The Public Advocate
Influencing change to transform lives

18 June 2024

Committee Secretary
Housing, Big Build and Manufacturing Committee
Parliament House
George Street
Brisbane Qld 4000

Via email: hbbmc@parliament.qld.gov.au

Re: Trusts Bill 2024

Thank you for the opportunity to comment on the draft of the Trusts Bill 2024 (the Bill).

As you would be aware, as the Public Advocate for Queensland, I undertake systemic advocacy to promote and protect the rights and interests of Queensland adults with impaired decision-making ability.[1] There are several conditions that may affect a person's decision-making ability, including intellectual disability, acquired brain injury, mental illness, neurological disorders (such as dementia) or alcohol and drug misuse.

Aspects of the Bill are relevant to people with impaired decision-making ability. The Bill also interacts with the *Guardianship and Administration Act 2000 and the Powers of Attorney Act 1998*.

My comments are primarily associated with these provisions.

I have made submissions in the past during the public consultation stages of this Bill, and the below reflects the submissions that I have made previously.

Clause 22 – Appointment of trustees – replacement of last continuing trustee with impaired capacity

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 if there is an administrator under the *Guardianship and Administration Act* or an attorney through an enduring power of attorney under the *Powers of Attorney Act* for the last continuing trustee who has lost capacity to administer the trust.

The proposed Clause 22 requires an administrator or attorney to have been appointed for **all** financial matters, and that the provisions of the *Guardianship and Administration Act* and the *Powers of Attorney Act* would not apply to the process of appointing a trustee.

There are a number of issues that arise from this clause (originating from recommendations made by the Queensland Law Reform Commission in its (QLRC) 2013 review into the *Trusts Act 1973*). The Bill attempts to use existing substitute decision-making frameworks for the appointment of trustees in the *Trusts Act* even though there exist a number of fundamental compatibility problems.

These problems were discussed in previous consultations, however my submission is that the Bill does not resolve the incompatibilities in its current form.

Ultimately, neither the *Guardianship and Administration Act* nor the *Powers of Attorney Act* were designed to deal with the complex issues associated with trusts and the appointment of trustees. The articulated objectives and principles underlying these two Acts also create tensions with the *Trusts Act* that may not be able to be resolved.

[1] *Guardianship and Administration Act 2000* (Qld) s 209.

The appointment of a trustee is a power of a fiduciary nature, to be exercised for the benefit or in the best interests of the beneficiaries.[2] This is in contrast to the principles found in the *Guardianship and Administration Act* and the *Powers of Attorney Act*, which are focused on the adult and their general wishes and preferences.[3]

Further, the appointment of an administrator under the *Guardianship and Administration Act* revolves around the needs of the adult being met and the protection of the adult's interests.[4] The considerations behind the appointment of an administrator include whether the administrator will follow the general principles included in the Act; in other words, if they will uphold the interests of the adult.[5]

This conflict is not addressed in the Bill. This means that an administrator or attorney, when appointing a trustee, would need to apply principles related to trusts more broadly (acting in the best interests of the beneficiaries) rather than those under which they were initially appointed.

Conflicts between the Bill and existing legislation also create a number of additional issues and difficulties.

The following examples illustrate these difficulties:

- A current attorney, who was not informed or made aware that their responsibilities would extend to the appointment of trustees (and may not fully comprehend the issues surrounding trusts) would, under the Bill, be expected to appoint trustees.
- As the responsibilities and liabilities of administrators and attorneys are found in the *Guardianship and Administration Act* and *Powers of Attorney Act*, and those two Acts would not be applicable when appointing trustees under the Bill, what recourse would a person have if a decision is made by an administrator or attorney to appoint a new trustee, and that decision turns out to cause problems? Where does the liability for negligence and/or reckless decisions lie?
- By excluding the *Guardianship and Administration Act* and *Powers of Attorney Act*, a number of safeguards related to financial decision-making for a person with impaired decision-making ability are effectively removed. The Queensland Civil and Administrative Tribunal (QCAT), which can normally review decisions, and where administrators and attorneys can seek advice or directions, will not have any jurisdiction.
    - Recourse to QCAT currently exists as quite often laypersons (ie. people not considered to be financial experts) are appointed as administrators and attorneys. The potential exclusion of the two Acts would mean that an administrator or attorney would be acting alone to appoint trustees, often without the necessary trust expertise required to make appropriate decisions.
- Can someone apply to have an administrator appointed under the *Guardianship and Administration Act* for the purposes of having a new trustee appointed as per clause 22 of the Bill? If so, what factors would QCAT need to consider when appointing such an administrator, if the administrator is not bound by the *Guardianship and Administration Act* when making a decision under the Bill?
- If an appointment is sought solely to appoint a new trustee, clause 22 of the Bill allows for the appointment of a new trustee by an administrator if the administrator has an appointment for **all** financial matters. This is not currently compatible with administrator appointments made under the *Guardianship and Administration Act,* as QCAT is only to make financial administrator appointments when particular financial decisions need to be made (for example, the payment of bills). QCAT must also consider making an administrator appointment in a way that is least

[2] Queensland Law Reform Commission, *A Review of the Trusts Act* 1973 (No. 71, December 2013) p 30.
[3] *Guardianship and Administration Act 2000* (Qld) s 11B, *Powers of Attorney Act 1998* (Qld) s 6C.
[4] *Guardianship and Administration Act 2000* (Qld) s 12.
[5] *Guardianship and Administration Act 2000* (Qld) s 15.

restrictive of the adult's rights.[6] It would therefore be unreasonable to seek the appointment of an administrator for all financial matters solely for the purpose of appointing a new trustee when the adult may not require any other decisions to be made.

- When a person accepts their appointment under an enduring power of attorney, they sign an acceptance stating that they will be making decisions in accordance with the *Guardianship and Administration Act* and *Powers of Attorney Act*.[7] The Bill is effectively adding a decision-making duty to the role of the administrator that is not included in the provisions of the two principal Acts under which appointments are made, and to which the attorney did not agree.

Ultimately, using the *Guardianship and Administration Act* and *Powers of Attorney Act* in this way is potentially unworkable. The two Acts were not enacted with the intention of applying to the appointment of trustees.

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

Clause 100 – Power to delegate matters

Clause 100 of the Bill allows a trustee to delegate their powers to another if the trustee is to be absent from Queensland or becomes temporarily incapable of performing the duties of a trustee. However, under clause 106, this delegation is revoked if the trustee 'becomes a person with impaired capacity for administering the trust.'

Clause 100 provides an example of how to manage issues regarding trusts and impaired capacity, with the creation of a specific delegation under the Bill that does not rely upon existing substitute decision-making laws. The new *Trusts Act* should include provisions on how trustees with impaired capacity are dealt with and clause 22 should, in my view, be amended accordingly.

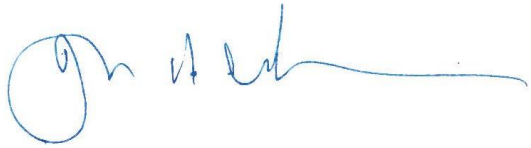
Conclusion

Thank you again for the opportunity to comment on the Trusts Bill 2024.

The Bill represents a broad change in how trusts are managed in Queensland, however I believe that revisions are required to improve the Bill's application in situations where trustees have impaired decision-making ability.

Should you wish to discuss any of the matters I have raised in this submission further, please do not hesitate to contact my office via email public.advocate@justice.qld.gov.au or phone 07 3738 9513.

Yours sincerely



John Chesterman (Dr)
Public Advocate

[6] *Guardianship and Administration Act 2000* (Qld) s 11B.
[7] Enduring power of attorney – short form (Queensland) s 5; Enduring power of attorney – long form (Queensland) s 5.