TRUSTS BILL 2025

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Our ref: [SS:MC]

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Committee Secretary
Justice, Integrity and Community Safety Committee
Parliament House
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By email: JICSC@parliament.qld.gov.au

Dear Committee Secretary

Trusts Bill 2025

Thank you for the opportunity to provide feedback on the Trusts Bill 2025 (**Bill**). The Queensland Law Society (**QLS**) appreciates being consulted on this important piece of legislation.

QLS is the peak professional body for the State's legal practitioners. We represent and promote over 14,000 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide. QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

This response has been compiled by the QLS Succession Law Committee and Not for Profit Law Committee, whose members have substantial expertise in this area.

QLS supports the Bill's objectives of modernising and simplifying the current *Trusts Act 1973* (Qld) (**Trusts Act**) and addressing gaps in the Trusts Act. QLS acknowledges the significant work of the Department of Justice in developing the Bill and particularly appreciates being given the opportunity to comment on consultation drafts of the Bill within the timeframes the Department was working to.

Consultation timeframe

QLS is concerned with the short timeframe allowed for submissions on the Bill. In our view, it was not necessary to declare the Bill urgent under the provisions of standing order 137. Although it is arguable that modernisation of trusts law in Queensland has long been overdue, this is not an adequate reason to declare the Bill urgent and truncate the public consultation period. A fundamental tenet of our system of parliamentary democracy is that stakeholders have a meaningful opportunity to be involved in the consultation process. We do not consider short consultations such as this one amount to meaningful and robust consultation with stakeholders.

Although the Bill is modelled largely on the Trusts Bill 2024 (**2024 Bill**), which we have previously reviewed, the current consultation period of less than five business days has not

given us sufficient time to consider the Bill in detail. We usually consult on technical legal and drafting points with our committee members, who are volunteer expert legal practitioners that are not always available to provide feedback on short notice.

We also suggest that, where a consultation period is shortened, the government should provide a marked-up version of the Bill that clearly shows any changes made to the drafting since the previous version of the Bill. This would greatly assist stakeholders to review the relevant amendments more quickly.

Given the short consultation period, we have only considered the clauses raised in this letter. If we have not commented on other aspects of the Bill or corresponding provisions during consultation on the 2024 Bill, it should not be taken as our assent or support.

Disclaimer of trust of will

QLS appreciates the Department reconsidering the concerns we raised with clause 44 of the Bill (clause 49 of the 2024 Bill) and further consulting with us in relation to the drafting of the clause. However, we believe the wording we previously suggested to the Department is clearer than the current drafting. Our suggested amendments to the clause are marked-up below.

> **44 Disclaimer of trust ~~of will~~ on renunciation of probate or failure to apply**
>
> (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~~ for the estate.
>
> (3) To remove any doubt, it is declared that subsection (2) ~~does not affect any express~~ is not to be taken to be a disclaimer of any separate testamentary trust established under the will, unless specifically stated in the renunciation or citation.

The current drafting of subclause 44(3) appropriately states the disclaimer does not apply to express trusts in the will. However, our suggested inclusion of the words "unless specifically stated" allows the trustee to also renounce their trusteeship of express trusts established under the will at the same time as they renounce probate of the will. Without this amendment, the trustee will need to provide a separate document renouncing trusteeship of the express trusts if they wish to renounce both probate and the express trusts. It would therefore be simpler to allow the renunciation to address both types of trusts if the trustee wishes to do so.

Vesting of trust property – last continuing trustee with impaired capacity

QLS is concerned with the removal of part 3, division 8 in the 2024 Bill in relation to vesting trust property where the last continuing trustee has impaired capacity. QLS supported the inclusion of this division in the 2024 Bill because it provided a protective mechanism until a replacement trustee could be appointed that was consistent with the preceding division regarding death of a sole trustee (clauses 37 to 43 of the Bill).

We understand the Public Trustee of Queensland's (**PTQ**) concern that there was no mechanism to revest the trust property in the trustee if they regained capacity. We note clause 22 of the Bill gives the trustee's attorney or administrator the power to appoint another trustee if the last remaining trustee has impaired capacity if the circumstances specified in subclause 22(1) have been satisfied. However, as this is a discretionary power, the trust will not have a trustee until that power is exercised. Further, if the circumstances specified in subclause 22(1) do not apply, e.g., if there is no administrator or attorney authorised to exercise power for all financial matters for the trustee, a court order will be required to appoint a replacement trustee. This raises questions of how to protect the trust until a replacement trustee is appointed, and whether this is a real risk in practice that should be addressed by legislation.

On balance, we consider the protective mechanism provided by part 3, division 8 of the 2024 Bill is beneficial. The risk of a last remaining trustee losing capacity is likely to increase with our ageing population. In situations where older couples have established discretionary family trusts with themselves as joint trustees, there is a real risk of one trustee dying and the other losing capacity. If this occurs, there may be situations where no one else is aware a new trustee needs to be appointed, which will leave the trust unprotected. Moreover, if a court order is required to appoint a replacement trustee, the remaining beneficiaries may be unwilling to bear the costs of making a court application.

Therefore, we support reinstatement of part 3, division 8 of the 2024 Bill with an additional mechanism to revest the trust assets in the last remaining trustee if they regain capacity.

However, if Parliament does not wish to reinstate part 3, division 8 of the 2024 Bill, it must consider putting in place other mechanisms to address the risk. Given the short timeframe for consultation, we have not considered other mechanisms in detail.

Ancillary funds

QLS acknowledges the amended drafting to Part 13 in the Bill is intended to address the concerns which we raised during the consultation process on the 2024 Bill.

QLS is seeking to ensure that in updating the Trusts Act, we preserve the position of ancillary funds under the existing State and Federal legislation. In particular, we are seeking to ensure the small group of affected public ancillary funds (**PAFs**) previously identified as income tax exempt funds (**ITEF**) in the *Income Tax Assessment Act 1997* (Cth) can continue to distribute to non-charitable DGRs as permitted by their trust deeds. To be clear, this is a power preserved under Federal tax and charity legislation, which we are seeking to preserve under Queensland law.

On balance, it seems the amendment to the 2024 drafting would deal with the problem of the ITEFs but there are a number of practical issues outlined below. We also suggest it is an unnecessarily complicated way to achieve this outcome, noting again our earlier recommendation to adopt the drafting in sections 51-53 of the *Charitable Trusts Act 2022* (Western Australia).

We foreshadow the following practical issues:

- To meet the requirements of the definition of ***prescribed trust*** in clause 212, paragraph (b), the prescribed matters will need to be properly and carefully drafted. The drafting approach contemplates a trust "established and maintained for charitable

or philanthropic purposes" and "is of a class prescribed by regulation". Additional consultation will be required to appropriately define the class or classes to be identified in the regulation. The wording in WA will not likely be appropriate in this context since the mechanism is different, so a new formulation will have to be developed.

- The prescribed matters must now be the subject of a regulation and be tabled in Parliament (including dealing with any sunsetting that may occur). There is a risk this secondary process could be stalled or may never gain the administrative support within the government of the day to make the regulation. This approach does not give the same certainty to ITEFs as it would if the protection of their charitable status was set out in the Act, as previously recommended.
- This approach is complicated and technical. It adds a layer of complexity which will require ITEFs (or their advisors) to track through the provisions, and then the regulations, to identify whether the ITEFs remain charitable. If this proposal proceeds, we encourage clear wording in the Explanatory Notes explaining it is the intention the charitable status for ITEFs will continue.

Finally, we query whether it is intended the prescribed matters will be dealt with when the Act is passed? If not, there will be an unclear period where the ITEFs may not be regarded as charitable and technically may fail as trusts on that basis.

However, we recognise the drafting in the Bill is intended to address our concerns. The drafting approach will achieve that end, subject to the prescribed matters being accurately drafted and guidance given in the Explanatory Notes.

We would recommend the charitable sector and industry stakeholders be given the opportunity to consult on any associated Regulations dealing with prescribed trusts. Ideally, any regulations would be passed concurrently with the proposed Act. In the alternative, given the urgency which has been applied to this Bill, draft regulations should be released for consultation as soon as possible so the regulations might be made and ready to commence at the same time as the proposed Act.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via policy@qls.com.au or by phone on (07) 3842 5930.

Yours faithfully

Genevieve Dee
President