill, cl 232.

197 Bill, cls 29 and 238.

198 Clause 29(1) of the Bill identifies those circumstances included in cl 20(1) that apply in relation to the removal of a trustee. Explanatory notes, p 31.

199 Act, s 80(2).

200 Bill, cl 29(1), (3).

201 Bill, cls 20(1)(g), 29(1), 238.

The Bill's proposed amendments may adversely affect rights and liberties of a trustee, including a child trustee[202] by providing for the trustee's removal. However, a trustee may only be replaced by the specified persons, by instrument, where the specified circumstances exist, and where the minimum trustee requirements will be satisfied. The circumstances for removal apply retrospectively and may be adverse, such as where a trustee wishes to continue in that capacity but is removed for being unfit to act or incapable of acting, becoming bankrupt or being disqualified from managing corporations.

According to the explanatory notes, the Bill's provisions protect 'the rights of those interested in the trust property to ensure that the trust is able to be effectively administered for the benefit of those with an interest in the trust property'.[203]

Committee comment

The committee is of the opinion that the proper and effective management of the trust justifies the retrospective, and potentially adverse, effect of the provisions.

- Clause 253 - Liability for improper loans made by trustee before commencement

In relation to the retrospective application of the Bill's proposed liability provisions associated with the improper loan of trust funds on the security of property,[204] the explanatory notes state that the proposed provisions are intended to have the same effect as the existing provisions of the Act.[205] Further, 'there is no intention to practically alter the rights and obligations of the trustees and those parties with an interest in the trust property'.[206]

The committee notes that the Bill's provisions replicate the existing law, including in their retrospective nature,[207] applying to loans made by the trustee whether before or after the commencement. While the provisions may be adverse depending on the circumstances in any given matter—for example, the provisions may be adverse in the sense that they limit the liability of a trustee who has made an improper loan with trust money, to the detriment of a beneficiary of the trust, or may be adverse to a trustee where liability is found to exist for a loan the trustee has made—the committee notes the advice that the intention is not to alter the rights and obligations of the trustees and those parties with an interest in the trust property.

Committee comment

The committee believes that the proposed liability provisions justify their retrospective and potentially adverse effect, and they have sufficient regard to the rights and liberties of individuals.

- Clause 254 – Proceedings against trustees for breach of trust in relation to exercise of investment power

In providing for proceedings against a trustee for a breach of trust in the exercise of an investment power,[208] the Bill largely retains the Act's existing matters to be taken into account. However, the Bill proposes an additional matter the court may consider, being the amount of the trust funds invested in the exercise of the investment power.[209]

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202 The Bill retains the effect of s 12 of the Act in relation to removal of a child as trustee, though the Act uses the term infant, as opposed to child. Bill, cl 238.

203 Explanatory notes, p 31.

204 Bill, cls 84 and 253.

205 Act, s 30A(1).

206 Explanatory notes, p 32.

207 Act, s 30A(2).

208 Bill, cls 85 and 254.

209 Bill, cl 85(2)(b).

Although the Bill proposes that the Act's existing provisions continue to apply to a proceeding started before the commencement,[210] they also provide that the proposed amendments apply to the exercise of an investment power whether before or after the commencement.[211] The potential retrospective impact of this is nullified, as the Bill includes additional provisions that will ensure that the additional consideration will not apply to a proceeding for an investment power exercised before the commencement.[212]

According to the explanatory notes, the Bill's provisions are 'intended to preserve the effect of the Act' and are 'not intended to practically alter the rights and obligations of parties to proceedings against the trustee'.[213]

Committee comment

The committee believes that the proposed provisions have sufficient regard to the rights and liberties of individuals.

- Clause 255 – Set off gains and losses in proceedings for breach of trust

In providing for the set off of gains and losses in proceedings against a trustee for a breach of trust in relation to an investment,[214] the explanatory notes state that the Bill is 'effectively a restatement of section 30C of the Act, so there is no intended change to the rights and obligations of the parties to proceedings under this clause'.[215]

Although the Bill proposes to apply to an investment whether made before or after the commencement, it does not apply to a proceeding started before the commencement which remains subject to the Act. Although the potential retrospective impact of the Bill is somewhat nullified, the explanatory notes observe that the Bill 'applies to proceedings started after commencement, therefore the (modernised) wording of clause 86 will apply retrospectively'.[216]

Committee comment

The committee is of the opinion that the proposed provisions have sufficient regard to the rights and liberties of individuals.

- Clause 257 – Application of general powers in relation to existing trust property

The Bill's proposed general powers conferred on a trustee in relation to existing trust property[217] will be retrospective and may adversely affect rights and liberties of an individual, such as a beneficiary of the trust. The explanatory notes assert that the Bill 'gives the trustee flexibility to administer the trust property as effectively as possible without unnecessary restrictions of the limited powers given under the Act'.[218] For example, the Bill's general power to lease the trust property is broader than the Act's existing powers which are limited to leasing the property 'at a reasonable rent for any term not exceeding 1 year'.[219]

210 Bill, cl 254(2), (5).

211 Bill, cl 254(1).

212 Bill, cl 254(3)-(5).

213 Explanatory notes, p 32.

214 Bill, cls 86 and 255.

215 Explanatory notes, p 33.

216 Explanatory notes, p 33.

217 Bill, cls 87 and 257.

218 Explanatory notes, p 33.

219 Act, s 32(1)(d).

According to the explanatory notes, the Bill's general powers are 'restrictive and amount to less than the powers of an absolute owner of property',[220] as the trustee's powers are subject to an express statement excluding or modifying that power in the trust instrument.[221] However, the Bill seeks to limit the supremacy of the trust instrument by providing that it is unable to exclude or modify specific powers, including, for instance, the power to sell, lease, insure or mortgage trust property.[222]

The Bill includes a safeguard by making the general powers conferred on a trustee subject to the trustee's duties administering the trust. In this regard, the Bill places a range of duties on the trustee, including to exercise the care, diligence, and skill that a prudent person of business would exercise in managing the affairs of other persons,[223] to act honestly and in good faith,[224] and to keep accurate accounts and records for the trust.[225]

Committee comment

The committee considers the flexibility to administer the trust property as effectively as possible justifies the retrospective, and potentially adverse, effect of the provisions.

2.19 Part 18 – Amendment of Acts (Clauses 312-347)

Part 18 amends the following Acts:

- *Aboriginal Land Act 1991* and *Torres Strait Island Land Act 1991* to enable the District Court to have jurisdiction where the value of all of the trust property does not exceed the District Court's monetary limit.
- *Corrective Services Act 2006* so that the Bill does not apply to the prisoners' trust fund or a victim trust fund.
- *District Court of Queensland Act 1967* so that the District Court has jurisdiction to determine an application under the Bill for proceedings relating to a trust, trust property, or property, where the value of all of the trust property of the trust, or the property, the subject of the application does not exceed the District Court's monetary limit.
- *Funeral Benefit Business Act 1982* so that regulations may prescribe the extent to which the Bill applies to a payment that is made by, or on behalf of, a contributor under a funeral benefit agreement and provide for transitional arrangements for the provisions of the Act to continue to apply until any regulation is made.
- *Public Trustee Act 1978* to:
  - replace existing sections 40 and 40A of the Act to reflect the:
    - modernisation of the custodian trustee provisions in the Bill
    - updated and modernised statutory trustee provisions in the Bill
  - provide transitional arrangements for these new provisions to apply.
- *River Improvement Trust Act 1940* to:

220 Explanatory notes, p 10.

221 Bill, cl 87(1), (3).

222 Explanatory notes, p 33.

223 Bill, cl 67. The Bill provides for greater responsibilities for professional trustees (cl 65) and those trustees who hold themselves out as having special knowledge or experience relevant to administering trusts or trusts of a particular type (cl 66).

224 Bill, cl 68.

225 Bill, cl 69.

- provide that the Bill does not apply to a trust established under that Act
- retrospectively validate that the Act never applied to a trust established under that Act
- retrospectively validate that the Act never affected the appointment of a member of the trust made under the Act before commencement.

- *Succession Act 1981* to insert new provisions which replace sections of the Act into the Succession Act, because those provisions do not have practical application to trustees generally, but only to personal representatives. These new provisions are:
  - Sections 49A to 49D (which replace section 57 of the Act)
  - Section 53A (which replaces section 75 of the Act)
  - Section 61AA (which replaces section 78 of the Act)
- *United Grand Lodge of Antient Free and Accepted Masons of Queensland Trustees Act 1942* to provide consequential amendments for the power of the board to invest monies under the Bill.[226]

This part also makes consequential amendments to the legislation in Schedule 2 of the Bill to update references to the Act with references to the equivalent provisions in the Bill.

2.19.1 Stakeholder views – Replacement of s 3D (unauthorised investments by board subject to approval of grand lodge) (Clause 347)

In relation to the proposed consequential amendment to section 3D of the *United Grand Lodge of Antient Free and Accepted Masons of Queensland Trustees Act 1942*, the United Grand Lodge of Antient Free and Accepted Masons of Queensland suggested the following addition to section 3D(b):

> (b) is authorised under a power conferred on the board by an order made under the Trusts Act 2024, section 184 *if, and only if, the obtaining of such an order is first authorised by Grand Lodge*.

The submitter argued that the addition of the extra requirement that the board must obtain the approval of Grand Lodge before applying to the court for approval of an investment would maintain the current balance of control under the internal constitutional arrangements of Grand Lodge and its Board of Benevolence. Without that requirement, the Board of Benevolence would gain a degree of independence and freedom from oversight by Grand Lodge which it does not currently have. They submitted that it would be inappropriate for the new Act to confer that independence and remove that extra level of oversight and as currently proposed would effectively alter the constitutional arrangements of the Grand Lodge and its Board of Benevolence.[227]

2.19.1.1 Department response

This matter is noted and will be given further consideration as to whether the consequential amendment to the *United Grand Lodge of Antient Free and Accepted Masons of Queensland Trustees Act 1942* is consistent with the current requirements under that Act.[228]

[226] DJAG, briefing paper, pp 9-10.

[227] United Grand Lodge of Antient Free and Accepted Masons of Queensland, submission 2, p 1.

[228] DJAG, response to submissions, p 4.

Committee comment

The committee notes that Department of Justice and Attorney-General will consider clause 327 to determine whether it is consistent with the current requirements under the *United Grand Lodge of Antient Free and Accepted Masons of Queensland Trustees Act 1942*, and welcomes action by the department to potentially remedy the matter.

2.19.2 Fundamental legislative principles - Sufficient regard to the institution of Parliament (Clauses 325-329)

Whether a Bill has sufficient regard to the institution of Parliament depends on whether, for example, the Bill allows the delegation of legislative power only in appropriate cases and to appropriate persons; sufficiently subjects the exercise of a delegated legislative power to the scrutiny of the Legislative Assembly; and authorises the amendment of an Act only by another Act.[229]

2.19.2.1Amendment of an Act only by another Act

The Bill proposes to amend the *Funeral Benefit Business Act 1982* (FBB Act) to provide that the Bill, when enacted, applies to a payment made by or on behalf of a contributor under a funeral benefit agreement in the way and to the extent prescribed by regulation.[230]

The explanatory notes observe that the FFB Act[231] currently lists the parts of the Trusts Act that apply to payments made by a contributor.[232] According to the explanatory notes:

> Because of the uniqueness of funeral benefit businesses, the exclusions that apply to certain entities, and the nature of payments made by contributors, Clause 326[233] of the Bill allows the provisions of the Bill that will apply to funeral benefit businesses to be specified in a regulation. It also provides for a transitional provision that retains the position under the Act until this regulation is made.[234]

Although acknowledging a departure from fundamental legislative principles, the explanatory notes seek to justify the proposed amendments as they provide 'appropriate flexibility to determine the appropriate provisions of the Bill to apply to funeral benefit businesses'.[235]

A Bill should only authorise the amendment of an Act, by another Act.[236] A clause in an Act which enables the Act to be expressly or impliedly amended by subordinate legislation or executive action is defined as a Henry VIII clause. Where an Act is purported to be amended by a statutory instrument (other than an Act) in circumstances that were not justified, parliamentary committees have opposed the relevant provisions by requesting that Parliament disallow the part of the instrument that does not have sufficient regard for the institution of Parliament.[237]

229 LSA, s 4(4).

230 Bill, cl 326 (FBB Act, amends s 79).

231 FBB Act, s79(2), (3).

232 Explanatory notes, p 36.

233 Note - clause 324 in explanatory notes, p 36 should be Clause 326 as stated above.

234 Explanatory notes, p 36.

235 Explanatory notes, p 36.

236 LSA, s 4(4)(c).

237 OQPC, Notebook, p 159.

Although, committees have considered the possible use of Henry VIII clauses in limited circumstances,[238] the existence of these circumstances does not automatically justify the use of Henry VIII clauses, and, if the Henry VIII clause does not fall within any of the above situations, committees have classified the clause as 'generally objectionable'.[239]

The Bill proposes to amend 'primary legislation' (that is, the FBB Act) to provide that 'other primary legislation' (the Bill, when enacted) will apply to a payment made by or on behalf of a contributor under the funeral benefit agreement provisions of the primary legislation. This alone represents an Act seeking to amend another Act, which, depending on the context, may be readily justifiable.

However, the Bill proposes to go further by providing that the other primary legislation will apply to the primary legislation in the way, and to the extent, prescribed by regulation. In effect, this means that subordinate legislation will dictate which provisions of the other primary legislation will apply to the primary legislation.

The existing provisions of the FBB Act identify the specific existing provisions of the Act (referred to as 'nominated Trusts Act provisions') which apply to the relevant payments under a funeral benefit agreement. This approach makes it clear which provisions of the Act will apply to the FBB Act. Additionally, for these 'nominated Trusts Act provisions' to be altered, an amendment Bill would need to be introduced and would attract the full scrutiny of the parliamentary process.

Under the proposed amendments, subordinate legislation will prescribe which of the other primary legislation's provisions apply to the relevant payments under a funeral benefit agreement. It may be that regulation prescribes the same provisions as those currently specified as 'nominated Trusts Act provisions'. However, there is no certainty that this will be the case.

Arguably, subordinate legislation prescribing which provisions of the other primary legislation will apply to the primary legislation, including how and to what extent they will apply, represents subordinate legislation amending primary legislation.

Given the explanatory notes assert a justification of flexibility, it does not appear that the limited circumstances where previous committees have considered the possible use of Henry VIII clauses exist in relation to this Bill's provisions. The Bill and explanatory notes do not provide details on what is intended to be prescribed, or guidance on what considerations will guide such matters.

One safeguard is that a regulation amending the primary legislation will be required to be tabled and able to be subject to a disallowance motion under section 50 of the *Statutory Instruments Act 1992* and, therefore, subject to the scrutiny of the Legislative Assembly.

2.19.2.2Department response

The department acknowledged the existing section 79 of the FBB Act provides that certain nominated provisions of the Trust Act apply in relation to payments made by a contributor to a funeral benefit business. The amendment proposed by clause 326 of the Bill to section 79 of the FBB Act retains the principle that trusts laws apply to funeral benefit businesses but allows specific requirements relating to payments to be specified by regulation.[240]

The department explained this legislative approach for the FBB Act, as contained in the Bill, recognises that the funeral benefits industry has unique characteristics and needs. By allowing the flexibility for a regulation to be made under the FBB Act to prescribe the way a new Trusts Act would apply to funeral benefit businesses, the Bill establishes a framework that allows a flexible, that is a responsive and tailored approach, to the regulation of trust-related issues that are relevant for funeral benefit businesses.

238 Such as, to facilitate: immediate executive action, the effective application of innovative legislation, transitional arrangements, and the application of national scheme legislation. OQPC, Notebook, p 159.

239 OQPC, Notebook, p 159; Alert Digest 2006/10, p 6, paras 21-24; Alert Digest 2001/8, p 28, para 31.

240 DJAG, Public hearing - further issues, p 2.

This more flexible framework is expected to be beneficial in ensuring that an appropriate balance is struck between consumer protection and regulatory burden on the funeral benefit business industry.[241]

Moreover, the department considered this approach recognises that the Bill introduces a modernised approach to trusts laws, which needs to be considered, in terms of their application, to meet the unique and evolving characteristics of funeral benefit businesses over time. The regulation-making capacity ensures the laws work effectively, both initially and on an ongoing basis, by enabling the approach to be adjusted and updated as needed, within the confines of the modernised and reformed trusts laws framework delivered by the Bill.[242]

The department anticipated that prior to the making of subordinate legislation under the FBB Act, further analysis, as well as engagement and consultation with stakeholders, will be undertaken to inform the content and composition of the proposed regulation. In summary, the anticipated subordinate legislation is expected to detail the provisions of the new *Trusts Act 2024* that are applicable for a funeral benefit business. The Government has not determined a specific timeframe for this work.[243]

The department stated that the Bill contains provisions to avoid unnecessary uncertainty and disruption for funeral benefit businesses following passage of the Bill. Specifically, the amendment made by clause 326 of the Bill to section 79(2) of the FBB Act provides that the *Trusts Act 2024* applies in relation to payments made by a contributor to a funeral benefit business, in the way, and to the extent, prescribed by regulation. This amendment should be read in conjunction with clause 329 which provides that if a regulation has not been made under the new section 79(2), the repealed *Trust Act 1973* provisions continue to apply.[244]

The department clarified that the transitional provision under clause 329, in combination with clause 326, means that if a regulation remains in development at the commencement of the *Trusts Act 2024,* funeral benefit businesses can continue to adhere to the existing requirements under the FBB Act, including the nominated Trust Act provisions referred to in section 79(3), until such time as new subordinate legislation is made and notified under the FBB Act.[245]

The department acknowledged that prior to the commencement of the subordinate legislation, funeral benefit businesses and the department will need an appropriate opportunity to undertake necessary implementation, communication, and other preparatory activities.[246]

Committee comment

The committee considers the limited scope of the regulation making power, that is, its specific application to the Bill's provisions to the relevant payments under a funeral benefit agreement under the FBB Act; the justification that flexibility is required; and the disallowance powers that will apply provide sufficient regard to the institution of Parliament. However, the committee believes the use of a Henry VIII clause to amend primary legislation for reasons of 'flexibility' is not a desirable precedent.

The committee notes the department will consult with stakeholders to inform the content of the proposed regulation if the Bill is passed.

241 DJAG, Public hearing - further issues, p 2.

242 DJAG, Public hearing - further issues, p 2.

243 DJAG, Public hearing - further issues, p 3.

244 DJAG, Public hearing - further issues, p 3.

245 DJAG, Public hearing - further issues, p 3.

246 DJAG, Public hearing - further issues, p 3.

Appendix A – Submitters

Sub #	Submitter
1	Public Advocate
2	The United Grand Lodge of Antient Free and Accepted Masons of Queensland
3	STEP Queensland Limited
4	Queensland Public Trustee
5	Queensland Law Society

Appendix B – Officials at public departmental briefing

Brisbane, 10 June 2024

Department of Justice and Attorney-General

- Leanne Robertson, Assistant Director-General, Strategic Policy and Legislation
- Leighton Kraa, Director, Strategic Policy and Legislation
- David Coco, Acting Principal Legal Officer, Strategic Policy and Legislation
- Sarah Higton, Acting Principal Legal Officer, Strategic Policy and Legislation

Appendix C – Witnesses at public hearing

Brisbane, 10 July 2024

The Public Trustee

- Kathryn Williams, Official Solicitor - Corporate Legal Services

Office of the Public Advocate

- Dr John Chesterman, The Public Advocate
- Yuu Matsuyama, Senior Legal Office

Queensland Law Society

- Sonia Smith, Special Counsel Legal Policy
- Karen Gaston, Member of QLS Succession Law Committee
- Jessica Lipsett, Member of QLS Not for Profit Law Committee

Society of Trust and Estate Practitioners (STEP Queensland)

- Angela Rae, Chair - STEP Queensland