HOUSING, BIG BUILD AND MANUFACTURING COMMITTEE

Members present:
Mr CG Whiting MP—Chair
Mr JJ McDonald MP
Mr DJ Brown MP
Mr MJ Hart MP
Mr TJ Smith MP

Staff present:
Ms S Galbraith—Committee Secretary
Dr V Lowik—Assistant Committee Secretary

PUBLIC BRIEFING—INQUIRY INTO THE TRUSTS BILL 2024

TRANSCRIPT OF PROCEEDINGS

Monday, 10 June 2024

Brisbane

MONDAY, 10 JUNE 2024

The committee met at 10.00 am.

CHAIR: Good morning. I declare open this public briefing for the committee's inquiry into the Trusts Bill 2024. My name is Chris Whiting. I am the member for Bancroft and chair of the committee. I respectfully acknowledge the traditional custodians of the land on which we meet today and pay our respects to elders past and present. We are very fortunate to live in a country with two of the oldest continuing cultures in Aboriginal and Torres Strait Islander peoples whose lands, winds and waters we all share. With me today are Jim McDonald, the member for Lockyer and deputy chair; Don Brown, the member for Capalaba; Michael Hart, the member for Burleigh; and Tom Smith, the member for Bundaberg.

This briefing is a proceeding of the Queensland parliament and is subject to the parliament's standing rules and orders. Only the committee and invited witnesses may participate in the proceedings. Witnesses are not required to give evidence under oath or affirmation, but I remind witnesses that intentionally misleading the committee is a serious offence. I also remind members of the public that they may be excluded from the briefing at the discretion of the committee. I remind committee members that department officials are here to provide factual or technical information. Any questions seeking an opinion about policy should be directed to the minister or left to debate on the floor of the House.

These proceedings are being recorded and broadcast live on the parliament's website. Media may be present and are subject to the committee's media rules and the chair's direction at all times. You may be filmed or photographed during the proceedings and images may also appear on the parliament's website or social media pages. I ask people to turn their mobile phones and computers off or onto silent mode.

COCO, Mr David, Acting Principal Legal Officer, Strategic Policy and Legislation, Department of Justice and Attorney-General

HIGTON, Ms Sarah, Acting Principal Legal Officer, Strategic Policy and Legislation, Department of Justice and Attorney-General

KRAA, Mr Leighton, Director, Strategic Policy and Legislation, Department of Justice and Attorney-General

ROBERTSON, Mrs Leanne, Assistant Director-General, Strategic Policy and Legislation, Department of Justice and Attorney-General

CHAIR: I now welcome representatives from the Department of Justice and Attorney-General. I invite you to brief the committee after which we shall have some questions for you.

Mrs Robertson: Thank you, Chair, and thank you for the introductions. I, too, would like to acknowledge the traditional owners of the land on which we meet and to pay my respects to elders past, present and emerging. I would particularly like to extend this respect to the elders and Aboriginal and Torres Strait Islander people who are joining us today either in this room or remotely.

The Trusts Bill is broadly consistent with recommendations from the Queensland Law Reform Commission's review of the act. The drafting of the bill was informed by extensive, targeted consultation during drafting, as well as through public consultation on an exposure draft through the Queensland Department of Justice and Attorney-General and also the Get Involved websites. The bill will replace the current Trusts Act with a new act, drafted in line with modern practice and using plain English. Like the current act, the bill does not attempt to codify the law of trusts but instead supplements the general law. It facilitates the efficient administration of trusts by conferring powers on trustees that might otherwise be lacking under the trust instrument and by ensuring the court has appropriately wide powers to supervise the administration of trusts. The bill repeals provisions of the act that are now obsolete, no longer appropriate in modern trust legislation or are no longer needed in light of new provisions in the bill itself.

The bill also introduces significant reforms including providing trustees minimum or core statutory duties, granting new powers to trustees for dealing with trust property and to delegate investment powers, conferring additional powers on the courts in relation to the administration of trusts to fill existing gaps, streamlining decision-making and facilitating cost savings for deciding lower valued, less complex court matters by providing for the District Court to have jurisdiction for matters within its monetary jurisdiction, that is, up to $750,000 because currently only the Supreme Court has jurisdiction.

The bill also allows the Attorney-General to consider and determine cy pres applications. These are applications to alter the purposes of charitable trusts where, for example, it is impossible or impracticable to carry out the original purposes of the charitable trusts. The Attorney-General will be able to consider such applications where the trust property does not exceed the District Court's monetary jurisdiction of $750,000.

I turn now to some of the key issues that arose during the development of the bill. In regards the definition of the word 'charitable', in line with the QRLC's recommendations the bill adopts the same position under the current act so that the definition of 'charitable' 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, 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.

Some stakeholders suggested that 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 currently adopted in the current Trusts Act and also the bill. The Commonwealth definition includes trusts for the provision of social or public welfare, including child care 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 reflects the Commonwealth's purpose to promote philanthropic gifting through taxation concessions.

It is noted that Queensland legislation, as well as that of other states and territories, adopts a variety of different definitions of 'charity' and 'charitable', depending on the purposes of the legislation. An amendment to the Trusts Bill only will not ensure uniformity or simplify the administration of charitable trusts. Further, extending the definition of 'charitable' in the bill would extend to the courts and the Attorney-General's jurisdiction in relation to cy pres applications for charitable trusts to trusts that are non-charitable trusts at common law. I understand that there was no evidence presented during consultation on the bill of any need for the cy pres jurisdiction to apply to these non-charitable trusts.

I turn now to the issue of conditional appointment of minors as trustees. Under the current act, whilst minors are not prevented from being appointed as trustees, they are able to be removed as trustees. The Queensland Law Reform Commission recommended that a minor should only be able to be appointed as trustee conditional on their attaining the age of majority. This conditional appointment approach was supported by some stakeholders. However, 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; and uncertainty as to when and how trust property would vest in the minor after they achieved their majority and/or accepted their appointment as trustee. Given these practical issues may impact on the efficient administration of trusts and lead to uncertainty as to the validity of the appointment of 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. This position provides certainty and administrative efficiency for trusts.

I turn now to the issue of maximum number of trustees, that is, approval of more than four persons as trustees. Currently, the act restricts the number of trustees of a trust to not more than four trustees, except for charitable trusts or where the Attorney-General approves more than four trustees. The Queensland Law Reform Commission recommended that this provision be retained but rather than the Attorney-General approving more than four trustees this power be passed to the court. The Queensland Law Reform Commission'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, as I have mentioned, of the administration of charitable trusts. The Queensland Law Reform Commission also noted that the current act includes provision for the Attorney-General to approve more than four trustees for superannuation funds which may require up to six individual trustees.

Ultimately, the bill before the parliament has been drafted to retain the limit on the maximum number of trustees to four, but 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. This approach is in line with the Queensland Law Reform Commission's recommendation and allows private trusts to apply for the appointment of not more than four trustees where appropriate, but ensures that an application is subject to the court's determination given that the circumstances where more than four trustees are sought is typically complex and may increase trust disputes or create inefficiencies in the administration of the trust itself.

I turn now to the 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 of their duties due to physical infirmity. The Queensland Law Reform Commission's recommendations propose an extension of the power to delegate to include where a trustee was temporarily incapable of performing all of their duties due to impaired mental capacity.

Stakeholder views on this recommendation were mixed. There are significant issues with the 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. Further, 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. 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.

Chair, we thank you again for the opportunity to brief the committee. We are happy to take questions.

CHAIR: Thank you very much, Mrs Robertson. Briefly on a couple of those issues you just talked about, on the definition of 'charitable' and the delegation powers, clearly some issues came up during the extensive consultations you have had on this bill; would that be right? The industry and legal practitioners have raised it and said, 'These are some of the issues we see with it,' and that henceforth has led to the position that the bill is in today; have I got that right?

Mr Kraa: That is right. While the bill was drafted broadly in accordance with those recommendations from the Queensland Law Reform Commission, there was an extensive amount of consultation on draft iterations of the bill. Those two issues, as well as others, were raised and the bill was refined in recognition of the feedback that was raised, particularly around some of those practical and operational challenges that were identified by stakeholders regarding those particular provisions.

CHAIR: On the issue of consultation and feedback, clearly the paper was prepared over 10 years ago. Have there been any changes that we need to account for in that period since the paper has been prepared?

Mr Kraa: It is true that the paper was developed over 10 years ago. The paper, when it was developed by the Queensland Law Reform Commission, went through an extensive period of consultation at that time. There was an interim and then final report that were published, as well as a draft bill. Trust law issues at the time were thoroughly considered and dealt with.

Since that time, in October 2017 there was some initial consultation undertaken with stakeholders and then further rounds of feedback, specifically during 2023, with both a targeted group of peak legal and industry bodies and also a public consultation round on the bill in late 2023. The importance of those extensive consultation processes were to make sure that the issues surrounding trust law were still relevant, that the appropriate issues were being captured. It was generally the

finding that the recommendations at the time were correct. Trust law is a complex area of law and the bill has not been comprehensively considered in some time. Therefore, the law has developed over that time, but those issues were considered and stakeholder views were sought to ensure how the recommendations were being implemented in the drafting captured current matters around trust law.

CHAIR: Due to the size and complexity of trust law, I think it is fair to say that since that time this act has been percolating. It has not been dropped at any stage. It sounds like it has been continually worked on during that time; would that be correct?

Mr Kraa: I would say that is a fair assessment. It is a very complex area of law and time is necessary to ensure that the drafting is precise and correct and also to ensure that there is sufficient time for stakeholders to consider the complex drafting. To say it has gone through a considerable amount of development through those processes is fair, yes.

CHAIR: The fundamental part of this bill is that it does not create or codify the law of trust; it sets out how these are to be administered. Tell me if I am wrong, but I assume trust law being common law, there is a massive amount of precedent not only in Queensland and Australia but also internationally that could apply to any of these cases coming through; would that be correct?

Ms Higton: Yes. Trusts is an intersection of both the trust instrument—the document that creates the trust—and equity in common law. Obviously a vast majority of that has come from UK precedents, but that has been further developed across various states of Australia and also in Queensland. The law is very extensive in that area.

Mr McDONALD: Thank you all for being here and for the briefing. Thank you for the departmental briefing notes because that helped us get through a lot of information quickly. Back in 2012 the Law Reform Commission was asked to look at this and modernise and standardise it. Do you know why that occurred back then, why we are doing it now and why it has not been done before?

Mrs Robertson: I do not think we can answer that first question in relation to 2012. I suspect back then there must have been some concerns and it had not been looked at since its original enactment, which is a significant period of time. Usually with Law Reform Commission references the legal profession might say to the Attorney-General at the time, 'This is an area to look at,' or there might have been other legal or trust stakeholders who thought it was time to have a look at the legislation itself.

Mr McDONALD: Your briefing note outlines that it was for modernising and streamlining the administration and regulation of it. Could you take on notice whether there is something in the report that is actually informing us to come forward, why the delay and why we are doing it now, some 10 or 12 years later?

Mr Kraa: Just to elaborate on the first part, the terms of reference given to the QLRC were certainly around considering how to modernise, simplify and update the general law of trusts. It was also to consider whether Queensland's specific trusts acts provided an adequate, effective and comprehensive framework for Queensland to consider relevant legislation in other jurisdictions and whether there had been developments there, whether there was a need for consistency or if, as a consequence of changes in other jurisdictions, whether there needed to be changes in Queensland. Also it was to streamline the law, particularly around disputes, and to ensure the effective administration of trusts. Where there are disputes and the trust is required to bear the cost, that can have an impact on the ultimate trust property that is available for beneficiaries. Ensuring that our trusts can be administered effectively and efficiently is a really important aim of Queensland's trust law.

They were broadly the terms of reference for the Queensland Law Reform Commission when considering Queensland's law. As I spoke to earlier, it has been some time since that report was handed down, with the interim report being given in the middle of 2013 and the final report in December 2013. As I alluded to earlier, the nature of trust law being very complex, it was important to take the time to ensure that drafting, especially where the drafting was going to update or modernise Queensland's provisions, was right to ensure that it was accurately consistent with other jurisdictions where it needed to be and was reflecting the current trust issue of the day. Time was taken to work through that process and to make sure it was thoroughly consulted on as well.

Mr McDONALD: Who are the primary users of trusts and the law around this? For somebody outside this, what do I tell them it is all about?

Ms Higton: You come across trusts more often than you think. Obviously superannuation funds are trusts. A lot of people, even politicians, have family trusts or discretionary trusts. You also see this in your wills. When you die the estate is technically a trust and in some wills you also have what we call testamentary trusts or testamentary discretionary trusts. It has wide application and actually affects people day to day more than they think.

Mr McDONALD: Why is it being done now? It has been such a long time. Is there anything that has happened in the last couple of years such as a precedent from a court that has made us think we need to fix this now or is it just a matter that has taken so long?

Mrs Robertson: The reality of the matter is that the timing of a program of legislation work is ultimately a matter for government in that space. As my colleagues have said, we had the QLRC report and draft provisions there, but there was a need to really look at that, talk to the stakeholders, the users, the legal profession and the trustee profession in that space and simply work on that drafting having regard to things that may have happened since the time of the QLRC report. The timing itself is ultimately the government's call.

Mr BROWN: With regard to the trustees' duties, have there been disputes and case law around whether someone is a professional trustee or not and what their qualifications are? Is that what we are trying to clear up in part 5?

Mr Coco: You mentioned trustees' duties. However, you talked about professional trustees. Who is a professional trustee is actually defined now in the act. Part 5 of the act deals with trustees' duties. It states—

professional trustee means—

(a) a trustee whose profession, business or employment is, or includes, acting as a trustee; or

(b) a custodian trustee whose profession, business or employment is, or includes, acting as a custodian trustee.

On the duties that apply to a professional trustee under clause 65 of the bill, non-professional trustees and other trustees are separated into three different sections. If there was a case where a trustee is alleged to have breached their duty and that was to be determined by the court, one of the things determined by the court would be which of those three standards and duties would apply. There is case law that would deal with the difference between what is a professional and non-professional trustee, but ultimately it is a question of fact for a court to decide and apply the appropriate standard. In the bill, on this occasion, clauses 65, 66 and 67 demark between professionals, non-professional trustees who hold themselves out as having special knowledge or experience relevant to administering trusts or trusts of a particular type, and other trustees. I hope that helps.

Mr BROWN: With regard to the changes to charitable trusts, are there many examples of where the trust has been tied up and cannot be moved such as because the charity does not exist? Are there some examples that you can give where people have provided feedback?

Ms Higton: What we are talking about here is the cy pres schemes that the Supreme Court currently administers. For charitable trusts where the charitable purpose is not able to be given effect to, for example, where the charity to receive the gift is no longer in existence or never existed, the court can alter the charitable purpose so it is as close as possible to that original purpose. There are three situations where these cy pres schemes generally arise: where you have an immediate impossibility, where the proposed charitable gift cannot be given effect to because either the entity does not exist or never existed; where it has become impossible to give effect to because the charitable purpose is no longer charitable; or where it is impossible to give effect to because of external circumstances. I will give you an example of each of those.

If you have a gift to the cat and dog society and that cat and dog society has ceased to exist before the charitable gift takes effect, that is an initial impossibility so that cannot continue. If you had a gift to the welfare league for the poor and they never existed, it is the same deal; you cannot make that gift so that gift will fail and need to be applied cy pres. There is previous case law where the purposes have become practically impossible. There was a gift to a charity—and this is an existing case—where the charity was required to use the funds for establishing a soup kitchen and an adjoining hospital for the poor. It was impossible to do because the area that the gift required for that kitchen and hospital was not available within the proposed area. That failed because of that practical impossibility.

Where it has subsequently become impossible is where there has been a change in cultural or societal circumstances. There is an example from 1961—I am sorry I do not have a more recent one—where the charity was required to maintain a hostel for male students of European origin from

the overseas dominions of the British Empire. Obviously because of the racial connotations in that purpose, that was held not to be charitable and that was an event that meant that the property had to be applied cy pres. It does actually pop up quite frequently.

Mr BROWN: Thanks for giving those examples.

Mr HART: I have lots of questions. Let me just preface this by saying I am not a lawyer. Thank you for your briefing. You were talking about deeds and superannuation funds. What is the logic in having four trustees or four beneficiaries of a superannuation fund? Are those two things tied, beneficiaries and trustees?

Ms Higton: What you probably are thinking of here is self-managed superannuation funds. That is governed by the Superannuation Industry (Supervision) Act 1993, which is Commonwealth legislation. Under that there are certain requirements a superannuation fund must have. One of those is that each member must be either an individual trustee or a director of the corporate trustee, and the membership cannot be more than six members in a self-managed super fund. That is a relatively recent change to superannuation law. That means that where you have six members and you do not have a corporate trustee you have to have six individual trustees, which means there is a conflict with the Trusts Act, which is why we have excluded that.

Mr HART: It was four before, was it not?

Ms Higton: Yes, previously.

Mr HART: It concerns me that it has taken from 2013 to come to fruition. I noted what you said before, Director-General, about it being a government decision. Some of the changes we are making here I imagine are for issues that we have seen in the last few years, where somebody has gone bankrupt or they are financing a company. We want to try to fix some of those very important issues. Can you step us through the timeline as to when the draft exposure was done, how many iterations of this bill there have been and when the bill that has been presented to us now was finalised?

Mr Kraa: The Queensland Law Reform Commission's final report in December 2013 also contained a draft bill that was delivered with their report and recommendations. Feedback was then again sought from targeted stakeholders and peak bodies in the trusts and legal industry in October 2017 on that draft bill from the QLRC. Following that, in May and June of 2023 a consultation version of what is now the current bill was released for targeted stakeholder feedback. Following this, in November and December 2023 a public consultation version of the bill was released which again took account of the feedback and refining from stakeholders. Then further consultation on the bill occurred with targeted stakeholders in early 2024.

Mr HART: Why did it take from October 2017 until 2023 to make the changes to the bill? Six years seems like a very long time.

Mr SMITH: Point of order, Chair. I feel as though the member for Burleigh is both seeking an opinion and asking about policy.

Mr HART: If it is a policy decision he can just say that; that is fine.

CHAIR: I understand your point of order, member for Bundaberg, but my issue was repetition. We have talked through this a couple of times—

Mr HART: I have not had an answer I am satisfied with.

CHAIR: I am not finished yet. I heard the answer. If our witnesses could just talk about the process from 2017 of liaising with a variety of bodies nationally and internationally and how that process looks to get that information back from them.

Mr Kraa: Procedurally, consultation occurred through written submissions. Public consultation processes occurred through a draft bill published on the government's Get involved website. Meetings were also held with targeted stakeholders to hear oral feedback and submissions on that process as well. Effectively, that has occurred, as I said, initially beginning in late 2017. In real substance, 2023 and early 2024 when consultation was—

Mr HART: In relation to stopping minors being trustees, do we have any figures on how many children or minors would be trustees at the moment?

Mr Coco: No, we do not. The way the bill works is that new appointments of minors are of no effect. Under the present act, should a minor be appointed as a trustee there might be grounds for removal of that person as a minor because they do not have the capacity to act.

Mr HART: I imagine there is going to be quite an education process for the people who write trust deeds to implement these changes. I see the bill is on ascension. How long do we expect it to be before the bill comes into force?

Mr Kraa: Being a complex area of law, it is important to ensure a commencement date that allows for any necessary education and preparation activities with those affected. Typically, trusts are established by a solicitor or accountant, those kinds of professional bodies, so an appropriate commencement date would need to take account of feedback from those professional bodies and parts of industry. Often new bills that deal with complex areas of law have substantial lead-in times, so we might expect that to be the case here. The commencement date will ultimately be a matter for government to determine. There will be education activities needed by those affected sectors.

Mr HART: Are trust deeds that are in place at the moment going to need to be rewritten for these changes?

Mr Kraa: The bill includes some very specific and detailed transitional provisions to ensure there is real clarity in how the bill will affect existing trust instruments and clarity for beneficiaries and trustees—anyone affected—as to when the new laws will apply or when the existing laws may continue to apply to existing trust instruments. Those have been particularly considered and canvassed in the bill.

Mr HART: I notice it fixes a lot of things. Sarah, you mentioned things that have changed, transitioned or are no longer in existence. What has been happening in the meantime? Are these things covered by common law or something? If something no longer exists and we have not made this change to the bill yet, has it been dealt with?

Ms Higton: If it no longer exists then it is probably not going to have an effect because it is no longer in existence. It is more a matter of removing these unnecessary or irrelevant provisions from the Trusts Bill. Do you want me to take you through some examples?

Mr HART: No. While I am not a lawyer, I have used trusts a fair bit. I think I understand what you mean. Out of interest, I am a member of the surf club. I imagine if a surf club's block of land was disposed of, someone would need to decide how that particular trust—if there was one covering the surf club—could be used with something that is closely similar. That is what we are trying to achieve, is it not?

Ms Higton: I think it would depend on the surf club and what the structure of the surf club was.

Mr HART: Do not worry about surf clubs; I was just using that as an example. A person who is disqualified cannot be a trustee now if it is decided by a court. How are those things going to be recognised or reported? How does that flow of information happen to stop someone from becoming a trustee in the future? Every time I pick up a paper I see someone who has been disqualified but has somehow managed to become a trustee or director of a new phoenix company. It is a massive issue and I think we need to solve it. What is the reporting structure there?

Ms Higton: There are new provisions in the bill that provide for the court to disqualify trustees from being trustee of a company or removing them as trustee of other companies. Obviously that requires fairly serious misconduct by them. This has been extended from the trustee provisions under superannuation legislation, also director provisions under corporations legislation, with the intention of trying to protect people with interests in the trust. As these will be subject to a court decision, those court decisions will be published and in the public forum. There is no register of trusts. They are not like companies. There is no central registry body like ASIC, so there is no way of having a central notification system. It will be up to the individual creators of the trust, the settlers, to undertake the necessary checks.

Mr HART: Under your part 8 changes, I see from your briefing paper that the bill 'removes reference to settlement on marriage or holding accumulation for minors until marriage that are in the act as this is no longer required'. Can a trust deed still have that written into the deed even though it is no longer required under the bill?

Ms Higton: Settlements on marriage was the subject of an old act under Queensland legislation which has since been abolished. I cannot speak to what may be out there in other trust instruments. There may well be those powers for the trustee to do that, but there are also other powers to provide maintenance and advancement for minor beneficiaries. There is still the ability for trustees to distribute to children where necessary, and that is both under the Trusts Act currently and also under the—

Mr HART: What I am getting at is if I want to write a trust that left something to a minor or a teenager but they did not get it until they got married, is that allowable or does this change mean that is no longer allowable?

Ms Higton: That would probably be a question for the court on public policy matters as to whether that was an allowable condition. It would depend on how that condition was drafted.

Mr HART: Is it presently allowable?

Ms Higton: It would depend on how it was drafted, I think. That is probably something I would need to look at further. It is not an area I have expertise in.

Mr HART: Is that something you can come back to us on? I am trying to figure out whether there are changes here that stop someone from doing something because of some sort of social reason.

Mrs Robertson: Chair, we are happy to take the question, but obviously the advice that we give back to the committee would be of a general nature. I just want to be clear about that.

Mr HART: That is fine. I understand how the system works. Those are my questions, Chair.

CHAIR: Reading through part 8, I thought there must have been some very old trusts that say, for example, a girl cannot get money until she gets married or some other antiquated parts of a deed like that. But there could be other parts that may be affected by that.

Mr SMITH: I imagine that some of the recent legislation around the Human Rights Act would also potentially counter some of those.

CHAIR: It is a very complex area of law.

Mr SMITH: Yes. This obviously replaces the 1973 act. Before the 1973 act were trusts largely formed off Westminster legislation?

Mr McDONALD: That is common law.

Mr SMITH: But common law in terms of relating back to laws coming out of the British parliament. If you are not sure, that is okay. It is just a bit of a nerdy legislative question.

CHAIR: Is that a history teacher question?

Mrs Robertson: We are happy to take that on notice.

Mr SMITH: The reason I ask is that we recently replaced an entire bill because it had large ties to the Westminster system. With this being common law, even though we are making some changes, how far can that expand so judges can still use precedent from the UK and other parts of the Commonwealth? How far can that expand their reach?

Mrs Robertson: As we said, the bill, if enacted, is not a complete code. It will augment the existing common law. Where there are specific provisions that override the common law in any shape or form then obviously it is the act of parliament, but it is not a code as such in that sense.

Mr SMITH: But precedent can stretch across the Commonwealth as long as it is under a crown; is that right?

Mrs Robertson: In a modern Australia, you have regard to decisions of other jurisdictions within the country itself but you can certainly look at other common law jurisdictions. The reality of it is, especially because some of the provisions in the bill would look like provisions in other jurisdictions in Australia, that is where your precedent would most likely come from.

Mr SMITH: Mrs Robertson, you mentioned before about the changing language. You used the words 'impaired mental capacity'. The current act talks about people being excluded from transition of settlement property because of being 'mentally ill'. Will this bill also fix up some of that outdated language, so instead of 'mentally ill' it will be 'impaired mental capacity' and so forth?

Mrs Robertson: The bill has been drafted having regard to modern drafting practices including language in that sense.

Mr SMITH: We are fixing up some of the language that 50 years ago was appropriate but no longer is now.

Mrs Robertson: I do not know whether the correct phrase is 'fixing up'. It is certainly having regard to the language that we would use in modern drafting as such.

CHAIR: In terms of part 8, clauses 133 and 135 talk about maximum amounts. It is interesting to note that under section 62 of the act the maximum amount is $2,000. We have increased that to greater than half the capital or $100,000, with that $100,000 being indexed. It is always an issue when you put in specific amounts of money in legislation. Clearly $2,000 is way out of date. Can you tell me why you arrived at that figure of $100,000 in this particular part?

Ms Higton: That was the QLRC recommendation that was adopted from their draft bill. Obviously that has been tested with stakeholders through the various consultation processes as well.

Mr HART: I refer to page 5 of your briefing paper where it states—

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;

What is the reason for or the logic behind making that change?

Mr Coco: Prior to the current act, it was not seen as an investment to buy a residence for a beneficiary to live in. In that act there were specific categories of approved investments which were removed in the 1999 changes. They have been out for a long time. The bill further relaxes those requirements.

Mr HART: Is that conditional on having some sort of impairment or disability?

Mr Coco: It is a power to buy or construct a residence for the beneficiary to live in or to retain a residence that is part of the trust property for the beneficiary to live in or to enter into an agreement or arrangement to secure a right to use a residence for the beneficiary to live in. The QLRC reform was based on the current policy setting being too restrictive and this is a more fulsome power. That can be granted on conditions that the trustee considers to be appropriate. That is so under the current act and it is so under the bill.

Mr HART: Does that apply to an able-bodied person?

Mr Coco: It applies to any beneficiary.

Mr McDONALD: When somebody is disqualified, particularly in the case of a child trustee—if there are children involved in trusts now—what is the process? Is the child trustee replaced or does it just wipe out that trust? Again, when a court disqualifies somebody, does that just wipe out the trust or is it a matter of replacing the trustee?

Mr Coco: Is this if a trustee is appointed who is disqualified or who is a child?

Mr McDONALD: Yes. That is one example. The other example is of a child who may be a trustee. Is it the case that a child could never be appointed as a trustee?

Mr Coco: Under the present act nothing stops you appointing any person as a trustee, but a child is liable to be removed on the grounds that they are an infant. That was the word used under the current act. Whereas now—

Mr McDONALD: They cannot be a trustee.

Mr Coco: Clause 13 of the bill says—

(1) The following persons can not be appointed as a trustee—

(a) a child;

...

(d) a person who is disqualified from being appointed as a trustee ...

They cannot be appointed as a new trustee. There is a transitional provision to deal with what occurs if a child was appointed and remains a child under the current act when the bill is enacted. That is provided for.

Mr HART: Which bill is the definition of a 'child' in?

Mr Coco: It is not in our bill.

Mrs Robertson: I suspect that that might be in the Acts Interpretation Act, but we can check that for you.

Mr HART: Is it 14 now?

Mr McDONALD: It is 18.

CHAIR: It all depends on the context.

Mr McDONALD: Criminal responsibility is if deemed to be capable. Going back to that question I asked about if somebody is disqualified by a court, does that wipe out the trust or just that person's ability to be the trustee and then that person could be replaced?

Mr Coco: If a trust had a single trustee who was disqualified then presumably under the act someone would need to apply to a court, if there were no other appointer of the trust or other co-trustee, in order to get a new trustee appointed. That is the short answer. It is unlikely to annihilate the trust. It is more likely to require an application to court in the worst-case scenario or use of one of the other mechanisms of appointment of a trustee to appoint an alternative person.

Mr McDONALD: Regularly when we have a new bill it opens up a whole world of litigation and challenges to develop new case law. Is it fair to say that that should not happen with this bill or are there areas in this bill that will require the establishment of new case law and, if so, what are they?

Mr Kraa: As has been said, this bill does not codify all of trust law, so existing precedent will continue to apply. Insofar as there are expanded powers or duties or certain provisions that have modernised drafting, it may still be the case that dispute arises as to how those terms are interpreted or applied and that may need further refinement. It would be likely and expected to be only those kinds of newer areas.

Ms Higton: Going back to the definition of a 'child', it is under the Acts Interpretation Act. If age rather than descendency is relevant, 'child' means an individual who is under 18 under the Acts Interpretation Act.

Mr HART: Thank you.

CHAIR: Do we have any further questions? I have written out some questions on notice that are more asking for written briefings but not extensive ones. One is on the complexity and size of case law, common law and precedents—mostly across state jurisdictions but internationally—that need to be considered for a bill in the Queensland context. One is on the development of a definition for 'charitable trust' or 'organisation' for this bill, especially in regard to how that intersects with any Commonwealth legislation.

Mr McDONALD: Leighton, I am pretty sure when you answered Mr Hart's question before about the consultation that occurred that you said there was a process in October 2017.

Mr Kraa: Yes.

Mr McDONALD: October 2017 was a month before the last state election and here we are in June four months before the next state election. Is there any tie there to wanting to get this legislation done before an election?

CHAIR: That is a good try. He was waiting till the last to ask that.

Mr SMITH: Did he also land on the moon?

CHAIR: Thank you, member for Bundaberg. I am ruling that one out of order. There is a gift for you. Thank you very much. That concludes our briefing. Thank you to everyone who has participated today. Thank you to the secretariat. Thank you to our committee. Thank you very much, David, Leanne, Leighton and Sarah. A transcript of these proceedings will be available on the committee's webpage in due course. Responses to questions on notice are due by Monday, 24 June, except those brief written briefings that I have asked for. We will give you time for those.

Mrs Robertson: Is it okay if we check in with the secretariat in relation to the specifics of the questions on notice?

CHAIR: Yes, we will email you the specifics of those. I declare this public briefing closed.

The committee adjourned at 10.57 am.