

Queensland Art Gallery Amendment Bill 2012

Report No. 2
Education and Innovation Committee
June 2012

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Abbreviations

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| DSITIA | Department of Science, Information Technology, Innovation and the Arts |
| EIC | Education and Innovation Committee |
| FAC | Finance and Administration Committee |
| QAG | Queensland Art Gallery |

Chair's foreword

On behalf of the Education and Innovation Committee of the 54th Parliament of Queensland (the Committee), I am pleased to present the Committee's first report relating to a bill.

The Queensland Art Gallery Amendment Bill 2012 was introduced to the Parliament and referred to the Committee by the Hon Ros Bates, Minister for Science, Information Technology, Innovation and the Arts on 17 May 2012. The Committee was set a reporting date of 11 June 2012.

At the outset I would like to acknowledge the work of the Finance and Administration Committee (FAC) of the previous Parliament, who had commenced examining an earlier version of the Bill. That the FAC had run a public consultation process on the previous Bill meant that the Committee could focus on gaining an understanding of the technical aspects of the Bill as well as the policy outcomes it aims to achieve, within the time allowed.

I would like to thank the Department of Science, Information Technology, Innovation and the Arts for the assistance it has given the Committee, and in particular for the briefing it provided at the Committee's first meeting. This greatly assisted all of us to understand what the Bill does.

Thanks also to all members of the Committee, and in particular those who are new members of Parliament. Committee members have taken up their role as legislators and as representatives of the electorate with enthusiasm and a strong sense of responsibility. I particularly note that the Committee's recommendations in respect of this Bill are unanimous.

I commend the report to the House.



Rosemary Menkens MP

Chair

June, 2012

Executive summary

The Queensland Art Gallery Amendment Bill 2012 would change the governance arrangements for the Queensland Art Gallery Foundation. The purpose of the Foundation is to attract and manage donations and bequests to the Queensland Art Gallery. At present the Foundation is run by a council. It is a separate entity from the Queensland Art Gallery Board of Trustees (the Board), which is a statutory body established to manage the gallery. As an unincorporated body, the legal status of the council is not clear which creates a number of potential issues.

The Bill would enable the Board to establish a committee to run the Foundation's activities, under power delegated from the Board.

The explanatory notes advise that this is the most appropriate means of clarifying the legal status of the Foundation. Establishing the Foundation Committee would address a number of potential issues, including:

- Clarifying that the Foundation is a charitable body, ensuring that private ancillary funds – the key source of funds donated to the Foundation – can make donations to the Foundation.
- Ensuring that Foundation Committee members, like Board members, are protected from any civil liability for any act done or omission made honestly and without negligence when they are carrying out the functions of the Foundation Committee, as delegated by the Board.
- Clarifying the relationship between the Board and the Foundation. The Bill establishes a structure in which the Board has authority over the Foundation Committee; and provides mechanisms to support that authority.

In examining the Bill the Committee considered the application of fundamental legislative principles, and concluded that they were appropriately applied in this legislation.

The Committee unanimously recommends that the Bill be passed. This report includes other recommendations for consideration which would, in the Committee's opinion, result in more effective legislation, including strengthening accountability for both the Board and the Foundation Committee.

Recommendations

Recommendation 1 **2**

That the Queensland Art Gallery Amendment Bill 2012 be passed.

Recommendation 2 **4**

That terms of appointment to the Foundation Committee reflect the terms of appointment of Board members.

Recommendation 3 **4**

That the Board be required to decide the name and membership conditions, and endorse the constitution for, the Foundation Committee.

Recommendation 4 **5**

That consideration be given to ensuring there is capacity to terminate the appointment of a member of the Foundation Committee if that member was found to have breached section 40G or 40H of the *Queensland Art Gallery Act 1987* in respect of conflicts of interest.

Recommendation 5 **5**

That the Minister clarifies what reporting obligations would be placed on the Foundation Committee, including and in addition to annual reporting requirements.

1 Introduction

1.1 Role of the Committee

The Education and Innovation Committee (the Committee) was established by resolution of the Legislative Assembly on 17 May 2012. The Committee has both government and non-government members.

Section 93 of the *Parliament of Queensland Act 2001* provides that a portfolio committee is responsible for considering:

- the policy to be given effect by the Bill, and
- the application of the fundamental legislative principles to the Bill.

The Queensland Art Gallery Amendment Bill 2012 was referred to the Committee on 17 May 2012, with a reporting date of 11 June 2012.

1.2 Process

A previous version of the Bill, the Queensland Art Gallery Amendment Bill 2011, was introduced to the 53rd Parliament on 29 November 2011, and referred to the Finance and Administration Committee (FAC), the portfolio committee which at that time had responsibility for the Arts. The FAC had not completed its report back to the House at the dissolution of Parliament on 19 February 2012, at which time that Bill lapsed.

The Queensland Art Gallery Amendment Bill before the Committee now is essentially the same Bill as was considered by the FAC.

The FAC commenced its examination of the 2011 Bill by calling for public submissions, both in a public advertisement and by writing directly to 18 stakeholders, on 17 December 2011. No submissions had been received by the closing date of 31 January 2012.

The FAC had not received a briefing from the Department.

Given that a public consultation process on a Bill that was essentially the same had already been conducted by the former FAC with no submissions received from stakeholders - and given a limited timeframe - the Committee decided not to call for public submissions. It also notes the advice from DSITIA that the current Foundation Council and major donors agree with the action being taken through the Bill.¹

The Committee was briefed by DSITIA on 30 May 2012. The transcript of the briefing is published on the Committee's webpage at www.parliament.qld.gov.au/committees.

Following that briefing, the Committee deliberated on the Bill.

1.3 Policy objectives of the Bill

The Bill changes governance arrangements for the Queensland Art Gallery's fundraising and funds management.

The Queensland Art Gallery is managed by a Board of Trustees, established under the *Queensland Art Gallery Act 1987*.

The Queensland Art Gallery Foundation is established to attract donations and bequests to benefit the art gallery, its constitution stating that "the objects of the Foundation shall be generally to assist

¹ Hansard transcript, 30 May 2012, EIC – Public briefing on the Queensland Art Gallery Amendment Bill, p2

the trustees to maintain, improve and develop the state collection".² The explanatory notes state that the intent of the Bill is "...to regularise the status..." of the Queensland Art Gallery Foundation, and to limit restrictions on the Foundation's ability to receive and deal with donations and bequests.

Private ancillary funds are the major source of donations to the Foundation, and such funds are restricted to donating to charitable organisations.

At present, the Foundation conducts its fundraising, donations and bequest functions under the governance of a council.³ As an unincorporated body, the legal status of the council, including whether or not it is a charitable institution, and its relationship to the Art Gallery Board of Trustees (the Board), are not clear.

These matters were raised by the Auditor-General in a private report to the Board in 2007-08, identifying the current arrangements as high risk and recommending that the legal status of the Foundation be clarified. He also noted that the Foundation council appeared to have more powers than the Board, and that this would not be appropriate. That report recommended this historical issue be addressed, and this is what the Bill seeks to do.⁴

The explanatory notes advise that enabling the Board to establish a committee to manage the activities of the Foundation, with features including a clear relationship to the Board, is the most appropriate means of clarifying the legal status of the Foundation.

This requires amendments to the *Queensland Art Gallery Act 1987* to extend the power of the Board to include the development of the Gallery's collection. The Act would then allow the Board to delegate this power to the Foundation Committee, for the purpose of performing these functions. The amendment would also remove references to redundant entities such as the Queensland Art Gallery Society.

The amendments would also provide that the Board is a charitable institution, ensuring that taxation arrangements relevant to donations to charitable institutions would apply.

Recommendation 1

That the Queensland Art Gallery Amendment Bill 2012 be passed.

² Ibid, p3

³ Hansard, 17 May 2012, p91. Introductory Speech by the Hon Ros Bates MP, Minister for Science, Information Technology, Innovation and the Arts.

⁴ Auditor-General, Queensland, 2007-08. Final Management Report to the Queensland Art Gallery Board of Trustees (unpublished); referred to in Hansard, 30 May 2012, EIC - Public briefing on the Queensland Art Gallery Amendment Bill, pp3-4.

2 Examination of the Queensland Art Gallery Amendment Bill 2012

2.1 Policy issues

Regularising the status of the Foundation

The Committee sought and received advice from DSITIA about firstly, what regularising the status of the Foundation meant, and secondly, why it was needed.

The advice received was that 'regularising' in this instance means to make clear and appropriate the legal status of the entity. The Foundation's function is to attract and manage donations and bequests to the Queensland Art Gallery. At present its legal status is 'irregular', in that it is not established under an Act, or as a trust, or by any other method of establishing a statutory or incorporated body.

It is noted that the Bill would align governance arrangements for Queensland's art gallery legislation with other Australian jurisdictions. The model provided for in the Bill follows that used by the National Gallery of Victoria, which is the most successful of other jurisdictions in terms of fund raising.⁵

Governance arrangements

The Board is a statutory entity, established under the *Queensland Art Gallery Act 1987*. As such, it is appointed by the Governor-in-Council, and is a body corporate that represents the state. The Foundation Council is not clearly established as a legal entity. It has been carrying out its functions under an uncertain legal status. These functions involve significant amounts of funds.

The amendments to the Act would see the Foundation's functions undertaken by a new Committee that has a clear legal status as a defined committee of the Board, acting under a delegation of power from the Board. This would make clear that the Board controls the Foundation.⁶

The Act as it stands now allows the Board to establish and delegate its powers to a committee, but that committee can consist only of Board members. The amendments would allow a new committee (the Foundation Committee) to be established, including people who are non-Board members - but the Foundation Committee must include at least two Board members. Foundation Committee members would be appointed by the Board.

A quorum of the Foundation Committee would be the majority of members, including both of the members who are also members of the Board. This arrangement supports the respective roles and responsibilities of the Board and the Foundation Committee, making clear the Board's authority and the delegation of power from it to the Foundation Committee.

Committee comment

The Committee notes this arrangement makes unlikely any conflict of interest arising between the Board and its Foundation Committee. A further safeguard to the Board's authority is offered by the fact that the new clause 7 of the Act provides that in exercising the powers delegated to it by the Board, the Foundation Committee is subject to the written direction of the Board (Clause 7 of the Bill, new section 40E), and the Board may decide how the Foundation Committee conducts its business (new section 40F).

The Committee gave consideration to the term of appointment to the Foundation Committee, and has developed a view that it would be beneficial to align the terms of those appointments with those

⁵ DSITIA, Hansard transcript, 30 May 2012, EIC - Briefing on Queensland Art Gallery Bill, p3

⁶ Ibid, p3

of the Board, given that members are appointed by that particular Board. This would seem appropriate given the nature of the relationship between the Foundation Committee and the Board.

Recommendation 2

That terms of appointment to the Foundation Committee reflect the terms of appointment of Board members.

The Bill would enable the Board to determine such matters as the name, membership conditions and the constitution for the Foundation Committee, although this is not expressly required. In the context of the Foundation Committee including non-Board members, the Committee considers that the Board should be expressly required to decide the name and membership conditions and endorse the constitution for the Foundation Committee.

Recommendation 3

That the Board be required to decide the name and membership conditions, and endorse the constitution for, the Foundation Committee.

Foundation Committee members - obligations and protections

The Committee discussed the importance of ensuring that Foundation Committee members were adequately protected under the law to the extent required to enable them to fulfil their functions. Without adequate protection, it would be difficult to attract people to Committee positions.

Committee comment

This protection must be balanced with the need to protect the assets managed by the Foundation Committee, under the Board's delegated authority. To this end, the Bill provides that failure by a foundation member to comply with the following rules regarding a personal material interest in a matter being considered by the Foundation Committee: a) disqualified from voting; b) barred from voting on the proposed resolution under subsection (2); c) excluded from any related resolution considered by the Foundation Committee; and d) banned from any decision by the Foundation Committee; will attract a penalty of 100 penalty units (\$10,000) (Clause 7, new 40G).

Failure to disclose a direct or indirect interest in a matter before the Foundation Committee by a Foundation Committee member will attract a penalty of 100 penalty units (\$10,000) (Clause 7, new 40H).

The provision for penalties to apply where a Foundation Committee member does not disclose a potential conflict of interest, or further, votes on a matter in which they have a material personal interest (unless the Foundation Committee resolves otherwise) as provided for under new sections 40G and 40H (Clause 7 of the Bill) is strongly supported.

In fact, the Committee had some discussion about whether the penalties proposed – currently \$10,000 for each offence – are sufficient, and suggests that it is important there be capacity to terminate the appointment of Foundation Committee member should they breach those conflict of interest provisions and become subject to the prescribed penalties.

Recommendation 4

That consideration be given to ensuring there is capacity to terminate the appointment of a member of the Foundation Committee if that member was found to have breached section 40G or 40H of the *Queensland Art Gallery Act 1987* in respect of conflicts of interest.

Foundation Committee reporting

The annual reports of the Queensland Art Gallery include both the Gallery and the Foundation at present. Regular reports from the Foundation Committee to the Board are an important consideration given the extent of the funds involved, and the fact that the legal status of the new Committee is being changed to enhance the Foundation's ability to perform its financially-focused functions.

Committee comment

Given the Bill would clarify (and provide for) the legal status of the Foundation, the Committee is keen to ensure that regular reporting by the Foundation Committee on financial and other activity is provided for in the amended legislation.

Recommendation 5

That the Minister clarifies what reporting obligations would be placed on the Foundation Committee, including and in addition to annual reporting requirements.

3 Fundamental legislative principles

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

- the rights and liberties of individuals, and
- the institution of parliament.

3.1 Rights and liberties of individuals

Immunity from proceedings or prosecution without adequate justification

The explanatory notes to the Bill identify a possible breach of the FLP that “legislation should not confer immunity from proceeding or prosecution without adequate justification”.

Section 55 of the Act now provides that, subject to section 56 [*Illegal Borrowing*], a member is not civilly liable for an act done, or omission made, honestly and without negligence under the Act (55(1)). Where subsection 55(1) prevents a civil liability attaching to a member, the liability attaches instead to the Board.

Clause 9 of the Bill amends section 55 by inserting a new section 55(4) which states that a member includes a Foundation Committee member. The Bill would thereby extend the protection afforded to Board members, to Foundation Committee members in respect of civil liability for an act done, or omission made honestly and without negligence under the Act.

The Government’s position as stated in the explanatory notes is that the conferment of immunity is justifiable because the Foundation Committee is established as a committee of the Board and its function is to raise funds to assist in the fulfilment of the Board’s functions. It may only exercise powers delegated to it by the Board.

Further, the position is that adequate qualifiers are in place: the protection is only against civil liability; it only applies when the member has acted honestly and without negligence; and the Board assumes the liability.

Committee comment

The Committee accepts the Government’s position on this matter.

Proposed penalties

The Committee considered whether the penalties proposed in clause 7 of the Bill were appropriate and proportionate to the breaches to which they relate. The details of this consideration are contained in section 2.1 of this report, *Foundation Committee members - obligations and protections*.

Committee comment

The Committee believes the proposed penalties are proportionate to the offence, and so do not breach the rights and liberties of individuals.

3.2 The institution of parliament

Delegation of administrative power in appropriate circumstances to appropriate persons

It is a fundamental legislative principle that administrative power should only be delegated in appropriate cases and to appropriate persons.

Clause 7 of the Bill amends the *Queensland Art Gallery Act 1987* to allow the Board to establish a committee of the Board (the Foundation Committee) to carry out the activities of the QAG Foundation.

The function of the Foundation Committee is to raise funds to assist in the fulfillment of the Board's functions by encouraging gifts, donations, legacies and bequests for the benefit of the Board and managing and investing property made available to the Foundation Committee by the Board (s.40D). Clause 5 inserts a new section 40(E) which allows the Foundation Committee to exercise the powers delegated to it by the Board under section 40.

Safeguards limiting the exercise of those powers are also set out in section 40E. These are:

- in exercising the powers the Foundation Committee is subject to the written directions of the Board (section 40E(2));
- in performing its function, the Foundation Committee has the powers necessary to encourage gifts, donations, bequests and legacies of property for the benefit of the Board (section 40E(3));
- in performing its function and exercising its powers, the Foundation Committee must not incur a debt (section 40E(4)); and
- for investing property made available to the Foundation Committee by the Board, the Foundation Committee may use only the powers the Board has for investing the property that the Board has delegated to the Foundation Committee (section 40E(5)).

In respect of whether the proposed delegation is to appropriate persons, a further safeguard for the exercise of a delegated power can be found in section 40C (4)(b) which requires that, in appointing a person to the Foundation Committee, the QAG Board have regard to that person's ability to take part in the exercise of the powers delegated to the Foundation Committee under section 40.

Committee comment

The Committee takes the view that the safeguards are sufficient to make the delegation of power from the Board to the Foundation Committee an appropriate delegation, and further, that the relationship between the Board and the Foundation Committee makes the delegation essential in order to achieve the purposes for which the Committee is established – namely, attracting funds, donations and bequests for the Queensland Art Gallery.

3.3 Explanatory Notes

Part 4 of the *Legislative Standards Act 1992* relates to explanatory notes. Subsection 22(1) states that when introducing a bill in the Legislative Assembly, a member must circulate to members an explanatory note for the bill. Section 23 requires an explanatory note for a bill to be in clear and precise language and to include the Bill's short title and a brief statement providing certain information.

Explanatory notes were tabled with the introduction of the bill. The notes are fairly detailed and contain the information required by section 23 of the *Legislative Standards Act 1992* and a reasonable level of background information and commentary to facilitate understanding of the Bill's genesis and objectives.

Committee comment

While noting that the explanatory notes meet the requirements of the *Legislative Standards Act 1992*, the Committee would like to comment that providing a rationale for the Bill – that is, stating the issue/s the Bill was aiming to address – rather than stating the objectives without that context, would have added clarity to the explanatory notes.

References

The Hon Ros Bates MP, Minister for Science, Information Technology, Innovation and the Arts. Introductory Speech for the Queensland Art Gallery Amendment Bill 2012, Hansard, 17 May 2012, p91.

Auditor-General, Queensland, 2007-08. Final Management Report to the Queensland Art Gallery Board of Trustees (unpublished, sighted); cited in Hansard, 30 May 2012, EIC - Public briefing on the Queensland Art Gallery Amendment Bill.

Department of Science, Information Technology, Innovation and the Arts, Hansard transcript, 30 May 2012, EIC - Briefing on Queensland Art Gallery Bill 2012.

Appendix

Witnesses at public briefing – 30 May 2012

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| Witnesses |
| Mr Philip Reed, Director-General, Department of Science, Information Technology, Innovation and the Arts |
| Mr Andrew Clark, Assistant Director, Queensland Art Gallery |
| Ms Deb Tanzer, Principal Legal and Governance Officer, Arts Queensland |