# CONSULTATION NOTES - TRUSTS BILL 2024

## Part 1 Preliminary

## Clause 11 – Meaning of charitable [TB, cl 6, TA, s 103]

1. It has been suggested that the meaning of “charitable” should be amended to adopt the defined concept of charity in the *Charities Act 2013* (Cwlth).
2. The Commonwealth definition of charity is wider than that under common law. The *Trusts Act 1973* (the Act) and the Bill use the more restrictive common law definition. The Commonwealth definition, for example, has been extended to include the provision of social or public welfare that includes childcare services; rebuilding, repairing or security assets after a disaster (independently of the relief of individual distress), and because an entity provides benefits solely to Indigenous individuals (including in respect of native title) will not fail the public benefit test solely because the beneficiaries are related.
3. The practical effect of altering this definition in the Bill would be to extend the charities to which the *cy pres* provisions would apply to those covered by the *Charities Act 2013* (Cwlth). This would be a significant extension of the common law *cy pres* regime.
4. This would also, potentially, extend the jurisdiction of the Queensland Attorney-General, under those *cy pres* provisions, to charities which would not otherwise fall within the Queensland Attorney-General’s jurisdiction.

**1 Query: clause 11**

1.1 Stakeholder feedback is sought on whether the definition of ‘charitable’ in the Bill should adopt the definition of ‘charity’ in the *Charities Act 2015* (Cwlth) or whether it should remain aligned with the common law (as it is presently in the Act)?

## Part 2 Restrictions on appointment of trustees and related matters

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

## Bankruptcy terminology

1. The QLRC recommended that a person who is an undischarged bankrupt, or who is insolvent or taking advantage of the laws of bankruptcy, be unable to be appointed a trustee.
2. The QLRC’s recommendation was based on the view that it is undesirable that a trust should have a trustee appointed who is an undischarged bankrupt or who is insolvent (but who may not yet be a bankrupt). While a person’s bankruptcy or insolvency is not necessarily an indication that the person is unfit to be a trustee, this has the potential to complicate, and adversely affect, the administration of the trust. Third parties may be less willing to deal with the trustee (in particular, because bankruptcy affects the trustee’s legal capacity to institute legal proceedings and to be sued) and it may impact on the credit rating of the trust.
3. The QLRC’s Trusts Bill provides that “a person who is bankrupt or is taking advantage of the laws of bankruptcy as a debtor under the *Bankruptcy Act 1966* (Cwlth) or similar law of a foreign jurisdiction is not able to be appointed as a trustee” and also states that bankrupt includes “insolvent” which meant a person was unable to pay all of their debts as and when they became payable.
4. However, there may be considerable uncertainty associated with determining whether a person is able to pay their debts as and when these debts fall due which may lead to uncertainty as to whether a person may be appointed as a trustee.
5. Accordingly, a narrower definition of bankruptcy has been adopted in the Bill to mirror the *Bankruptcy Act 1966* (Cwlth) so that it only prevents a person being appointed as trustee, or permits them to be removed a trustee (under clause 20), or permits revocation of a delegate’s appointment (under clause 105), where they are a bankrupt, or taking advantage of the laws of bankruptcy as a debtor under the *Bankruptcy Act 1966* (Cwlth) or a similar law or a foreign jurisdiction.
6. Options for an alternative approach

Option 1: A return to the position under the QLRC’s Trusts Bill noting that this may lead to uncertainty as to whether a person may be appointed or removed given the broad definition of ‘insolvent’.

Option 2: An individual is ineligible for appointment as a trustee, or can be removed as trustee or where they are *insolvent under administration* adopting the definition under the *Legal Profession Act 2007*, namely:

*insolvent under administration* means—

(a) a person who is an undischarged bankrupt within the meaning of the *Bankruptcy Act 1966* (Cwlth) or the corresponding provisions of the law of a foreign country or external territory; or

(b) a person who has executed a deed of arrangement under the *Bankruptcy Act 1966* (Cwlth), part X, or the corresponding provisions of the law of a foreign country or external territory, if the terms of the deed have not been fully complied with; or

(c) a person whose creditors have accepted a composition under the *Bankruptcy Act 1966* (Cwlth), part X, or the corresponding provisions of the law of a foreign country or external territory, if a final payment has not been made under that composition; or

(d) a person for whom a debt agreement has been made under the *Bankruptcy Act 1966* (Cwlth), part IX, or the corresponding provisions of the law of a foreign country or external territory, if the debt agreement has not ended or has not been terminated; or

(e) a person who has executed a personal insolvency agreement under the *Bankruptcy Act 1966* (Cwlth), part X, or the corresponding provisions of the law of a foreign country or external territory, but not if the agreement has been set aside or terminated or all of the obligations that the agreement created have been discharged.

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| **2 Query: clause 13**  2.1 Stakeholder feedback is sought on whether the current approach in the Bill is preferable or whether option 1 or option 2 of the alternative approaches should be considered. Please provide reasons for your view.  2.2 Stakeholder feedback is also sought on whether the words “or similar law of a foreign jurisdiction” should be included in clauses 13, 20 or 105. There may be practical difficulties in making inquiries about whether a potential appointee was bankrupt or taking advantage of the laws of bankruptcy in a foreign jurisdiction to ascertain whether a person can be appointed as a trustee. Instead, should those words only be included in clauses 20 and 105 (allowing the person to be removed as trustee or their delegation revoked) and not in clause 13 so that there is no uncertainty about whether a person’s appointment is valid. |

## Insolvent corporation

1. The QLRC, although recommending that a bankrupt individual not be eligible to be appointed as a trustee, did not recommend that an insolvent corporation should not be able to be appointed as a trustee.
2. Clauses 20 and 28, provide that certain persons may be replaced or removed without replacement. This includes a corporation that— (i) has stopped carrying on business; or (ii) is a Chapter 5 body corporate within the meaning of the Corporations Act, section 9; or (iii) has been deregistered or has otherwise ceased to exist.

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| **3 Query: clause 13**  3.1 Stakeholder feedback is sought on whether clause 13 should be extended to prevent the appointment of an insolvent corporation as a trustee including:   * if not, the circumstances in which the appointment of an insolvent corporation as trustee may be appropriate; or * if so, how should insolvent corporation be defined. |

## 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]

## Extra trustees

1. The Bill provides for the first four trustees named in the trust deed that are both: willing and able to act; and, whose appointments are otherwise able to take effect, to be appointed (the Appointed Trustees). The Bill provides that the appointment of any trustees by the trust deed, after the Appointed Trustees, is of no effect. The trustees whose appointment was of no effect would still be able to be appointed as trustee of the trust pursuant to the trust instrument or part 3, division 2 of the Bill should a vacancy arise in the future.
2. This differs from clause 12 of the QLRC’s Trusts Bill which provides that any person named as trustee in the trust deed after the first four named trustees (the Extra Trustee) will only become trustee if a vacancy happens and the Extra Trustee is appointed to fill the vacancy. The clause provides no right in the remaining trustees to be appointed (or appointed in a particular order). Therefore, the Extra Trustee would need to be appointed, either pursuant to the trust instrument, or pursuant to part 3, division 2 of the Bill. The Extra Trustee’s appointment as trustee would need to be effected by a person with the power of appointment or by the court. The appointment of these trustees could also be undone by the appointor of the trust (subject to the terms of the trust instrument).

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| 4 Query: clause 14  4.1 Stakeholder feedback is sought on:   * except for charitable trusts and SMSF trusts, are there any circumstances where trusts are commonly created with more than four people as trustees? If so, please provide details. * whether there would be any utility in specifically providing a mechanism for the appointment of the Extra Trustee/s when a vacancy arises? If so, how, the appointment of Extra Trustees should be accommodated in the Bill? |

## Part 3 Appointment, discharge and removal of trustees and devolution of trusts

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

## Replacement of bankrupt trustee

1. The QLRC considered that it was undesirable that a trust should have a trustee appointed who is already a bankrupt (see paragraph 6 above). However, the QLRC recognised that different consideration may apply in the case of a person who is bankrupted after his or her appointment as trustee has taken effect. The proposed provision allows for a trustee who becomes bankrupt to be replaced.

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| **5 Query: clause 20**  5.1 Stakeholders’ views are sought on whether clause 20 should be amended so that replacement of a trustee who becomes a bankrupt, or is taking advantage of the laws of bankruptcy, is subject to a contrary intention or an express contrary intention in the trust instrument.  5.2 Where the sole remaining trustee becomes bankrupt, and there is no appointor of the trust, stakeholders’ views are sought on whether the bankrupt trustee ought to be able to exercise a power of appointment to appoint a new trustee of the trust, subject to a contrary intention in the trust instrument.  5.3 As for Query 2 (in relation to clause 13) above, stakeholders’ views are sought on whether the definition of bankrupt adopted in the Bill is appropriate. |

## Clause 21. Appointment of trustees—replacement of last continuing trustee who is dead [TB, cl 15(2)(b)(ii) and (3) - (6); TA, s 12(1)(a) and (4); Recs 3-4 and 3-7]

1. Where there is no appointor, or no appointor who is able and willing to appoint a trustee to replace the last continuing trustee who has died, clause 21(5) of the Bill permits the personal representative of the last continuing trustee who has died to appoint themselves as trustee, which mirrors clause 15(5) of the QLRC’s Trusts Bill. This power of appointment given to the personal representative of the last continuing trustee who has died is subject to a contrary intention in the trust instrument.
2. Section 12(1) of the Act permits the personal representative of the last surviving or continuing trustee to appoint a new trustee (whether or not the trustee appointed is the person or persons exercising the power). Under section 10 of the Act this provision, unless otherwise provided in this part, applies whether or not a contrary intention is expressed in the instrument creating the trust.

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| **6 Query: clause 21**  6.1 Stakeholder views are sought on whether the power to appoint a replacement trustee that is exercisable by the personal representative of the last continuing trustee who has died should only apply where: there is no other mechanism available under the trust instrument to appoint a new trustee; or where there is such a mechanism, but it has not been exercised within a reasonable period of time. |

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

## Last continuing trustee with impaired capacity

1. Under the Act, if a last surviving or continuing trustee dies and there is no person nominated under the trust instrument for the purposes of appointing replacement trustees, or there is no such person who is able and willing to act, the personal representative of the last surviving or continuing trustee is authorised to replace the trustee who has died (section 21).
2. However, if the last surviving or continuing trustee has impaired decision-making capacity to administer the trust and there is no appointor who is able and willing to appoint a replacement trustee, no one is authorised to replace the trustee with impaired capacity, and an application must be made to the court to appoint a replacement trustee.
3. The QLRC recommended that the following persons may, by instrument, appoint one or more trustees to replace a last surviving or continuing trustee who has impaired capacity for administering the trust:

- a person who is, for the time being, the administrator of the trustee under the *Guardianship and Administration Act 2000* (the GA Act) or under the corresponding law of another Australian jurisdiction; or

- a person who is, for the time being, the attorney for financial matters for the trustee under an enduring power of attorney made, or recognised, under the *Powers of Attorney Act 1998* (*the POA Act)*.

1. The QLRC also recommended that:

- the administrator or attorney may exercise the power regardless of the scope of his or her appointment as administrator or attorney; and

- if the trustee has more than one administrator or more than one attorney for financial matters, the power to appoint replacement trustees is to be exercised jointly.

1. In arriving at these recommendations, the QLRC noted that the submissions were fairly evenly divided on the threshold issue as to whether the legislation should confer such powers on the administrator or attorney (or both).
2. It is noted that the recommendation is analogous to the existing power of the personal representative of the last surviving or continuing trustee who has died to appoint a new trustee. The personal representative may have little or no connection with the trust and have duties in relation to the estate of the deceased trustee which differ to those an appointor owes to the trust. It is also noted that the power of appointment is a power subject to a fiduciary duty to act in the interests of the beneficiaries of the trust which, if breached, may be remedied by a court on application.
3. A stakeholder submitted:

* that the clause would foreseeably be productive of disputes, particularly in family discretionary trusts where a child who is an attorney may take control of the family discretionary trust from an aged parent, to the detriment of other objects of the trust; and
* that there is no real need for it, because in the event that one is compelled to turn to an administrator or attorney to make an appointment, there can really be no objection to turning to the court to do so (and often this should occur to avoid problems).

1. Other issues identified with this clause by stakeholders include:

* the absence of a specific conferral of power through the GA Act or the instrument pursuant to the POA Act, may raise issues around what power should be appropriately exercised by such persons;
* the person appointed as an adult’s administrator is not necessarily someone in whom the adult has reposed his or her trust and confidence, and might have little or no connection with the trust;
* guardianship law concerns the property of the adult concerned and it is not clear that it is appropriate to be extended to property of beneficiaries of a trust of which the adult concerned is a trustee.

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| **7 Query: clause 22**  7.1 Stakeholder feedback is sought on whether clause 22 should be included in the Bill or whether the scenario of a last continuing trustee who has impaired capacity (when there are no other persons who have the power of appointment, or who are willing and able to exercise the power of appointment) should require recourse to the court.  7.2 Stakeholder feedback is sought on whether:   * if this clause is adopted, it should be made subject to the agreement of the beneficiaries, noting that this might not be practical in the case of a discretionary trust with a large class of possible beneficiaries and that, in those circumstances, recourse to the court would be required; or * if this clause is adopted, in the case of discretionary trusts, should the operation of this clause be subject to the consent of at least any default, primary or named beneficiaries who are entitled to default income and capital distributions from the trust, unless the trustee determines otherwise, pursuant to the trust instrument. |

## More than one administrator/ attorney

1. When more than one administrator or attorney are appointed, they may be appointed to act, for example, jointly, severally, or successively. To avoid uncertainty, the Bill adopts the position that, regardless of whether the administrators or attorneys are appointed to act jointly or severally, they must act jointly under this section.

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| **8 Query: clause 22**  8.1 Stakeholder feedback would be appreciated as to whether it is appropriate for administrators and attorneys to act jointly under this section. |

## Contrary intention in trust instrument or contrary intention in Attorney or Administrator’s appointment

1. The Bill allows the attorney or administrator appointed (or jointly where more than one is appointed) for the last surviving or continuing trustee who has impaired capacity to administer the trust to exercise the power of appointment and appoint a new trustee, including themselves.
2. The Bill provides that this power is not made in the capacity of administrator or attorney for the last continuing trustee and it is not governed by the *GA Act* nor the *POA Act*. Accordingly, the obligations on an attorney or administrator under these Acts do not apply in relation to the exercise of the power of appointment. However, the power of appointment given to the attorney or administrator under the Bill is subject to a contrary intention in the trust instrument or the order or instrument under which the administrator or attorney is appointed.
3. As this is a new provision that does not have an equivalent provision in the Act, a testator may not have accordingly expressed a contrary intention in an existing trust instrument (as contemplated at clause 22(7)).

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| 9 Query: clause 22  9.1 Stakeholder feedback is sought on whetherthe power of appointment granted to the attorney/administrator in the Bill should be subject to an “express contrary intention” rather than a “contrary intention” in the trust instrument or the order or instrument appointing the attorney or administrator.  9.2 Stakeholder feedback is sought on whether the operation of this clause is to be limited to trusts created after commencement. This change would mean for trusts created before commencement of the Bill, an administrator or attorney of the last remaining trustee of the trust with impaired capacity to administer the trust would be unable to appoint a new trustee under the new power contained in this clause. |

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

1. Clause 23(4) of the Bill permits the appointor for a trust to appoint themself as an additional trustee of the trust, subject to a contrary intention in the trust instrument, which mirrors clause 17(4) of the QLRC’s Trusts Bill.
2. Section 12(5) of the Act permits the appointor to appoint an additional trustee (whether or not the trustee appointed is the person or persons exercising the power). Under section 10 of the Act, this provision, unless otherwise provided in this part, applies whether or not a contrary intention is expressed in the instrument creating the trust.
3. The position in the QLRC’s Trusts Bill was to allow separation between the trustee and appointor roles by allowing a contrary intention to be expressed in the trusts instrument and this to override this provision of the Bill.

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| 10 Query: clause 23  10.1 Stakeholder feedback is sought on whether:   * clause 23(4) should be subject to a contrary intention or an express contrary intention in order to prevent the appointor from appointing themself as trustee; and * the operation of this clause should be limited to trust deeds created after commencement given that this changes the existing law. This change would mean that appointor of a trust created before commencement of the Bill would continue to be able to appoint themself as trustee even if a contrary intention was in the trust instrument, because this clause would not apply to them. |

## Part 3. Division 8 - Vesting of trust property and devolution of trusts - last continuing trustee with impaired capacity for particular matters

1. A stakeholder suggested that property should vest in the Public Trustee when the last continuing trustee has impaired capacity and remain so vested until a new trustee is appointed. However, this may raise practical considerations, including the uncertainty associated with determining whether person has impaired capacity and when and how the Public Trustee would become aware of the impaired capacity of a last continuing trustee.
2. Part 3 division 8 of the Bill provides that the trust property is vested in the Public Trustee when the last continuing trustee has an administrator appointed by a tribunal for all financial matters, or is determined by a court or tribunal to have impaired capacity for all financial matters or for administering the trust, and remains vested in the Public Trustee until a new trustee is appointed and notice is given to the Public Trustee.
3. This clause mirrors the existing provision dealing with property vesting in the Public Trustee on the death of the last continuing trustee in that the Public Trustee does not receive notification of the vesting and nor is there any need for the Public Trustee to act in relation to the trust, unless the court, in special circumstances, otherwise directs.

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| **11 Query: Part 3, division 8**  11.1 Stakeholder feedback is sought on the proposed part 3 division 8 of the Bill and whether this vesting in the Public Trustee is appropriate. |

## Part 4 Custodian trustees

## Clause 52. Vesting of trust property in custodian trustee [TB, cl 34(1) and (3)–(6); TA, s 19(2)(a); Rec 4-5]

1. Clause 52(5) of the Bill provides that, subject to an express contrary intention in the trust instrument, the trust property vests in the custodian trustee as if the custodian trustee was the sole trustee. This alters clause 34(1) and (6) of the QLRC’s Trusts Bill which is expressed only to be subject to a contrary intention in the trust instrument.
2. Section 19(2)(a) of the Act provides that, subject to the provisions of the instrument creating the trust, the trust property vests in the custodian trustee as if the custodian trustee were the sole trustee.
3. This provides greater certainty for custodian trustees by requiring an express contrary intention in the trust instrument to alter the position set out in the Bill.

## Clause 53. Trust powers, authorities and discretions of managing trustees not affected [TB, cll 34(2) and (6) and 38; TA, s 19(2)(b) and (i); Rec 4-5]

1. Section 19(2)(b) of the Act provides that subject to the provisions of the instrument creating the trust, the management of the trust power and the discretions exercised by the trustee under the trust remain vested in the managing trustees.
2. Clause 53(4) of the Bill provides that, subject to an express contrary intention in the trust instrument, even on the appointment of a custodian trustee, the powers, authorities and discretions exercisable by trustees under the trust, including the management of the trust property, and the power to appoint a new trustee, remain vested in the managing trustee of the trust. This would provide greater certainty for custodian trustees by requiring an express contrary intention in the trust instrument to alter the position set out in the Bill.
3. This alters clause 34(2) of the QLRC’s Trusts Bill which was only subject to a contrary intention in the trust instrument under clause 34(6).

## Clause 54. Function of custodian trustee [TB, cl 35(1), (2) and (7); TA, s 19(2)(c); Rec 4-5]

1. Under clause 54(3) of the Bill, a custodian trustee’s function is limited to performing all acts and executing all documents as directed by the managing trustee to get in and hold the trust property, invest the trust property and dispose of the trust property, subject to any express contrary intention in the trust instrument. It provides greater certainty for custodian trustees by requiring an express contrary intention in the trust instrument to alter the position set out in the Bill. It alters clause 35 (7) of the QLRC’s Trusts Bill which was only subject to a contrary intention in the trust instrument.
2. Section 19(2)(c) of the Act, which mirrors this provision, applies subject to the provisions of the instrument creating the trust.

## Clause 55. Protection from liability for custodian trustee [TB, cl 35(3) and (7); TA, s 19(2)(e)–(f); Rec 4-5]

## AND

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

1. Clauses 55(3) and 56(3) provide that the custodian trustee is not personally liable, but the managing trustee is liable, for any acts and omissions of the custodian trustee under a direction of the managing trustee unless there is an express contrary intention in the trust instrument. This alters clause 35(7) of the QLRC’s Trusts Bill which is subject to a contrary intention in the trust instrument.
2. Section 19(2)(e) and (f) of the Act provides that this liability of the custodian trustee is ‘subject to the provisions of the instrument … creating the trust’.
3. This provides greater certainty for custodian trustees by requiring an express contrary intention in the trust instrument to alter the position set out in the Bill.

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

1. Clause 58 of the Bill provides that, subject to an express contrary intention in the trust instrument:

* proceedings must be brought, or defended, in the name of the custodian trustee as the managing trustees, by instrument, direct; and
* the custodian trustee is not personally liable for the costs of bringing or defending the proceeding.

1. Section 19(2)(g) of the Act mirrors this, but all of section 19(2) applies ‘subject to the provisions of the instrument … creating the trust’.
2. This provides greater certainty for custodian trustees by requiring an express contrary intention in the trust instrument to alter the position set out in the Bill.

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| 12 Query: clauses 52 to 56, and 58  12.1 Stakeholder feedback is sought on whether:   * these provisions should refer to a contrary intention or an express contrary intention; and * if an express contrary intention is to be required, should the application of this clause be limited to trusts created after commencement? |

## Clause 61 Managing trustees’ right to indemnity not affected

1. Clause 55 protects the custodian trustee from personal liability for any act done or omission made by the managing trustee, or pursuant to the managing trustee’s directions. Clause 56 makes the managing trustee liable for acts or omissions of the custodian trustee done under the managing trustee’s direction. Clause 57 allows the custodian trustee to apply to the court for directions where the custodian trustee believes the direction of the managing trustees would expose the custodian trustee to a personal liability.
2. Clause 58 requires, where there is a custodian trustee of a trust, and the managing trustees direct, that (court) proceedings be in the name of the custodian trustee (and not the managing trustees); however, the managing trustees, and not the custodian trustee, are personally liable for the costs of bringing or defending proceedings in accordance with the managing trustees’ direction.
3. Clauses 55, 56 and 58 are all subject to an express contrary intention in the trust instrument.
4. Clause 61 is a new clause which states that nothing in part 4 of the Bill (Custodian Trustees) limits the managing trustees’ right to be indemnified out of the trust property in relation to liabilities incurred in the proper administration of the trust.
5. The Bill and the Act do not contain a provision that codifies the trustee’s right to an indemnity out of the trust property for reasonable liabilities incurred in the proper administration of the trust.

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| 13 Query: clause 61  13.1 Stakeholder feedback is sought about whether, notwithstanding clauses 55 to 58, there are any circumstances in which the custodian trustee may foreseeably incur personal liability for which the custodian trustee is entitled to be indemnified out of the trust property, and, if so, does clause 61 need to be extended to a custodian trustee as well as managing trustees? |

## Part 6 Investments

## Clause 78. Investment in securities under RITS system [TB, cl 52; TA, s 26]

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| **14 Query: clause 78**  14.1 Stakeholder feedback is sought on:   * + whether there are comparable types of security to a chose in action arising under the RITS system; and   + if so, whether they should be provided for in the Bill. |

## Part 7 General powers of trustees

## Clause 90. Power to apportion expenditure between income and capital and recoup particular expenditure [TB, cl 62; TA, s 33(1)(g); Rec 8-6]

1. Section 33(1)(g) of the Act makes the exercise of a power to apportion expenditure subject to the Act or a direction of the court. It is not subject to a contrary intention (express or otherwise) and section 31 of the Act expressly provides that the powers under the part (relevant to section 33) apply whether or not a contrary intention is expressed in the instrument creating the trust.
2. The QLRC’s Trusts Bill provided that the power conferred by the provision should be capable of being excluded or modified by the trust instrument. This is reflected in clause 90(4)(c) of the Bill, which makes the exercise of apportionment of expenditure subject to an express contrary intention in the trust instrument (as well as the Act or a direction of the court). This mirrors clause 62(4) of the QLRC’s Trusts Bill.

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| 15 Query: clause 90  15.1 Stakeholder feedback is sought on whether, given that this will be a new provision, the operation of this provision (and any express contrary intention in the trust instrument altering the application of the provision) should only apply to trusts created after the commencement of the Act. |

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

1. Most discretionary trusts include a wide range of beneficiaries.

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| **16 Query: clause 103**  16.1 Stakeholder feedback is sought on whether:   * where notification under this clause must be given to the beneficiaries, should it be given to a more limited class of beneficiaries, for example, those who are personally named in the trust deed or who are entitled to a default capital or income distribution under the trust deed; and * in relation to the limited class of beneficiaries mentioned above, should the notification be given to the administrator, attorney, parent or guardian of any of those beneficiaries who have impaired capacity. |

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

1. Clause 124 of the Bill allows a trustee to pay the costs, expenses and charges incurred in making inquiries about a beneficiary out of that beneficiary’s share of the estate, subject to an express contrary intention in the trust instrument.
2. This deviates from clause 88 of the QLRC’s Trusts Bill which only requires a contrary intention. However, requiring an express contrary intention in the trust instrument to vary the default position in the Bill provides a trustee with certainty.
3. Section 33(1)(j) of the Act allows the trustee to make such inquiries, by way of advertisement or otherwise, as the trustee thinks necessary for the purpose of ascertaining the next of kin or beneficiaries and section 115 allows these expenses to be paid out of that beneficiary’s share of the trust, *unless a contrary intention appears in the instrument (if any) creating the trust*.

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| 17 Query: Clause 124  17.1 Stakeholder feedback is sought on whether:   * clause 124(3) of the Bill should be amended to replace ‘express contrary intention’ with ‘contrary intention’; and * this provision, if it remains subject to an express contrary intention in the trust instrument, should only apply to trusts created after commencement of the Bill. |

## Part 8 Maintenance, education and advancement

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

1. This clause, along with clause 132, allows a trustee to pay capital for a beneficiary’s maintenance, education and advancement of not more than the greater of $100,000 or one half of that beneficiary’s share of the capital.
2. This $100,000 is to be indexed annually by the annual increase in the Consumer Price Index (All Groups – Brisbane).

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| **18 Query: clause 133**  18.1 Stakeholder feedback is sought on whether the annual indexing of $100,000 to the annual increase in the Consumer Price Index (All Groups – Brisbane) is an appropriate indexing measure. If not, what indexing method should be adopted? |

## Part 10 Remuneration of trustees

## 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]

## Custodial and depository services

1. Companies providing a custodial or depository service are not licensed trustee companies within the meaning of the Corporations Act as the provision of a custodial or depository service is specifically excluded from the meaning of ‘traditional trustee company services’ by the Corporations Act, section 601RAC(3)(b).
2. However, the provider of a custodial or depository service may hold financial products, or beneficial interests in financial products, in trust for or on behalf of a client or another person nominated by the client (Corporations Act, section 766E).
3. It is noted that the Corporations Act does not appear to have an equivalent provision to section 601TEA (which provides for reduction of excessive fees for licensed trustee companies) in relation to these entities.

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| **19 Query: clause 165**  19.1 Stakeholder feedback is sought on whether clause 165(4) needs to be broadened to also refer to a company providing a custodial or depository service. |

## Part 12 Charitable trusts

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

1. Amendment has been made to clause 204(1)(a)(iii), (c)(ii) and (d)(ii) to modernise these provisions so that the social and economic conditions prevailing at the time of the proposed alteration of the purpose is taken into account.

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| **20 Query: clause 204**  20.1 Stakeholder feedback is sought on what further amendments, if any, should be adopted in the *cy pres* provisions to adopt contemporary views of *cy pres* schemes. |

## Note about long title to the Bill

1. The long title of the Bill, which appears on page 15, makes automatic reference to the year 2023 but will be updated to 2024 over time