**PUBLIC CONSULTATION**

**PAPER**

Public Consultation Draft

Trusts Bill 2024

**November 2023**

This document does not represent government policy

# Attorney-General’s Foreword

Prior to the last election, the Government made a commitment to reform and modernise the *Trusts Act 1973* (the Act) in consultation with key stakeholders.

Queensland’s trusts laws were enacted over 50 years ago and are in need of review, simplification and modernisation to ensure they give effect to modern societal expectations. Whilst the Actdoes not codify the law of trusts, it legislates important matters in relation to trusts.

All Queenslanders are impacted by trust law during their lifetimes, whether it be through deceased person’s estates, businesses or other assets which are owned by family discretionary trusts, superannuation fund trusts or gifts to charitable trusts.

The Government is seeking the community’s views on the draft new Trusts Bill 2024 (the Bill).

Some reforms in the Bill to modernise and simplify the law in this area include:-

- simplifying the investment powers of the trustee including permitting delegation of the investment power by the trustee;

- imposing minimum statutory duties on trustees to provide certainty for trustees and those with an interest in the trust property;

- increasing the maximum amount which can be advanced from the trust property for a child’s education, maintenance and advancement to reflect modern community standards;

- permitting certain *cy pres* applications to be dealt with by the Attorney-General to minimise costs for the charitable trusts;

- granting the District Court power to deal with disputes relating to trust property which fall within the District Court’s jurisdictional money limit to minimise costs for the trust and those with an interest in the trust; and

- modernising the provisions dealing with gifts by particular trustees for philanthropic purposes to reflect changes to Commonwealth legislation in this area.

These issues are important and will touch the lives of many Queenslanders. I invite submissions on these important reforms and look forward to receiving your feedback. While the opportunity to comment is open to all, I appreciate that the provisions of the Bill raise legal and technical issues on which only stakeholders who practise in this area of the law may wish to engage.

**Yvette D’Ath MP**

Attorney-General and Minister for Justice and Minister for the Prevention of Domestic and Family Violence

November 2023

**Background**

The Department of Justice and Attorney-General (**DJAG**) is consulting the public on a draft of the Trusts Bill 2024 (**draft Bill**).

The *Trusts Act 1973* (**the Act**) facilitates the efficient administration of trusts by conferring powers on trustees that might otherwise be lacking under the trust instrument, and by ensuring that the court has appropriately wide powers to supervise the administration of a trust. The Act does not attempt to codify the law of trusts, but merely supplements the existing law relating to trusts, predominantly found in case law.

The draft Bill is intended to replace the Act with modern legislation, drafted in accordance with contemporary drafting practice and using plain English to simplify, streamline and modernise Queensland's trust legislation.

**Trust Law Review**

In January 2012, the Queensland Law Reform Commission (**QLRC**) received terms of reference to review the Act. The terms of reference required the Commission to review:

* whether the Act provides an adequate, effective and comprehensive framework for the regulation of trusts (including charitable trusts) in Queensland;
* opportunities for the Act to be modernised, simplified, clarified or updated, including in light of developments in case law and current trust practices and usage;
* whether any other relevant State legislation pertaining to the law of trusts should be amended for consistency with, or as a consequence of any recommended amendments to the Act;
* streamlining the law with respect to deciding disputes in relation to the terms of the administration of trusts, including the appropriate court or tribunal which is to have jurisdiction over less complex matters or disputes involving lower monetary values.

In December 2012, the QLRC completed a Discussion Paper examining a large range of issues relating to the provisions of the Act and formed preliminary proposals and questions on which the QLRC sought submissions. After submissions were received and reviewed from a wide range of stakeholders, an Interim Report was provided by the QLRC in June 2013 with preliminary recommendations (**Interim Report**). After further feedback in relation to those preliminary recommendations a Final Report was provided by the QLRC in December 2013 (**Final Report**) which included the Trusts Bill 2013 (QLRC’s Trusts Bill).

The terms of reference, Discussion Paper, Interim Report and Final Report can be accessed at: <https://www.qlrc.qld.gov.au/recently-completed-reviews#Trusts>

The Final Report recommended the enactment of new trusts legislation to replace the current Act. The QLRC’s Trusts Bill (included with the Final Report):

* omitted in whole or in part provisions under the Act that are obsolete or no longer appropriate in modern trusts legislation, or that confer powers that are no longer needed due to the proposed new provisions in the QLRC’s Trusts Bill;
* introduced a number of new or substantially changed provisions to streamline the legislation, meet modern needs and address existing gaps in the current legislation; and
* introduced key additions and changes including the following:
	+ new statements of trustees’ general management powers;
	+ new statements of trustees’ minimum or ‘core’ duties in administering a trust;
	+ a new power for a person who is the administrator or attorney (for financial matters) of the last continuing trustee, who has impaired capacity for administering the trust, to appoint a replacement trustee or trustees without recourse to the court;
	+ a clarification that nothing in the provision based on existing section 33(1)(i) (appropriation power) affects the power of appropriation conferred under the trust instrument;
	+ a new power for a trustee to authorise another person to exercise the trustee’s investment powers;
	+ changes to the trustee’s power to delegate the administration or exercise of the trusts, powers, authorities and discretions vested in the trustee, to impose a 12-month duration limit on the delegation, and an extension of the circumstances in which delegation is permitted including in anticipation of the trustee becoming temporarily incapable of performing the duties of a trustee because of impaired capacity for administering the trust;
	+ an increase in the amount of capital which may be applied by the trustee for the maintenance, education or advancement of a beneficiary;
	+ the conferral of new statutory powers for the court including powers to disqualify a trustee, review and reduce a trustee’s remuneration, and to remove and replace officeholders (other than trustees) appointed under the trust instrument;
	+ granting jurisdiction on the District Court to exercise the same powers as the Supreme Court, within the District Court’s jurisdictional money limit; and
	+ enabling trustees of charitable trusts, where the total value of the trust property does not exceed the monetary limit of the District Court, to apply to the Attorney-General for the approval of *cy pres* schemes rather than making an application to the Court.

**Draft Bill**

The draft Bill has broadly adopted the QLRC’s recommendations as contained within the QLRC’s Trusts Bill with some deviations.

The structure of the draft Bill is as follows:

* Part 1 – Preliminary
* Part 2 – Restrictions on appointment of trustees and related matters
* Part 3 – Appointment, discharge and removal of trustees and devolution of trusts
* Part 4 – Custodian trustees
* Part 5 – Trustees’ duties
* Part 6 – Investments
* Part 7 – General powers of trustees
* Part 8 – Maintenance, education and advancement
* Part 9 – Indemnities and protection of trustees and other persons
* Part 10 – Remuneration of trustees
* Part 11 – Court powers
* Part 12 – Charitable trusts
* Part 13 – Gifts by particular trustees for philanthropic purposes
* Part 14 – Statutory trustees
* Part 15 – Miscellaneous
* Part 16 – Repeal, transitional and validation provisions
* Part 17 – Amendment of Acts
* Part 18 – Other amendments
* Schedule 1 – Dictionary
* Schedule 2 – Other amendments.

Please note, the draft Bill contains no transitional provisions as these are yet to be finalised.

Theheading for each clause contains information intended to aid the reader. Where relevant each clause heading contains a reference to: the most relevant section from the QLRC’s Trusts Bill; the equivalent section in the current Act; where applicable, the relevant interstate provision; and, where relevant, the applicable recommendation from the Interim Report.

For example, clause 17 of the draft Bill reads as follows:

17 Application of part[TB, cll 8 and 9; TA, ss 12(9) and 16(9); Rec 3-19]

The information in square brackets indicates:

* the drafting is based on the QLRC’s Trusts Bill, clauses 8 and 9;
* the clause is equivalent to sections 12(9) and 16(9) of the Act; and
* recommendation 3-19 of the Interim Report has been adopted in the clause.

To assist in considering and commenting on the draft Bill, please note:

* final policy positions on the provisions have not yet been established and the draft Bill will be subject to further review following the results of this consultation;
* while the QLRC’s Trusts Bill has generally been adopted in the draft Bill, the **Annexure** to this paper notes key areas where it has not been adopted, wholly or in part, or has been varied; and
* there are a number of specific issues for stakeholders’ consideration and feedback in the accompanying Consultation Notes document.

**Have your say**

If you would like to provide a written response, please:

* email your submission to TrustsActReview@justice.qld.gov.au

This public consultation is now open and the closing date for written submissions is **5 p.m. on Tuesday, 19 December 2023**.

**Your privacy**

The Queensland Government is bound by the *Information Privacy Act 2009*. Find out more by reading our [privacy statement](https://www.justice.qld.gov.au/legals/privacy).

We may contact you for further information on the issues you raise in your submission. Information in your submission will be used to inform the drafting of the Bill. If you would like your submission—or any part of it—to be treated as confidential, please indicate this clearly. Please note however that all submissions may be subject to disclosure under the *Right to Information Act 2009*.

**Contact**

Please email the Trusts Act Review team on TrustsActReview@justice.qld.gov.au, if you would like to find out more about this consultation.

**Annexure**

**VARIATIONS FROM THE RECOMMENDATIONS IN THE QLRC’S TRUSTS BILL**

*Note: This list does not include recommendations that have been adopted in the draft Bill but have been drafted differently to the QLRC’s Trusts Bill.*

**Clause 7 - Meaning of *trustee* and *statutory trustee* [TB, sch 1; TA, ss 5 and 6(1)(b)(i)]**

The definition of *trustee* has been extended to include statutory trustees. Provisions have also been inserted to include the powers and restrictions on powers given to these statutory trustees under the Act in new part 14.

**Clause 9 – Meaning of *trust property* and references to trust property [TB, sch 1;TA, s 5]**

The definition of trust property has been extended to include the estate of a deceased person.

**Meaning of bankrupt [TB, Sch 1, TA, s 5]**

The definition of bankruptcy has been removed and any references to a bankrupt are defined by that term in the *Bankruptcy Act 1966* (Cwlth) so as to provide certainty as to when bankruptcy occurs and whether a person is able to be appointed as a trustee and also removed as a trustee (see clauses 13, 20 and 105 of the Bill).

**Clause 10 – Meaning of *capacity* and *impaired capacity* [TB, sch 1; New]**

The definitions of capacity and impaired capacity have been broadened so that they are no longer restricted to a trustee for administering the trusts and is more broadly defined to apply to any person and confirms that capacity is matter specific.

**Clause 13 – Persons who can not be appointed as trustees [TB, cll 10(1) and 11; New; Rec 3-1 and 3-2]**

Rather than having the appointment of a child as trustee conditional on that child reaching the qualifying age, a child can not be appointed as trustee of a trust under the Bill.

This clause has also been amended to prevent:

* a trustee who is a bankrupt, or taking advantage of the laws of bankruptcy as a debtor, under the *Bankruptcy Act 1966* (Cwlth) or a similar law of a foreign jurisdiction from being appointed as a trustee under the Bill.
* a person who has been disqualified from being appointed as a trustee under clause 172 of the Bill from being appointed as a trustee.

**Clause 14 – Limit on number of trustees of particular trusts [TB, cl 12(1), (2), (4) and (5); TA, s 11(1)–(3)(a) and (4); Rec 3-3]**

A self-managed superannuation fund within the meaning of the *Superannuation Industry (Supervision) Act* *1993* (Cwlth), has been excluded from the requirement for a maximum of four trustees.

If more than four persons are named as trustees under the trust instrument, only the first four trustees named, who are able and willing to act as trustee, and whose appointments are otherwise able to take effect, are the trustees. The appointment of any further person or persons named as trustee is of no effect (subject to clause 15).

This clause and clause 15 have also been clarified so the usual definition of trustee applies to these clauses. This means that there must also be no more than four personal representatives of a deceased person’s estate appointed under this clause which mirrors the Act.

**Clause 16 - Local government trustees may act in administration of trusts [TB, cl 173(3) and (4); TA, s 116]**

This clause has been simplified to deal with any appointment of the local government as trustee of a trust.

**Clause 20 – Appointment of trustees – replacement of trustee in particular circumstances [TB, cl 15(1), (2)(a) and (b)(i), (5)–(6), TA, s 12(1), (3) and (7); Recs 3-4, 3-5 and 3-7]**

This clause has been amended to permit removal of a trustee where they become bankrupt, or start to take advantage of the laws of bankruptcy as a debtor under the *Bankruptcy Act 1966* (Cwlth) or a similar law of a foreign jurisdiction.

**Clause 22 – Appointment of trustees – replacement of last continuing trustee with impaired capacity [TB, cl 16; New; Rec 3-8]**

This provision has been varied so that the power to appoint a new trustee, in place of the last continuing trustee with impaired capacity, is limited to an administrator or attorney who is authorised, under the administrator’s or attorney’s appointment, to exercise power for all financial matters for that person who is the last continuing trustee.

The power of appointment is also clarified to make it clear that the power of appointment is not made in the capacity of administrator or attorney for the last continuing trustee and neither the *Guardianship and Administration Act 2000* nor the *Powers of Attorney Act 1998* applies in relation to the exercise of the power of appointment by the administrator or attorney.

This power of appoint a new trustee by the administrator or attorney, of the last continuing trustee with impaired capacity, is also to be subject to a contrary intention in the trust instrument or the instrument or order appointing the administrator or attorney.

**Clause 23 – Appointment of trustees – additional trustees [TB, cl 17; TA, s 12(5); Rec 3-12]**

This clause has been amended so that an additional trustee is not required to be appointed unless it is required under the trust instrument, or an Act (including the Bill (as enacted) and any other Act).

**Clause 30 – Person replacing or removing trustee to notify person who was trustee’s delegate [New]**

This new clause requires the trustee’s delegate to be notified of any replacement or removal of the trustee by the person who attends to the replacement or removal of the trustee.

**Clause 35 – Exercise of trust powers on death [TB, cl 28; TA, s 16(1); Rec 3-16]**

This clause clarifies that the surviving trustee or trustees may exercise the power and also perform the trust (noting that the QLRC’s Trust Bill only permitted surviving trustees to exercise the power).

**Clause 38(3) – Powers etc. of public trustee [TB, cl 31; TA, s 16(5) and**

**(8); Rec 3-16]**

This sub-clause has been amended to include section 61 (with section 62) of the *Public Trustee Act 1978* for completeness.

**Division 8 – Vesting of trust property and devolution of trusts – last continuing trustee with impaired capacity for particular matters [New]**

A new division has been inserted which mirrors the division dealing with vesting of trust property and devolution of trusts on the death of the last continuing trustee. It provides that, if:

* an administrator is appointed for all financial matters for the last continuing trustee of a trust; or
* a court or tribunal determines that the last continuing trustee of the trust has impaired capacity for all financial matters, or has impaired capacity for administering the trust,

the property of the trust will vest in the Public Trustee until a new trustee is appointed.

**Clause 51** **– Appointment of custodian trustee [TB, cl 33; TA, s 19(1); Rec 4-5(a)]**

Subclause (3) clarifies that the appointment of a corporation as custodian trustee of trust property is not subject to a contrary intention in the trust instrument. Instead, only how that custodian trustee may be appointed, by the trustee or appointor, may be subject to a contrary intention in the trust instrument.

**Clause 52 – Vesting of Trust Property in custodian trustee [TB, cl 34(1) and (3)-(6); TA, s 19(2)(a); Rec 4-5] to Clause 56 – Liability of managing trustees for acts and omissions of custodian trustee [TA, s 71]**

The clause has been clarified so that it is subject to an express contrary intention in the trust instrument.

**Clause 56 – Liability of managing trustees for acts and omissions of custodian trustee [TA, s 71]**

This clause clarifies that the managing trustee remains liable for any act or omission of the custodian trustee performed at the managing trustee’s direction, subject to an express contrary intention in the trust instrument.

**Clause 57 – Application by custodian trustee for directions [TB, cl 35(4) – (6); TA, s 19(2)(e); Rec 4-5]**

Subclause (1)(a) has been amended so that the conflict is with the “trust instrument” rather than the “trust”.

**Clause 58 – Proceedings to be in name of custodian trustee [TB, cl 36; TA, s 19(2)(g); Rec 4-5]**

This clause clarifies that the managing trustee is personally liable for the costs of bringing or defending the proceedings brought or defended by the custodian trustee pursuant to the managing trustee’s direction and that the custodian trustee is not liable for the costs of bringing or defending proceedings, subject to an express contrary intention in the trust instrument.

**Clause 61 – Managing trustees’ right to indemnity not affected [New]**

This clause confirms that the managing trustees’ right to be indemnified out of the trust property in relation to liabilities incurred in the proper administration of the trust is not affected by this part.

**Clause 65 – Duty of particular non-professional trustees [TB, cl 42(3); TA, s 22(1); New; Rec 6-1]**

This clause relates to the duty on non-professional trustees who hold themselves out as having special knowledge or experience. It clarifies that the special knowledge and experience may be in relation to both a particular type of trust and the administration of trusts generally, depending on the representation made by the trustee.

**Clause 71 – Duty of trustees who are professional investors [TB, cl 48, TA, s 22(1)(a); Recs 5-1 and 5-2]**

This duty, rather than being despite a contrary intention in the trust instrument, is subject to a contrary intention in the trust instrument, which reflects the current position under the Act.

**Clause 72– Duty of particular trustees who are not professional investors [TB, cl 48; TA, s 22(1)(a); Recs 5-1 and 5-2]**

This duty, rather than being despite a contrary intention in the trust instrument, is subject to a contrary intention in the trust instrument, which reflects the current provision under the Act.

**Clause 79 – Power to provide residence for beneficiary to live in [TB, cl 53; TA, s 28; Rec 5-5]**

Subclause (5) has been inserted to clarify that the trustee’s discretion to retain a residence does not limit the operation of the *Retirement Villages Act 1999* or any other Act.

Subclause (6) has been inserted to clarify that the trust instrument cannot forbid the exercise of, or otherwise limit, the trustee’s power under this section.

**Clause 84– Court may take into account investment strategy etc. in proceeding for breach of trust [TB, cl 56; TA, s 30B]**

The factors to be taken into account have been amended to include the amount of the funds invested (subclause (2)(b)).

**Clause 86 – General powers in relation to trust property [TB, cl 59; New; Recs 5-3, 7-1 to 7-3, 7-7 and 7-8]**

The general power to insure trust property has been extended to include insuring against any other risk or liability relating to the trust property.

**Clause 87 – Power to postpone sale, calling in and conversion of particular trust property [TB, cl 60; TA, s 32(1)(c) and (4); Recs 8-1 and 8-2]**

The power to postpone sale, calling in or conversion, has been clarified as applying where the trustee’s duty to sell arises because of a trust or direction for sale.

**Clause 89 – Power to expend amounts [TB, cl 61; TA, ss 27(b) and 33(1)(a)-(f); Rec 8-5]**

The power to pay calls on shares subject to the trusts has been clarified in subclause (2) to extend to calls on shares in the trustee corporation which is the trustee of the trust.

The power to subdivide has also been extended to include a water allocation as well as land in subclause (1)(e).

**Clause 93 - Interested person may apply to vary proposed appropriation or waive right to apply [TB, cll 63(3); TA, s 33(1)(l)(ii); Rec 10-6(a)]**

Subclauses (1)(b) and (3) allow any person who is interested in the appropriation, after receiving notice of the proposed appropriation from the trustee, to waive their rights to apply to the court to vary the appropriation, by written notice to the trustee and also to shorten the two-month time period.

**Clause 94 – Appropriation to satisfy legacy or share generally (TB, cll 63(1), (2)(a) and (b), (4)-(6) and 64(2)(b); TA, s 33(1)(l) and (2); Recs 10-6(a), 10-8 and 10-9])**

The power to appropriate has been clarified so that it cannot be exercised until:

* the relevant application period for each interested person has ended being:-
	+ two months after notice has been given to that interested person, or
	+ any shortened period notified by that interested person to the trustee, and
* no interested person has during the relevant application period for the person applied to the court to vary the appropriation and served a copy of the application on the trustee; or
* if an interested person has applied to the court to extend the time to make the application to vary the appropriation and served a copy of this application on the trustee, this application is dismissed;
* if an application to extend the time to make an application has been granted and any application to vary the appropriation has been filed and served on the trustee within the longer period allowed by the court on the extension application, that application is dismissed by the court; or
* each interested person has given written notice to the trustee waiving their rights to apply to the court to vary the appropriation.

The clause has also been clarified to make it clear that the value of the property to be appropriated shall be the determined at the time the appropriation is made.

**Clause 95 – Exercise of power for particular interested persons and entitled persons [TB, cl 63(7); TA, s 33(1)(i); Rec 10-6(a)]**

This provision clarifies that the guardian may give notice to the trustee waiving the child’s rights to apply to the court to vary the appropriation, shorten the time allowed to make an application to court to vary the appropriation, approve an appropriation of trust property on behalf of the child as an interested person; or consent to an appropriation of the trust property to the child on the child’s behalf.

**Clause 97 – Notice to relevant registrar if land or water allocation to be distributed after appropriation to pay annuity [TB, cl 66; TA, s 33(5), Rec 10-10]**

The operation of this clause has been widened to include not only land but also a water allocation.

**Clause 99 – Power to delegate matters [TB, cll 68 and 69(1)-(2) and (4); TA, s 56(1); Rec 4-6(a)-(c)]**

This clause limits the powers of a trustee to delegate where the trustee is, or may be about to become, because of physical infirmity, temporarily incapable of performing the duties of a trustee.

The QLRC recommended that a trustee be able to delegate their powers, limited to the period of 12 months, where the trustee may be incapable of administering the trust. This effectively makes the delegation one that would endure a period of both physical and/or mental incapability by the trustee (delegator).

The Bill does not follow the QLRC’s recommendation. Instead, any delegation will end if the trustee (delegator) has impaired capacity such that the trustee does not have capacity to administer the trust. It is noted that:

* The Bill provides alternative mechanisms for replacing a trustee with impaired capacity for administering a trust under clause 20, where the appointor or a co-trustee may remove a trustee with impaired capacity and appoint a new trustee, or under clause 22, where the sole trustee’s administrator/s or attorney/s may remove a trustee with impaired capacity and appoint a new trustee.
* Under clause 102, the trustee will remain personally liable for the delegate’s action as trustee. If a delegate is still able to act after the trustee has impaired capacity, the trustee is unable to supervise the delegate’s actions, and the delegate is not subject to the same statutory safeguards, obligations and financial accountability as the trustee’s attorneys under the *Powers of Attorney Act 1998* (Qld), or the trustee’s administrators under the *Guardianship and Administration Act* *2001* (Qld).

This clause also clarifies that the power to delegate to a trustee corporation is limited to a trustee corporation which carries on business in Queensland.

Subclause (2)(a)(ii) also limits the power of the trustee to appoint an individual as a delegate who would otherwise be eligible to be appointed as a trustee (i.e. see clause 13). It follows that the delegate cannot be a minor, a bankrupt or a person who has been disqualified from being appointed as a trustee by an order made under clause 172.

**Clause 100 – Period during which delegation is in effect [TB, cl 69(3)]**

This clause has been further clarified in the Bill so that the delegation also ends when the trustee who delegated dies, is replaced or removed, or is otherwise discharged, or on the happening of an event stated in the instrument of delegation as the time the delegation ends.

**Clause 101 – Effect of delegation [TB, cl 71; TA, s 56(2) and (4); Rec 4-6]**

This clause clarifies in subclause (2) that the delegate may perform or exercise a delegated matter only in the circumstances stated in the instrument of delegation as the circumstances in which the delegation is to operate.

**Clause 103 – Trustee to notify particular persons of delegation [TB, cl 73; New; Rec 4-6(d)]**

The trustee’s obligations to give written notice of the delegation has been extended to the beneficiaries of the trust (to the extent it is practical to do so), where there is no co-trustee, no appointor, and where the appointor is the same as the delegating trustee.

**Clause 104 – Revocation by trustee (TB, cl 70(1) and (3); New]**

Consistent with clause 99 of the Bill, this clause has been amended so that the delegation is revoked on the trustee becoming a person with impaired capacity. This clause no longer includes any exception where the instrument of delegation expressly provides for the delegation to continue to operate in this circumstance.

**Clause 105 – Revocation by delegate [TB, cl 70(2); New]**

The clause has been clarified so that a delegate’s appointment is also revoked where the delegate is disqualified from acting as a trustee of any trust by a court pursuant to clause 172.

Subclause (c)(ii) also reflects the definition of a bankrupt adopted in the Bill so that it is limited to a bankrupt, or a person taking advantage of the laws of bankruptcy as a debtor under the *Bankruptcy Act 1966* (Cwlth) or a similar law of a foreign jurisdiction.

**Clause 106 – References to delegate [New]**

For clarity, a new clause has been inserted so that any reference to delegate, in relation to the provisions dealing with protections for third parties in dealing with delegates in part 7, division 4, subdivision 4 of the Bill, includes a former delegate.

**Clause 108 – Effect of statutory declaration by delegate [TB, cl 75; TA, s 56(7); Rec 4-6]**

This clause has been amended so that a statutory declaration by the delegate must also declare that the delegation has not been revoked or otherwise ended to be conclusive evidence for a person dealing with the delegate.

**Clause 110 –Definition for division [TB, cl 82(6); TA, s 54(6); Recs 4-1, 4-2, 9-2 and 9-10]**

A ‘regulated principal’ has been removed from the definition of an agent.

**Clause 112 – Payment of agent and reimbursement of trustee [TB, cl 82(5); TA, s 54(1); Rec 4-1]**

This clause has been clarified to limit the right to reimbursement to those charges or expenses which are ‘reasonably and properly incurred’ to reflect a trustee’s current right of indemnity.

**Clause 119 – Application of insurance money [TB, cl 83(1)-(5); TA, s 48(1)-(3) and (5)-(7); Rec 9-6]**

This clause has been clarified so that subclause (1)(a) includes an insurance policy for any other risk or liability relating to the trust property.

**Clause 124 – Inquiries about beneficiaries [TB, cl 88; TA, s 33(1)(j) and 115; Rec 9-12]**

Subclause (3) has been clarified so that the right to be reimbursed for costs of inquiries about a beneficiary payable out of that beneficiary’s legacy or share, is to be subject only to an express contrary intention in the trust instrument.

**Clause 125 – Exercise of trustee powers when particular beneficiaries are absolutely entitled [TB, cl 90; TA, s 31(2)]**

This clause has been widened to reflect section 31(2) of the Act so that its operation is not limited to termination of the trust.

[This clause allows a beneficiary, or an administrator or an attorney of a beneficiary, whose capacity is impaired, and who is authorised to exercise powers for that beneficiary for that relevant matter, to expressly revoke, on the beneficiary’s behalf, the trustee’s powers, other than for trusts created under a court order.](https://archive.sclqld.org.au/qjudgment/2016/QCA16-194.pdf)

However, such revocation must still be expressly revoked by all beneficiaries (either personally, or where they do not have legal capacity, by their attorney or administrator).

**Clause 127 – Definition for part [TB, cl 93; New; Rec 10-1(a)(ii)]**

The definition of guardian has been removed from this clause and the amended general definition in Schedule 1 will apply.

**Clause 132 – Application of trust capital for beneficiary’s maintenance etc. [TB, cl 99; TA, s 62(1) to (3); Rec 10-2]**

This clause has been clarified in subclause (5) which expressly permits the court, on application, to authorise the trustee to pay or apply greater amounts out of the relevant capital than are permitted under subclause (4).

**Clause 134 – Prescribed amount for application of trust capital [New]**

The $100,000 amount of capital permitted to be applied is to be indexed annually based on the annual increase in the consumer price index for all groups (Brisbane) published by the Australia Bureau of Statistics.

**Clause 136 – Trustee may impose conditions [TB, cl 101; TA, s 63(1) and (3); Rec 10-3]**

This clause relates to the imposition of conditions on the payment or application of amounts for the maintenance, advancement, or education of a beneficiary. The clause in the QLRC’s Trusts Bill related only to the payment of capital. The Bill expands upon the QLRC’s Trusts Bill to include both payments of capital and income, which is the same as the position in the Act.

**Clause 139 – Giving notice of intention to distribute [TB, cl 105(1)-(4) and (10); TA, s 67(1)–(2); Rec 11-1]**

This clause has been amended so that the notice of intention to distribute property may be given by:

* publishing the notice of intention to distribute property in the notice of intention to apply for a grant pursuant to the *Uniform Civil Procedure Rules 1999* (UCPR); or
* if this does not apply, publishing the notice:-
	+ in a newspaper circulated through the State and sold at least once each week; or
	+ on a website approved for the purpose by:-
		- regulation; or
		- the Chief Justice by notice published on the Queensland Courts website; and
* giving any notices that the court may direct.

This allows the court flexibility in how it may require notices to be published, depending on the circumstances in the proceeding. The reference to an approved form has also been deleted as there is no approved form for a notice of intention to distribute.

**Clause 143 – Trustee may apply to court for orders in relation to claim [TB, cl 109(1) and (5); TA, s 68(2) and (40: Rec 11-2(b)]**

The requirement for the trustee to serve a copy of the application on the claimant has been removed (see clause 109(2) of the QLRC’s Trusts Bill) as this is adequately deal with under the UCPR.

**Clause 144 – Court may make orders in relation to claim [TB, cl 109(3) to (5); TA, s 68(3) and (4); Vic Administration and Probate Act, s 30(3)(b); Rec 11-2(b)]**

This clause has been amended to allow the court to make orders or directions that a beneficiary of the trust be given notice of the application, or be made a respondent to the application.

**Clause 145 – Contesting trustee’s right to indemnity [TB, cl 110; TA, s 68(6); Rec 11-2]**

This clause has been extended so that a beneficiary cannot contest a trustee’s right to indemnity if the beneficiary is joined as a party to an application made under clause 143 by the trustee, but also if the beneficiary is added as a party by the court under clause 144(3)(b).

**Clause 152– Protection in relation to acts and omissions of other persons and losses (TB, cl 113; TA, s 71; Rec 11-5)**

This provision clarifies that the trustee is also liable for any acts or omissions undertaken by the custodian trustee at the managing trustee’s direction under clause 56 and for the costs of bringing or defending any proceedings by the custodian trustee under the managing trustee’s direction under clause 58.

**Clause 155 – Evidence about vacancy in trust or removal of trustee [TB, cl 116(1) and (2); TA, s 13(1) to (3); Rec 3-14]**

Subclause (2)(c) has been amended so that it is extended to cover both the land registrar under the *Land Title Act 1994* and the registrar under the *Water Act 2000* by use of the defined term ‘relevant registrar’.

**Clause 156– Protection for persons registering dealings with trust property [TB, cl 117; TA, ss 34(3) and 38(3); Recs 7-10 and 7-18]**

This provision has been amended so that it is extended to cover both the land registrar under the *Land Title Act 1994* and the registrar under the *Water Act 2000*.

**Clause 162 – Definitions for part [TB, cl 145(4); TA, s 101(2) and (3)]**

The definition of ‘professional trustee’ has been clarified to make it clear that it includes a custodian trustee whose profession, business or employment is, or includes, acting as a custodian trustee.

**Clause 165 – Court may reduce excessive amounts for commission and professional charges [TB, cl 146; New; NSW Probate and Administration Act, s 86A; Rec 12-10]**

This clause has been clarified so that the court’s right to reduce remuneration applies to any trustee’s commission or professional charges which are charged or proposed to be charged.

This clause has been clarified to exclude a licensed trustee company under section 601RRA of the *Corporations Act 2001* (Cwlth), and to the public trustee to the extent that any public trustee’s fees payable to, charged, or proposed to be charged, are pursuant to section 17 of the *Public Trustee Act 1978*.

**Clause 169 – Division does not limit or affect particular provisions [new]**

This new provision clarifies that part 11, division 2 of the Bill does not limit or affect the operation of a provision of another Act, of how, or by whom, an application may be made on behalf of a person under a legal incapacity.

**Clause 170 – Power to appoint and remove trustees [TB, cl 127; TA, s 80; New; Rec 12-1]**

The court’s power to appoint and remove trustee is extended to where it is ‘impossible’ to do so without an order of the court.

Subclause (4) has been clarified so that the court must not remove a trustee without appointing a new trustee unless, on the removal (and appointment, if required) the trust will have at least one trustee.

Subclause (5) has been clarified to remove the reference to a continuing trustee.

Subclause (6) has also been clarified so that this clause also does not confer power to remove a personal representative.

**Clause 171 – Powers etc. of trustees appointed by court [TB, cl 128; TA, s 81; Rec 12-1]**

Subclause (2) clarifies that this clause applies in relation to the trustee on appointment by the court, both before and after the trust property is vested in the trustee.

**Clause 173 – Power to appoint or remove particular office holders [TB, cl 130; New; Rec 12-4]**

This clause has been clarified so that the power of the court to appoint and remove office holders of the trust is limited to those who, in exercising a power in relation to the trust or the trust property, must act in a fiduciary capacity.

This clause has also been clarified to make it clear that the court has the power to not only remove and appoint an office holder, but also only to remove, or only to appoint, an office holder.

The court’s power to appoint and/or remove an office holder has also been clarified to include where it is ‘impossible’ to do so without an order of the court to mirror the amendments to the court’s power to appoint and/or remove a trustee.

**Clause 174 - Application of division [TB, cl 131; TA, ss 82(2) and (3), 84, 85, 88 and 89, Rec 12-5]**

A clarification has been made so that this division also applies to a discharge of a trustee under clause 29. This now mirrors the current provisions of the Act to include the retirement (i.e. discharge) of a trustee.

This clause has also been clarified so that it applies where a new trustee is appointed under any other Act.

**Clause 177 – Effect of vesting and other orders [TB, cll 134 and 135(1); TA, ss 90(1) –(2) and 92, Rec 12-5]**

This clause has been clarified so that where legislation requires notification, registration or recording of a divesting and vesting of the trust property, for the divesting and vesting to take effect, the divesting and vesting under the order does not take effect until that notification, registration or recording of the divesting and vesting has occurred.

**Clause 178 - Transfer of property under vesting order [TB, cll 135(2) and 136; TA, s 90(3 – (5); Rec 12-5]**

This clause has been extended to include registration of the vesting order with not only the land registrar under the *Land Title Act 1994* but also the registrar under the *Water Act 2000* by reference to the defined ‘relevant registrar’.

**Clause 180 – Circumstances relating to validity of vesting and other orders etc. [TB, cl 138; TA, s 83(4)–(5); Rec 12-5]**

Subclause (3)(a) clarifies that the court’s power to direct a reconveyance of the property the subject of the order, where an order under clause 175 has been improperly obtained, is limited to where the improperly obtained order was a vesting order relating to that property.

This clause has also been broadly drafted to not just be limited to any order made but also to include any order, declaration or direction made by the court.

**Clause 182 – Definitions for division [TB, cl 139(8); TA, s 8(1); Rec 12-11]**

The definition of ‘relevant power’ clarifies that the court’s power to review decisions or apprehended decisions is limited to decisions that exercise a power in relation to trust property or a trust that must be exercised in a fiduciary capacity.

**Clause 184 – Grounds for review or directions [TB, cl 139(3) – (5); TA, s 8(1); Rec 12-11]**

Subclause (2) has been clarified so that it refers not only to the review of the decision, or apprehended decision, of the trustee, but also of the “other person” e.g. an office holder, so as to mirror the terminology in the other subclauses in this clause.

**Clause 194 – Court’s power to make orders in relation to property or claim of child [TB, cl 147; TA, ss 86 and 87; Recs 12-5 and 12-13]**

Noting rule 93 of the UCPR, the right to make an application on behalf of a child has been limited to the child’s litigation guardian under this clause.

**Clause 204 – Circumstances in which purposes of charitable trust may be changed under sdiv 2 or 3 [TB, cl 157; TA, s 105(1) and (2)]**

Subclauses (1)(a)(iii), (1)(c)(ii) and (1)(d)(ii) have been modernised so that they take into account relevant considerations which include the spirit of the trust as well as the social and economic conditions prevailing at the time of the proposed alteration of the purposes.

**Clause 207 – Trustee may apply to Attorney-General to approve scheme [TB, cll 160(1)–(2) and 161(1); New; Recs 13-1 and 13-2(a), (b) and (e); Vic Charities Act s 4(1)]**

Subclause (1)(b) clarifies that the Attorney-General may not approve a *cy pres* scheme which amends an existing *cy pres* scheme that had been approved by the court. Where a *cy pres* scheme is sought to be varied and that *cy pres* scheme was ordered by a court, any variation will need to be determined by the court.

**Clause 209– Powers of Attorney-General [New]**

Subclauses (1)(c) and (2) make it clear that the Attorney-General may propose a variation of the scheme and must consult with the trustee on the proposed variation.

**Clause 210 – Deciding application [TB, cl 160(4)–(7); New; Recs 13-1 and 13-2(a) (b) and (e); NSW Charitable Trusts Act s 14(1)(b); Tas Variation of Trusts Act, s 7(3)(a) and (b); Vic Charities Act, s 4(3)(a); WA Charitable Trusts Act, s 10A(4)]**

This clause has been clarified so that the Attorney-General cannot approve the scheme unless the trustee has given public notice of the application as required under clause 208(2) and (3).

This clause has also been clarified so that, if the Attorney-General decides to refuse to approve the scheme, the Attorney-General must give the trustee written notice of the decision including the reasons for the decision.

This clause has also been clarified so that, whilst an Attorney-General may propose a variation to a proposed *cy pres* scheme, any approval of any proposed variation must be subject to the consent of the trustee to the proposed variation (after previous consultation with the trustee under clause 209 above).

**Clause 211 – Public notice of Attorney-General’s decision [TB, cl 162; New; Rec 13-2(d); WA Charitable Trusts Act, s 10A(6)(b)]**

This clause has been clarified so that the Attorney-General must give notice of an aggrieved person’s appeal rights against the decision in the public notice of the decision in relation to the scheme.

**Clause 213 – Appeal against decision to approve scheme [TB, cl 165; New; Rec 13-2(f)]**

This clause has been clarified to specify that an appeal against the decision of the Attorney-General to approve a scheme must be started within 28 days after the public notice of the decision to approve the scheme is given.

**Clause 215 – Register of approvals [TB, cl 164; New; Rec 13-2(d); NSW Charitable Trusts Act, s 19; SA, s 69B(9); Tas Variation of Trusts Act, s 9]**

This clause has been varied to permit the chief executive to keep the register electronically and publish it through the department’s website.

**Part 13 - Gifts by particular trustees for philanthropic purposes**

This part has been redrafted to reflect changes to federal tax legislation in 2013 where certain ancillary funds are deemed charitable. This part now provides a trustee with relevant power to make gifts for philanthropic purposes to these ancillary funds that are deemed charitable, even if the trust instrument does not include the power expressly. These changes align with recent amendments to the *Charitable Trusts Act 2022* (WA).

**Part 14 – Statutory trustees**

A new part has been inserted dealing with the restrictions on the powers, and the rights, duties and protections of a statutory trustee.

**Schedule 1 – Definitions**

The definition of *guardian*, in relation to a child, is clarified to mean:

* + 1. a parent of the child; or
		2. another person who has the legal parental responsibility for making decisions about the long-term care, wellbeing and development of the child.