

Public Trustee (Advisory and Monitoring Board) Amendment Bill 2021

Statement of Compatibility

Prepared in accordance with Part 3 of the *Human Rights Act 2019*

In accordance with section 38 of the *Human Rights Act 2019* (HR Act), I, the Honourable Shannon Fentiman, Attorney-General and Minister for Justice, Minister for Women, and Minister for the Prevention of Domestic and Family Violence, make this statement of compatibility with respect to the Public Trustee (Advisory and Monitoring Board) Amendment Bill 2021 (the Bill).

In my opinion, the Bill is compatible with the human rights protected by the HR Act. I base my opinion on the reasons outlined in this statement.

Overview of the Bill

The Bill will establish the Public Trustee Advisory and Monitoring Board (the Board), to provide advisory and monitoring oversight over the Public Trustee.

The Public Trustee operates as a corporation sole, is governed by the *Public Trustee Act 1978* (the PTA), and provides a range of financial, trustee and legal services to Queenslanders. On 10 March 2021, the Public Advocate's report, *Preserving the financial futures of vulnerable Queenslanders: A Review of the Public Trustee's fees, charges and practices* (the OPA Report) was tabled in the Legislative Assembly. The OPA Report makes 32 recommendations relating to the Public Trustee's fees and charges regime, transparency, sustainability and provision of legal services.

Recommendation 30 of the OPA Report is that Government consider additional oversight and/or reporting mechanisms to improve the Public Trustee's performance, transparency and public accountability. In response to recommendation 30, the Government committed to the establishment of a Public Trustee Board with an advisory and monitoring focus.

The objective of the Bill is to amend the PTA to establish the Board, which will provide additional oversight over the Public Trustee to enhance the Public Trustee's performance, transparency and public accountability.

The Board will monitor the performance of the Public Trustee's functions and provide advice and make recommendations about how the performance of these functions can be improved. Specifically, the Bill provides that the Board will have the following functions:

- to monitor and review the performance of the Public Trustee's functions;
- to monitor complaints received by the Public Trustee about the performance of the Public Trustee's functions;
- to monitor and review the Public Trustee's processes for managing these complaints;

- to give written advice or make written recommendations to the Minister about:
 - changes to legislation, or improvements to the policies, practices, resources, services or training of the Public Trustee, to ensure the Public Trustee can effectively perform its functions; and
 - improvements or enhancements to the performance of the Public Trustee's functions to promote the interests of the Public Trustee's clients, particularly clients with impaired decision-making capacity;
- if asked by the Minister, to give written advice or make written recommendations to the Minister about matters relating to the performance of the Public Trustee's functions;
- to give advice or make recommendations to the Public Trustee about matters related to the performance of the Public Trustee's functions; and
- another function given to the Board under the PTA.

The Bill provides that the Board will have a membership comprising of a mix of ex-officio members appointed by virtue of the office that they hold (permanent Board members) and members appointed by the Minister (appointed Board members). Permanent members are to comprise of the chief executives of certain specified departments – the Department of Justice and Attorney-General, the department in which the *Financial Accountability Act 2009* is administered, the department in which the *Disability Services Act 2006* is administered, the department mainly responsible for seniors and the department in which the *Aboriginal Cultural Heritage Act 2003* and the *Torres Strait Islander Cultural Heritage Act 2003* are administered – or a senior executive of these departments nominated by the relevant chief executive.

The Minister must appoint at least four, but no more than five, appointed Board members, who are to comprise of:

- at least one person with knowledge, qualifications or skills in one or more of the following: corporate governance, finance and banking, financial investment, financial services, insurance, or the management of financial funds, financial risk or trusts;
- at least one person with knowledge, qualifications or skills in relation to advocacy, services and support for seniors and persons with a disability, including persons with impaired capacity;
- at least one person with legal knowledge, qualifications or skills in one or more of the following: commercial litigation, duties and obligations of trustees, powers of attorney, substituted decision-making for adults with impaired capacity, succession law, or the principles and rules of equity;
- at least one person with knowledge, qualifications or skills in relation to human resources management and culture change management; and
- any other persons with the knowledge, qualifications or skills the Minister considers appropriate.

The Minister must ensure the appointed Board members reflect the diversity of the Queensland community, and that at least one appointed Board member is an Aboriginal person or Torres Strait Islander.

A person will be disqualified from becoming or continuing as an appointed Board member if the person:

- has a conviction, other than a spent conviction, for an indictable offence; or
- is an insolvent under administration under section 9 of the *Corporations Act 2001* (Cth) (Corporations Act); or
- is disqualified from managing a corporation because of part 2D.6 of the Corporations Act; or
- is the Public Trustee.

Human Rights Issues

Human rights relevant to the Bill (Part 2, Division 2 and 3 HR Act)

In my opinion, the human rights under the HR Act that are relevant to the Bill are:

- taking part in public life (section 23, HR Act);
- privacy and reputation (section 25, HR Act);
- right to liberty and security of person (section 29, HR Act); and
- rights in criminal proceedings, in particular the right to be presumed innocent until proved guilty according to law (section 32(1), HR Act).

Membership of the Board

As outlined above, the Bill prescribes the Board's membership, whereby the Board must have a mix of certain permanent Board members and appointed Board members (one of which must be an Aboriginal person or Torres Strait Islander). The Bill further provides that a person is disqualified from becoming or continuing as an appointed Board member if the person has a conviction for an indictable offence, is an insolvent under administration, or is disqualified from managing a corporation. A person is also disqualified from becoming or continuing as an appointed Board member if the person is the Public Trustee.

By nominating certain individuals for automatic appointment based on their position, and by prescribing eligibility and disqualifying requirements for appointed Board members, the Bill limits individuals' right of access to a position as a Board member, and therefore a position in a public office. For this reason, the Bill limits the right to take part in public life (section 23, HR Act).

Obtaining a person's criminal history and imposing a requirement to disclose certain matters

The Bill provides that, to decide if a person is disqualified from becoming or continuing as an appointed Board member because they have a conviction, other than a spent conviction, for an indictable offence, the Minister may, after obtaining the person's consent, ask the commissioner of the police service for a written report about the criminal history of the person and a brief description of the circumstances of a conviction in the criminal history.

The Bill also requires an appointed Board member to immediately disclose to the Minister if they become an insolvent under administration under section 9 of the Corporations Act, are disqualified from managing corporations because of part 2D.6 of the Corporations Act, or are convicted of an indictable offence during the member's appointment. The Bill provides that it is an offence for a person to, without a reasonable excuse, fail to comply with these obligations to disclose information to the Minister and prescribes a penalty of 100 penalty units for each offence. The clauses are drafted on the assumption that section 76 of the *Justices Act 1886* applies to place both the evidential and legal onus on the Board member to prove the existence of a reasonable excuse for failing to comply with the obligation to disclose. Imposing the legal and evidential burden on Board members who fail to comply with the obligation to disclose certain matters reverses the onus of proof.

The provisions will allow the Minister to obtain potentially private personal information, and therefore limit the right to privacy and reputation (section 25, HR Act).

By creating new offences, the Bill places a person at risk of imprisonment where the person does not pay the monetary penalty and other enforcement action is taken, therefore potentially limiting the right to liberty and security (section 29, HR Act).

Further, by reversing the onus of proof for Board members, the Bill limits rights in criminal proceedings, and in particular a person's right to be presumed innocent until proven guilty (section 32(1), HR Act).

Conflicts of interest

The Bill provides that where a Board member has a direct or indirect financial or other interest in a matter being considered, or about to be considered, at a Board meeting, and that interest could conflict with the proper performance of the member's duties about the consideration of the matter, the member will be required to disclose the nature of the interest at a Board meeting. Unless the Board directs otherwise, the member must not be present when the Board considers the matter or take part in a decision of the Board about the matter. Particulars of the disclosure must be recorded in a register of interests kept for this purpose.

A Board member with a conflict of interest could be prevented from taking part in the Board's decision about the matter in question, limiting that person's right to take part in public life (section 23, HR Act).

Confidentiality

As outlined above, the Bill provides that an appointed Board member must give notice to the Minister if they are convicted of an indictable offence during the term of the member's appointment. Further, for a person who is becoming or continuing as an appointed Board member, the Minister may, after obtaining the person's consent, ask the commissioner of the police service for a written report about the criminal history of the person and a brief description of the circumstances of a conviction in the criminal history.

The Bill creates a new offence for a person who possesses another person's criminal history information (i.e. the notice or the written report) because the person is, or has been, a member of the Board, or another person involved in administering the PTA, to disclose or use the

criminal history information other than as provided for under the section. The maximum penalty for a breach of this provision is 100 penalty units.

The Bill also creates an offence for a person who is, or has been, a Board member, or a person assisting the Board in the performance of its functions, and in that capacity has acquired or has access to personal information, to disclose or use the personal information other than as provided for under the section. The maximum penalty for breach of this provision is 200 penalty units.

By creating these new offences, the Bill places a person at risk of imprisonment where the person does not pay the monetary penalty and other enforcement action is taken, therefore potentially limiting the person's right to liberty and security (section 29, HR Act).

If human rights may be subject to limitation if the Bill is enacted – consideration of whether the limitations are reasonable and demonstrably justifiable (section 13 HR Act)

(a) the nature of the right

The *right to take part in public life* (section 23, HR Act) provides that every person in Queensland has the right, and is to have the opportunity, without discrimination, to participate in the conduct of public affairs, directly or through freely chosen representatives. The right includes a right for every eligible person to have access on general terms of equality to the public service and to public office.

The *right to privacy* (section 25, HR Act) protects a person from having their privacy arbitrarily interfered with. The purpose of this is 'to protect and enhance the liberty of the person – the existence, autonomy, security and well-being or every individual in their own private sphere'.¹ The right protects against arbitrary interference with a person's private information.

The *right to liberty and security* (section 29, HR Act) protects personal liberty and requires that due process be followed when state authorities exercise their powers of arrest and detention. The right protects against the deprivation of liberty that is arbitrary or unlawful. The right is relevant whenever a person is placed at risk of imprisonment.

Section 32 of the HR Act protects *rights in criminal proceedings*, including a person's right to be presumed innocent until proved guilty. The right imposes the onus on the prosecution to prove the offence beyond reasonable doubt. The right may be engaged where legislation provides for an exemption from liability where a reasonable excuse exists.

(b) the nature of the purpose of the limitation to be imposed by the Bill if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The purpose of the Bill is to establish the Board, to provide additional oversight over the Public Trustee to enhance the Public Trustee's performance, transparency and public accountability. This is consistent with a free and democratic society based on human dignity, equality and freedom.

¹ *Director of Housing v Sudi* (2010) 33 VAR 139.

(c) the relationship between the limitation to be imposed by the Bill if enacted, and its purpose, including whether the limitation helps to achieve the purpose

The purpose of the Board's prescribed membership is to ensure the Board has members that collectively provide the appropriate skills, knowledge and representation of the community, with integrity, for the effective performance of the Board's statutory functions and fulfilment of its purpose. Further, given that the Board is to provide oversight over the Public Trustee, it would be inappropriate for the Public Trustee to be a member of the Board.

Imposing a requirement for members to declare conflicts of interest, restricting the participation of Board members where there is a conflict of interest, and requiring the Board to maintain a register of interests supports the integrity and accountability of Board members and transparency in decision-making. This is essential to ensure the good governance of the Board.

The limitation on the right to take part in public life is therefore directly related to, and helps to achieve, the purpose.

Similarly, the purpose of giving the Minister power to obtain a person's criminal history and imposing a requirement on members to disclose certain matters, with an accompanying offence for failure to do so, is directly related to the effective performance of the Board, by ensuring the integrity of its membership. Members of statutory bodies are in positions of trust and are responsible for the effective performance of the body. There is a strong public interest in ensuring that there is appropriate oversight and accountability imposed on people who seek appointment, or are appointed, to public office. The limitation on the right to privacy and the right to liberty and security is necessary to ensure the Minister can independently verify a person's suitability for appointment, including whether there are any matters that disqualify a person from being a member of the Board, therefore ensuring the integrity of the membership of the Board.

The purpose of providing an exemption from liability for the failure to comply with the obligation to disclose certain matters is to afford the appointed Board member the opportunity to raise an appropriate defence. The provision reverses the onus of proof as the Board member who has failed to comply bears the legal and evidential burden to prove they have a reasonable excuse. Reversing the onus of proof in these circumstances is appropriate as only the member in question could provide the relevant information to support the reasonable excuse defence. As stated above, the offence is included to ensure the integrity of the Board's membership and that the Minister is aware of matters that disqualify a person from being a member. The limitation on the right to be presumed innocent until proved guilty according to law therefore helps to achieve the purpose.

Given the functions of the Board, Board members, past Board members, and those who are, or who have been, involved in the administration of the Board, are likely to have access to highly sensitive personal information. The purpose of the offences in relation to using and disclosing certain information is to deter the unauthorised disclosure of sensitive personal criminal history information, as well as sensitive personal information, and to protect the privacy of the individual to whom the information relates. By providing deterrence from unauthorised disclosure, the offence supports the right to privacy and reputation of the person whose information is protected from disclosure.

(d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the Bill

The approach adopted in the Bill to provide for the membership of the Board is considered the least restrictive way of achieving the policy intent of establishing an advisory and monitoring Board to provide oversight over the Public Trustee, with members with appropriate skills, knowledge and experience to effectively perform the Board's functions and fulfill its purpose.

The approach adopted in the Bill to manage conflicts of interest is considered the least restrictive way of achieving the policy intent of ensuring that conflicts of interest are declared and managed in way that is accountable, transparent and appropriate for the Public Trustee.

The provisions in the Bill that provide the Minister with the power to request a person's criminal history and require a member to disclose certain information are necessary to ensure the integrity of appointments to the Board. Without the power to obtain a person's criminal history information, there is no other way (including any less restrictive and reasonably available way) for the Minister to independently verify a person's criminal history and whether the person is suitable for appointment in light of that history.

Further, the offence provisions in the Bill enliven the right to liberty and security (protected by section 29 of the HR Act) only in circumstances where a person does not pay the monetary penalty and other enforcement action is taken.

For the offence of failing to disclose information to the Minister, a less restrictive way of providing a general defence from liability would be to draft the provision so that the person subject to the offence only has the evidential and not legal burden of proving the reasonable excuse. In considering this option, it is noted that the impact on the right to be presumed innocent will be greater the higher the penalty and the wider the extent and nature of the matters to be proved by the defendant. Given that the facts of the defence of reasonable excuse are entirely within the defendant's knowledge, the approach in the Bill strikes a fair balance between the rights of the person subject to the offence and the purpose of the provision in ensuring the integrity of the membership of the Board.

As a safeguard, the Minister may only exercise the power to obtain a person's criminal history if the person has given the Minister written consent for the request. For an appointed Board member, while the person's membership will end if they fail to consent to the request, the Minister cannot compel the member to consent to the request. The Minister also cannot compel a person who is not a member of the Board to consent to the request. The Bill also includes safeguards to protect the person's criminal history and any criminal history information that the person discloses, by creating an offence for the unauthorised use or disclosure of the information. In addition, the Bill requires that a criminal history report or a notice of a change in criminal history information must be destroyed as soon as practicable after it is no longer needed for the purpose for which it was given.

Similar provisions in relation to the disclosure of information that would disqualify a person from membership of statutory bodies are common across Queensland legislation, including for example the *Health and Wellbeing Queensland Act 2019*, the *Hospital Foundations Act 2018*, the *Jobs Queensland Act 2015* and the *Cross River Rail Delivery Authority Act 2016*.

Deterring the unauthorised use or disclosure of personal information and protecting privacy of the individual in question by creating an offence is considered the least restrictive and most effective way of achieving this purpose.

Similar offences are included across the Queensland statute book, such as section 88M of the *Public Service Act 2008*, section 249A of the *Guardianship and Administration Act 2000*, section 228 of the *Disability Services Act 2006*, section 74A of the *Powers of Attorney Act 1998* and section 140 of the *Public Guardian Act 2014*, which provide similar protections to prevent confidential information from unauthorised disclosure.

(e) the balance between the importance of the purpose of the Bill, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

If enacted, the Bill will establish the Board, which will provide important advisory and monitoring oversight over the Public Trustee, to improve the Public Trustee's performance, transparency and public accountability.

Any limitations on a person's right to take part in public life that is protected by section 23 of the HR Act is reasonable and justified, when balanced against the public interest in the Board performing its functions and fulfilling its purpose effectively.

As outlined above, the Minister's power to obtain information about a person's criminal history and the requirement for a person to disclose certain matters that would disqualify them from Board membership is important to ensuring the integrity of the Board. It is in the public interest that the membership of public bodies be open to scrutiny by the Minister, and that obligations are imposed on members to disclose matters that would disqualify a person from being a member. Such provisions are common in Queensland legislation and strike a fair balance between the importance of ensuring an individual's right to privacy and the integrity of the Board's membership and appointments to Queensland Government statutory bodies.

While the offences in the Bill may limit an individual's rights to liberty and security, and the right to be presumed innocent until proven guilty, the limitations are reasonable and strike a fair balance between the importance of the rights, ensuring the integrity of membership and appointments to Queensland Government statutory bodies, and safeguarding an individual's personal information.

(a) any other relevant factors

As outlined above, the offence for unlawfully using or disclosing personal information also acts to protect the right to privacy and reputation of the person whose information is protected from disclosure.

Conclusion

In my opinion, the Public Trustee (Advisory and Monitoring Board) Amendment Bill 2021 is compatible with human rights under the HR Act because it limits human rights only to the extent that is reasonable and demonstrably justifiable in accordance with section 13 of the HR Act.

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