JUSTICE, INTEGRITY AND COMMUNITY SAFETY COMMITTEE

Members present:
Mr MA Hunt MP—Chair
Mr MC Berkman MP
Mr RD Field MP
Ms ND Marr MP
Ms MAJ Scanlon MP (substituting for Ms McMahon)
Mr CG Whiting MP (substituting for Mr Russo)

Staff present:
Ms M Westcott—Committee Secretary
Ms E Lewis—Assistant Committee Secretary

PUBLIC HEARING—INQUIRY INTO THE TRUSTS BILL 2025

TRANSCRIPT OF PROCEEDINGS

Monday, 3 March 2025

Brisbane

MONDAY, 3 MARCH 2025

The committee met at 1.00 pm.

CHAIR: Good afternoon. I declare open this public hearing for the committee's inquiry into the Trusts Bill 2025. My name is Marty Hunt. I am the member for Nicklin and chair of the committee. I would like to respectfully acknowledge the traditional custodians of the land on which we meet today. With me here today are: Chris Whiting MP, member for Bancroft, who is substituting for Peter Russo MP, member for Toohey; Russell Field MP, member for Capalaba; Natalie Marr MP, member for Thuringowa; Michael Berkman MP, member for Maiwar; and Meaghan Scanlon MP, member for Gaven, who is substituting for Melissa McMahon MP, member for Macalister.

This hearing 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 hearing at the discretion of the committee.

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. Witnesses, please remember to press your microphones on before you start speaking and off when you are finished. Please turn your mobiles phones off or to silent mode.

CHESTERMAN, Dr John, Public Advocate

MATSUYAMA, Mr Yuu, Senior Legal Officer, Office of the Public Advocate

CHAIR: Good afternoon. Would you like to make an opening statement before we start questions?

Dr Chesterman: Thank you for the opportunity to be here. I acknowledge that we are on the traditional lands of the Turrbal and Yagara people and I pay my respects to elders past, present and emerging. I am pleased to be here with my colleague Yuu Matsuyama.

As members of the committee know, as the Public Advocate for Queensland I undertake systemic advocacy to promote and protect the rights and interests of Queensland adults with an impaired decision-making ability. There are several conditions that may affect a person's decision-making ability. These include intellectual disability, acquired brain injury, mental illness, neurological disorders such as dementia, or alcohol and drug misuse.

As members would know from my submission, my contribution to today's discussion is on a relatively narrow issue which is relevant to adults with impaired decision-making ability. As I noted in my submission, clause 22 of the bill proposes to create a new power for an administrator or attorney to appoint a trustee. This is proposed to occur where the trustee, or the last remaining trustee where there is more than one, no longer has the capacity to administer a trust. If an administrator has been appointed under the Guardianship and Administration Act or an attorney exists as a result of their appointment under an enduring power of attorney and they have been appointed to make decisions for all financial matters, the effect of clause 22 would be that they are then able to appoint a trustee and that the provisions of the Guardianship and Administration Act and the Powers of Attorney Act would not apply to their appointment of a trustee.

There are number of problems here. In a nutshell, the main concerns I have are these. A person who is appointed by a tribunal as an administrator or by a person as their attorney will rarely know they might have the role of appointing a trustee in the circumstances envisaged by clause 22; nor quite likely would the tribunal or the principal, in making the appointment of the administrator or the attorney, know that the person they are appointing could themselves one day be able to appoint a trustee. This is an automatic appointment that the attorney or administrator would be able to exercise, even though the principal in the case of an attorney or tribunal in the case of an administrator may never have intended this. This goes against the idea of only appointing substitute decision-makers to roles either specifically envisaged by the principal or if the tribunal determines they are needed.

Clause 22 specifies that neither the guardianship legislation nor the powers of attorney legislation applies to the attorney or administrator when it comes to their role of appointing a trustee. This creates other problems. This means that the legislation governing the roles of administrator and attorney—indeed, the legislation responsible for their appointment—would be irrelevant to their role in appointing a trustee. This would be odd.

There are other flow-on concerns to which this gives rise. The responsibilities of administrators and attorneys under the guardianship and powers of attorney legislation are slightly different to their potential role under the Trusts Bill. I can elaborate on that if need be. If the guardianship and powers of attorney legislation do not apply to the appointment by an administrator or attorney of a trustee, where do you go if there are problems with the appointment or nonappointment of a trustee? What rules govern this? What role does QCAT have? It would not be able to advise attorneys and administrators, as it can normally under the guardianship and powers of attorney legislation. If QCAT were asked to appoint an administrator in order to enable them to appoint a new trustee, on what basis would it do so? It would need to appoint the person to make all financial decisions, which is not consistent with a least restrictive approach.

In terms of a potential solution, I note in my submission that 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. One option which existed in a previous iteration of this bill would have established a process by which the Public Trustee would have been put in place in circumstances where there was a ruling concerning the last trustee's capacity. That has been removed in the current iteration. One possible way forward is to rework a version of that option, taking account of the Public Trustee's previously expressed concerns about the need to cater for the potential regaining of capacity by the last trustee. Another option is to rely, in the relatively unusual circumstances that we are discussing, on the bill's provisions whereby the Supreme Court or District Court can appoint a new trustee.

Thanks for the opportunity to comment on the Trusts Bill. I welcome members' questions and comments.

CHAIR: It is a complex issue for parliamentarians to get their heads around if they are not trusts lawyers. Obviously becoming a power of attorney for, say, a parent with dementia comes with a lot of responsibilities that people were not prepared for. Does this not add one other thing that they might not have been prepared for? If they do not feel as though they can undertake that appointment of a trustee, is there a mechanism in the bill that allows them to divest that responsibility to somebody else?

Dr Chesterman: There is a bit to that question. I will answer and ask my colleague to jump in if he feels I have not fully answered the question. One of the concerns we have is that we are increasingly requiring attorneys, including attorneys in Queensland under our current Powers of Attorney Act, to obtain the views, wishes and preferences of the person for whom they are acting, which is not surprising. If you start acting in appointing a trustee, what you want the trustee to have in mind—and it depends whether it is a charitable trust or a regular trust—in the case of a charitable trust is that the trustee is to further the purposes of the charitable trust and for a regular trust to look at the interests of the beneficiaries. That is slightly different. You are moving away from the role of the attorney which is to act in the interests of the person. They have to start thinking about what is going to be best for the beneficiaries. That is a different role.

The other concern simply is that, in appointing an attorney, it would be unusual for the person appointing the attorney to think that this person may have a role in appointing a trustee in the circumstance that I am a trustee of a trust and I lose my decision-making capacity. It is very unlikely that you are going to know that in advance. Any agreement to take it on would not be with that in mind, that they would potentially be performing that role.

It is odd when you think that the legislation governing the role—and it applies also to an administrator under guardianship legislation—has no impact on their performance of this particular role. It is an obscure role where you have one trustee or the last remaining one losing capacity to administer the trust. We are not talking about a huge number of situations. It would be unusual for the attorney or administrator not to be able to rely on their governing legislation. It does not sit easily.

On the point of attorneys divesting, I do not believe they would have the power to nominate somebody else to appoint the trustee.

Mr Matsuyama: I would not think so, because the powers within this clause are self-contained. Because the clause specifically states that the guardianship and powers of attorney legislation do not apply, you cannot really rely on that for any other further delegation. Therefore, my understanding of this clause is that it would only be the administrator or attorney, as mentioned in this clause, that can exercise that power.

Adding to that, in terms of any option, it is not a mandatory action that they have to take. It is couched in those terms by using the word 'may'. They can choose not to. In reality, it is really a question of how much pressure they would be under if they were the administrator or attorney and this important trust needs a new appointment.

Dr Chesterman: There would be pressure because, otherwise, the default position would be an application to a court. An attorney does have that power—despite the fact they may not wish to exercise it; otherwise an application has to be made to a court, which would be expensive. In fairness to the drafters of the legislation, they are trying to avoid an unnecessary application to a court and the cost that would involve. We think this solution is not ideal.

CHAIR: The only alternative in this situation is to go to a court; is it not?

Dr Chesterman: As I was saying before, there was a provision in a previous iteration of the bill which enabled the Public Trustee to perform a default role, but that would only be where there had been a ruling about the person's capacity—for instance, in a guardianship hearing either in Queensland or in another state or territory or elsewhere. That would be a ruling. Again, we are not talking about a large number of cases where there would be a ruling and the person is exercising the role of trustee. Otherwise, a court is the last resort.

Ms SCANLON: Thank you for those introductory remarks. I note your preference is for systems and a framework when someone loses capacity. I am mindful that you may not have had an opportunity to look at all of the submissions, notably the Queensland Law Society submission where they have outlined that they are not necessarily supportive of the removal of part 3, division 8. There are different views around what the preference should look like, but there was some sort of protective mechanism envisaged in the first iteration of the bill. Is it your view that that particular part of that original bill should be put into the bill that is currently before the House so there is a protective mechanism in those circumstances that you have outlined?

Dr Chesterman: Just to clarify, that protective mechanism being what I was telling you about with the Public Trustee playing that role?

Ms SCANLON: Yes.

Dr Chesterman: Yes, I think it would make sense to put that in, bearing in mind that I know that the Public Trustee had the concerns I articulated before around a situation where a person regains the capacity to administer a trust. Just having a process in place where you could pretty much take that back to the guardianship tribunal and get a recognition that the person has regained the capacity to administer the trust, wherein they would come back in to play that role—with that proviso, yes, I would agree with that being reinserted.

Ms SCANLON: As Public Advocate, have you or your office had any engagement, between the lapsing of that first bill and now, about this particular matter? Have you received any advice from the department around why that part was removed from the bill that is before the House?

Dr Chesterman: I have not had particular engagement. I may have been privy to a brief conversation about the reasons for it and I am aware of the reasons for this provision being there, which is to try to avoid a court application and the expenses and delays that involves. It is trying to cater for that eventuality so I am sympathetic to that. I am mindful—I think the Queensland Law Society might say it in their submission—that we are going to see a rise in situations like this and not a decline because of demographic reasons. I am sympathetic to that, but I think this is a solution that does not sit easily with the guardianship legislation or the powers of attorney legislation. It is quite odd in the way it would fit with those pieces of legislation.

CHAIR: A power of attorney often has the ability to discuss with the person before they become power of attorney what that might look like in terms of advance health directives, financial wishes, funeral wishes—all sorts of things. If this becomes legislation, would it not be best to be part of a broader conversation process—obviously there are emergency situations where that cannot happen—in relation to preparedness for eventual mental incapacity and power of attorney? If it is in law then it becomes part of that conversation about their wishes.

Dr Chesterman: Interestingly enough, I was in this very room a week and a half ago talking about the need for greater education of attorneys on their roles and responsibilities. Indeed, you are right in saying that if this were legislated then there would need to be a focus on having those discussions with attorneys about what their roles and responsibilities are, to remember there would be this additional potential role were they to be appointed as attorney for a person who loses capacity to administer a trust if they are the only or last remaining trustee. It would have to be communicated to attorneys that they might have this responsibility. The challenge in educating people about that is: as

we are saying, this is not something that arises from looking at the Powers of Attorney Act, just looking at the Trusts Bill, so that would be a challenge for community educators. We are talking about a pretty niche area, so that is not going to be called upon a lot. I agree that we would need to educate attorneys that they may have this role.

Mr BERKMAN: You mentioned in one of your previous answers the possibility of a Supreme Court application to resolve a situation where, if I heard you correctly, the default trustee chooses not to take that role on. Could you just flesh that out a little bit? What exactly would the court be determining? What are likely to be the main points of dispute and the drivers of cost and complexity in the matter?

Dr Chesterman: I will begin and then I will hand over to my colleague. The legislation caters for an application going to the District Court or Supreme Court, depending on the particular trust in question, and that court would be asked to appoint a trustee to administer the trust. In terms of what they would take into account, I will hand over to my colleague.

Mr Matsuyama: Some members mentioned they are not trust lawyers and neither am I, unfortunately. I cannot answer that question. It would be determined based on an appointment if there was no administrator or attorney just under the trust legislation and all of the usual factors the court would take into consideration there as well. That is probably the extent of my knowledge in that particular area, unfortunately.

I did have one more point with regard to the previous question from the chair. The chair made a very good point in terms of speaking with your attorney before appointing. One of the options available under an enduring power of attorney is that the principal can list conditions and their actual wishes, which are generally binding on the attorney; however, because this clause specifically states to ignore the Powers of Attorney Act, any conditions they place in an enduring power of attorney in relation to trusts would not be followed because the clause tries to separate itself from the Powers of Attorney Act, creating that odd relationship between the two. That is potentially another problem that could arise.

Dr Chesterman: Those directions would not have to be followed. They could be followed, but the point is that they would not have to be followed. Coming back to the question—and I am certainly not a trusts lawyer—the concerns I have about that process would be the cost and the delay, but the court would be appointing a new trustee, the exact basis on which I am not entirely sure. I look to our next witnesses to answer that more fully. I assume it would be around the interests, obviously, of the trustee but also the beneficiaries of the trust.

Mr WHITING: Dr Chesterman, you suggested that the solution to the clause 22 issue was creating a system for situations where a person loses their capacity. What does that system look like? Are you talking about a legislatively mandated system or perhaps processes that are documented?

Dr Chesterman: I might take that on notice, because I would be interested to follow up with some colleagues—I can articulate a complex legislative process—about what a simple process might look like that would be feasible. I am happy to take that on notice, if that is all right.

Mr WHITING: That is fine.

CHAIR: The secretariat will get back to you in relation to when answers to questions taken on notice are required. Thank you for coming along today and thank you for your submission.

CORNFORD-SCOTT, Ms Angela, Chair, QLS Succession Law Committee, Queensland Law Society

DEVINE, Ms Wendy, QLS Manager, Legal Policy, Queensland Law Society

LIPSETT, Ms Jessica, Member, QLS Not for Profit Law Committee, Queensland Law Society

CHAIR: Welcome. Would you like to make an opening statement before we start questions?

Ms Devine: Thank you very much for inviting the Queensland Law Society to appear today. I would like to respectfully recognise the traditional owners and custodians of the land on which we meet. As the committee may be aware, the Queensland Law Society is the peak professional body for the state's legal practitioners. We are an independent, apolitical representative body that promotes good law and evidence-based law and policy.

The society generally supports the objectives of this bill: to modernise and simplify the current Trusts Act and address gaps in the current act. The society has advocated for reform to the Trusts Act over many years, including supporting the Queensland Law Reform Commission's call for new trust legislation that does not codify the trust law. We appreciate being given the opportunity to comment on earlier drafts of the bill, including the bill introduced in 2024. However, as outlined in our written submission, we believe there are aspects of this current bill that require additional consideration.

We raise three points for the committee to consider. First, we have suggested minor drafting amendments to clause 44 to allow a trustee who disclaims the trust for the estate to also disclaim express trusts created by the will at the same time if they wish to do so. Second, we recommend reinstating clauses that were previously in the 2024 bill to provide a mechanism to protect the trust if the last continuing trustee has impaired capacity. These clauses should also include a mechanism to re-vest the trust property in the trustee if they regain capacity. In our view, these clauses are necessary to address risks to discretionary family trusts where an older couple are joint trustees. If one of the trustees dies and the other loses capacity, the trust may be left without a trustee for some time until a replacement trustee is appointed.

Third, we are concerned that part 13 of the bill relating to ancillary funds may in practice prove to be overly complex. This part of the bill is intended to preserve the charitable status of certain ancillary funds under existing state and federal legislation. However, for the affected funds to gain the protection of this part a regulation will need to be made. This leaves ancillary funds in an uncertain position until such regulation is made. Our preference, as outlined in our submission, is to adopt the drafting approach in the equivalent Western Australian legislation under which the primary act protects their charitable status.

If the bill proceeds without change, we have recommended consulting with the charitable sector about any associated regulations. In this regard, we welcome the department's response to submissions published on Friday which indicated that such consultation is indeed proposed. Both Jessica and Angela can elaborate on these matters and the other matters raised in our submission. We welcome any questions the committee may have.

CHAIR: Thank you for coming along today. It is great to have your expertise here because, as I and other witnesses have observed, not many of us in the parliament are trust lawyers and we appreciate your learned advice. In relation to clause 44, can you explain in layman's terms if a person is named as an executor in a will and a trust how this operates and how you would like to see it operate?

Ms Cornford-Scott: I will give you an example. In a will where you have three children and you appoint the three children as executors of the will and you set up a testamentary trust for each of your three children under the terms of your will, if one of the children decides they do not want to act as executor for whatever reason then we do not want them to automatically be removed from being trustee of their own testamentary trust under the will.

CHAIR: Is this what clause 44 does?

Ms Cornford-Scott: Correct. We would prefer that a renunciation of the role as executor is only of that role unless it is specifically says, 'We also resign from the role as trustee.' Otherwise, if they resign from the role of executor they have lost control of their own testamentary trust.

CHAIR: How is that remedied by an amendment? In your submission have you suggested an amendment that remedies that?

Ms Cornford-Scott: That is correct, Chair.

Ms SCANLON: In your submission you talk about the gap that may occur where the prerequisites in clause 22 have not been met for the appointment of the replacement trustee but the last continuing trustee of the trust does not have the capacity to administer the trust. I know there has been one example fleshed out about an older couple. Can you explain to the committee any unintended consequences of that particular change? I note from your submission that, on balance, you think that previous part 3, division 8 was beneficial. Do you share the same views as the Public Advocate that that should be included in this bill, or do you have a view that you want a framework or system like he talked about?

Ms Cornford-Scott: Maybe I could give an explanation. Often you have a trust that has mum and dad as trustees of it. Mum or dad passes away and you have a sole surviving trustee. If that sole surviving trustee dies, under the current legislation the Public Trustee basically steps in unless we have someone else who takes control. As I understand this—and it makes sense—we are trying to fill that gap where that person has not died but they have lost capacity. We do need to fill that gap because that has been a problem, because it would result in a court application. These trusts do not necessarily have a lot of money in them so we do not want to incur the cost of a court application. On balance, we were fairly comfortable with section 22 in one of our original submissions, but one of the concerns that has been raised by the Public Advocate was that the power was there unless the terms of the appointment by QCAT or the terms of the enduring power of attorney restricted the exercise of that power, and that has not been adopted in the current draft.

I accept that there are some concerns around the roles of attorneys and their understanding, and that is a public education role, because an executor who takes on that role has this responsibility as well, so I think there is probably just an understanding of the extent of those responsibilities when you do assume those roles.

The issue in relation to the Public Trustee appointment—that obviously reflects, again, what happens currently if someone dies. The Public Trustee's concern, I think, is quite legitimate. When someone dies, obviously we do not need to reverse that scenario, but if someone loses capacity and regains capacity that does need to be addressed, and I think that is our position.

CHAIR: Thank you. Member for Thuringowa?

Ms MARR: I am happy to listen. It is making sense now that you are explaining it from your submissions, so thank you.

CHAIR: Yes. In that regard, the examples you are giving are very helpful. I refer to clause 13 in relation to ancillary funds. Can you flesh that out with a layman's example of how that might be affected, please?

Ms Lipsett: Absolutely. I am happy to provide some context to the issue, if that is helpful.

CHAIR: That is helpful, thank you.

Ms Lipsett: The issue we have stems from the current Trusts Act and the definition of 'eligible recipient' under that act for a particular class of ancillary funds to distribute to. Ancillary funds are charitable and philanthropic funds. They raise money and are solely able to distribute to what is known as an item 1 DGR, which is a particular category of a deductible gift recipient under federal law. There was a particular class of ancillary fund which was referred to as an income tax exempt fund under Commonwealth legislation. In 2013, when the Charities Act was introduced, those funds—ITEFs—were specifically grandfathered into the income tax exempt reporting.

CHAIR: Would that be churches, for example?

Ms Lipsett: No. This is a specific class of ancillary funds. We have some data from the ACNC available which would indicate that there were 34 former income tax exempt funds that are currently registered in Queensland.

CHAIR: Could you perhaps give an example of what one of them might be?

Ms Lipsett: Yes. I have a list here. This is publicly available data from the ACNC. One of those is the UQ Endowment Fund, which last year distributed $1.7 million. The other is the Charitable Works Fund of the Roman Catholic Archdiocese of Brisbane, which distributed $3.1 million last year. We have various other private ancillary funds on the list as well.

CHAIR: Are you able to pull that out for us and table it?

Ms Lipsett: Absolutely, I can do that. Again, this is information we have been provided by the ACNC.

Ms Devine: Can we perhaps provide a clean copy to you separately? We have made a few notes on that version.

Ms Lipsett: Apologies, I was looking up the ACNC register in the foyer.

CHAIR: The committee can resolve to table it after the hearing.

Ms Lipsett: I can provide a clean copy; that is not a problem.

CHAIR: I will move that. All those in favour? That is carried.

Ms Lipsett: Essentially, these 34 funds that are currently registered in Queensland have broader distribution provisions than other ancillary funds, and that, again, has been specifically grandfathered in the federal legislation. The effect of those provisions is that they are able to distribute funds to DGRs that are no longer registered charities, and there is one notable example of that: the Australian Sports Foundation. The issues that we have raised are in relation to preserving the status of these 34 funds as charities under the Queensland legislation and also preserving that power which has been grandfathered at the federal level to distribute to, notably, the Australian Sports Foundation.

Mr WHITING: What engagement has the Queensland Law Society had with the department between when the 2024 bill lapsed and this bill?

Ms Devine: We do want to recognise that the department has been very consultative in this process. We did raise issues through the 2024 consultation process and they have come back and spoken to us on these issues that we raised in that time. With regard to where we have gotten to with the ancillary funds approach, for example, we believe that the mechanism that has been included about making a regulation can be used effectively, so it does address our concerns, provided that the regulation is drafted appropriately. Our other submission to that, though, was that the Western Australian approach seemed a little cleaner to us in that it would protect the status of these organisations in the primary legislation without the need for a secondary regulation.

Mr WHITING: Why is section 53 of the Western Australian bill better than what has been proposed?

Ms Lipsett: It simply preserves the status of those funds and their ability to distribute to these item 1 DGRs that are not charities within the primary legislation. The current drafting, as we said, does work; however, it would require two things to be addressed by regulation. It would require those 34 former ITEFs to be prescribed by regulation and the class there to be drafted appropriately, and it would also require any non-charitable DGRs that they wished to distribute to to be prescribed by regulation.

Mr WHITING: We note in your submission that a gap may occur where the prerequisites of clause 22 have not been met for the appointment of a replacement trustee but the last continuing trustee of the trust has impaired capacity for administering the trust. Can you explain the risks that may arise in that circumstance?

Ms Cornford-Scott: The problem is that if you do not have someone who has the ability to appoint a trustee—for example, your sole surviving trustee has lost capacity—you have no-one who is in control of that fund for the benefit of the beneficiaries, so you have no-one who has authority to invest, manage the money or make any distributions.

Mr WHITING: So it is a real risk for that trust?

Ms Cornford-Scott: Correct. It is a real risk. It would require a beneficiary to fund a court application to have a trustee appointed to protect the assets.

CHAIR: Thank you. Thank you not only for appearing today but also for your submissions over time and obviously the work that the Law Society has done probably over a decade forming this new legislation. We are very appreciative of that. Is there anything else you wanted to bring to the committee's attention before we close out this hearing? Thank you very much. There were no questions taken on notice. Thank you for your time today. I declare the public hearing closed.

The committee adjourned at 1.38 pm.